

Thomas Cole
Head of Competition

04 July 2018

FAO Chris Blairs
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET



Dear Sirs,

Re: Competition Law Review

Thank you for inviting us to contribute to the Government's review of competition law in your letter dated 30 April 2018. We acknowledge and agree with the purpose of the review, namely that the competition regime should be designed to work as effectively as it can to support an enterprise economy.

The Office of Rail and Road ("**ORR**") is the independent economic and safety regulator for Britain's railways, and monitor of performance and efficiency for England's Strategic Road Network. We hold Network Rail and High Speed 1 to account, and we make sure that the rail industry is competitive and fair.

We are also a concurrent competition authority with powers to apply competition law in matters that relate to the supply of services relating to the railways, and, are an active member of the UK Competition Network ("**UKCN**"). Our jurisdiction to apply our competition powers is wider than the remit of our sector-specific economic regulation; this means we are able to consider and take action to address competition issues in the wider railways sector.

Our strategic objectives¹ include promoting a dynamic and commercially sustainable rail sector, securing value for money from the railway, and, ensuring the delivery of better customer service. One of the key ways in which we seek to achieve these objectives is to promote, where possible, effective market mechanisms and competition in railway markets. Where competition exists, we seek to protect the process of competition by carefully monitoring markets, and, where necessary, making targeted interventions or issuing warnings to correct market distortions and deter future anti-competitive conduct.

We consider that economic enforcement, competition and consumer policy all play their part in creating the best possible framework for ensuring effective market outcomes for

¹ <http://orr.gov.uk/about-orr/what-we-do/our-strategy/our-strategic-objectives>

passengers, taxpayers and freight operations that deliver: sufficient incentives for investment in the sector; value for money; and, greater efficiency. We have therefore developed a strategy by which we utilise our competition powers and sector-specific regulatory powers in a complementary way to achieve these goals.

We have used our competition powers both prior to, and after the reforms brought about by the Enterprise and Regulatory Reform Act 2013 (“**ERRA**”). We are therefore well placed to provide commentary on our experience of the efficacy of the tools, developments in the concurrency regime, and our application of competition law and policy in fast-moving digital markets. This response sets out our views on each these themes, which broadly follow the questions posed in your letter.

Concurrency

We are of the view that, generally, the current framework