

28 October 2009

Consultees

Dear Sir or Madam,

Consultation conclusions: 2009 edition of ORR's approach to reviewing railway markets

1. On 10 June 2009, we consulted on our 2009 edition of our guide *ORR's approach to reviewing markets*. We are grateful to all those who took the time to respond and for the constructive and detailed comments we received. The revised guide, which we have published today, is available on our website¹ and from our library on request.
2. We received seven responses from railway service providers, Transport for London (TfL) and the Department for Business, Innovation and Skills². The responses are published on our website³. The responses were mainly positive. Respondents were supportive of the guidance, agreeing that it is clear and assists transparency. There was strong support for the new names for the stages of studies and most respondents said that they would use the guide, where a study we were carrying out was relevant to them. Respondents broadly supported our interpreting our criteria (particularly in respect of whether a study adds value to existing business priorities) in line with our strategic themes.
3. Respondents asked for clarification on a number of points relating, for example, to the scope and breadth of our market study programme, the stages at which we use our prioritisation criteria and how the industry would be able to tell when a public study would be carried forward into a remedies study. We have amended the guide to cover those areas of comment which are likely to be relevant to a broad range of stakeholders. We address other areas which have a specific or more limited relevance, in the commentary below.

¹ <http://www.rail-reg.gov.uk/upload/pdf/407.pdf>

² Association of Train Operating Companies, FirstGroup, National Express, DB Schenker, Network Rail, the Department for Business, Innovation and Skills and Transport for London

³ <http://www.rail-reg.gov.uk/server/show/ConWebDoc.9848>

Prioritisation and criteria

4. We agree with National Express that it would be helpful to be clearer about when the criteria will be used. The criteria have been specifically designed to assist us in identifying where to focus our resource in any given business year. They are, therefore, typically applied in the business planning round prior to publication of our business plans and will be used to identify what research studies we will undertake over the next twelve months. Our programme of reviews is, however, not entirely static and we are keen to ensure that it remains responsive to market developments. We will, for example, apply the criteria during the course of a business year to ensure the programme remains valid and is extracting most value. For example, if we receive information about an area which would potentially benefit from more immediate scrutiny, we receive a supercomplaint or a research study has identified the need to divert some resource into a public study. We have included this in our guide at paragraph 3.6.

5. DB Schenker (DBS) asked for clarity over how we would determine that a market is working well and, therefore, not undertake a study. We do not rule out undertaking research on a market or a feature of a market which on the face of it appears to be functioning well (that is, none of the drivers described at paragraphs 3.1 and 3.2 of the guide are present). However clearly, and consistent with focused and effective regulation, we are more likely to prioritise areas where there is evidence of potential market failure and where the absence of intervention could result in significant harm.

6. In similar vein and in response to National Express who queried the breadth of our programme, we can confirm that we do intend to review all significant markets associated with the railway over time. This is consistent with our duties and responsibilities to keep railway markets under review and enables us to ensure that our regulatory approach is responsive to market developments. Our prioritisation criteria help us to direct our time and effort towards the most useful areas and avoid duplicating the work of others.

7. National Express considered that we should not prioritise a study prompted by EU interest where no concern has been raised domestically. We note in our corporate strategy for 2009-14 that European Union rail policy has generally been consistent with the approach taken in the UK, but its implementation will increasingly affect the UK rail industry. We consider, therefore, that influencing the European rail agenda will become increasingly important. One objective of our market studies programme is to ensure that we understand developments in UK railway markets and whether there are particular features of which we need to be aware. Such knowledge will help us to take part in European level debates on future rail policy more effectively and to respond constructively and knowledgeably to European proposals.

8. TfL considered that we should give the impact on customers most weight in our prioritisation criteria. Consistent with our corporate strategy focus on the end-user we have in the 2009 edition of our guide indicated our intention to consider the end-user in our assessment of the scale and significance of the potential problems. This means that, although we do not consider that we should routinely give more weight to one criterion over another, there is now more explicit consideration given to the impact on customers within the criteria themselves.

9. Network Rail was interested to know, when we are prioritising study proposals, what each of the rankings in the scale we use are and whether there is a trigger point above which a study will go ahead. For information purposes, the rankings are evenly spaced from very low, low, low middle, high middle, high to very high. We do not have a 'trigger point' as such. Instead proposals are given a score for each criterion, these are aggregated and the top scoring proposals are taken forward. Typically those which score highest and which have a committed resource will be published as part of our business plan commitments for the coming year. As discussed earlier, the remainder of the programme (consisting generally of a further two to three potential studies) remains subject to change and the emergence of competing priorities.

Conducting studies

10. Respondents were supportive of our aim of minimising the burden on the industry by starting with research studies that collate evidence without routinely contacting industry players in the first instance to diagnose the issues and determine whether, and if so what, further action is necessary.

11. DBS was interested to know how we would define markets, with particular reference to competition from road freight. This is a very specific point that is beyond the scope of the general guidance. In all cases, market definition depends very much on the products/services in question and the objectives of the particular study. We do not consider it always essential to formally conclude on the precise boundaries of a market particularly within the research or public study stage. Whether or not we do so will very much depend upon the circumstances and whether or not we consider that to do so is critical to our conclusions and any proposals for remedial action. With particular reference to DBS's question, the significance of road may form part of our consideration should we be looking at the extent to which certain features of a rail freight market could lead to end-user harm. It may, on the other hand, be adequate to confine our consideration to a rail only market where we are identifying the existence or otherwise of barriers to on-rail competition.

12. Network Rail said that it would be important for the industry to understand at what point a public study had finished, and if a remedies study would be started. Consistent with

the principles of better regulation we are committed to openness and transparency within our processes and decision making, whenever we publicise the existence of a study, we will publish summary findings or a concluding report. In this we will set out what further action we propose to take, if any. In the case of a public study, this would include whether or not we are proceeding to a remedies study.

Specific concerns

13. National Express also made the observation that we appeared to focus on supply markets and omit any discussion of potential issues relating to horizontal competition. This was not intentional and we do not rule out the possibility of incorporating within our programme some research say on what benefits or otherwise result from on-rail competition from an end-user perspective. DBS raised concerns in similar vein regarding the allocation of capacity between franchised and freight operators, and regarding enhancements not taking appropriate account of freight operators' requirements. We would be interested to hear views on how each of these specific and particular concerns could be articulated within the framework of a market study. The study suggestions form at Annex B of our guide provides a means for setting these down.

General

14. TfL suggested that we include more information on the scope and range of issues that might be covered by a market study. We have therefore included examples of recent studies and provided links to the market studies pages on our website which summarise the findings of these studies. We have also provided links to other relevant websites such as that of the Competition Commission. We have however kept this brief in order to keep the guide concise.

15. DBS asked for more detail in Annex A on the circumstances in which ORR may consider publishing or submitting a report to Government and/or the European Commission in respect of a novel situation which our current powers do not cover and notes that our powers do not extend to the Channel Tunnel or shuttle services. It is difficult to be particularly precise, however, we are asked for railway specific advice from time to time by the UK competition authorities and as a National Competition Authority (NCA) we are obliged to work closely with other NCAs and the European Commission to ensure the effective and consistent enforcement of Articles 81 and 82. It is entirely possible, therefore, that we could be called upon to provide advice or conversely ask for advice in situations where case law or regulation provides little by way of precedent.

16. Network Rail asked us to indicate whether we had any plans to incorporate the ORR Guidance on the Assessment of New International Passenger Services⁴ once a market has been chosen for review. In particular, it referred to the seven stage economic equilibrium test. We can confirm that we do not currently have any plans to incorporate this guidance or its contents into the administration of our market studies programme. We do not envisage using the ORR Guidance on the Assessment of New International Passenger Services or the economic equilibrium test in a broader context because it was developed to fulfill a quite specific purpose, namely as part of the implementation of Directive 2007/58/EC: the part of the third railway package dealing with the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure which envisages opening the market for international passenger services to competition from 1 January 2010.

Suggested markets for review

17. We have not yet received any firm proposals for markets to review from external stakeholders. We continue to welcome your suggestions, and to help structure them we have created a form which you can find at Annex B⁵ of our guide.

Yours faithfully



Annette Egginton

⁴ <http://www.rail-reg.gov.uk/upload/pdf/399.pdf>

⁵ <http://www.rail-reg.gov.uk/upload/pdf/407-annexb.pdf>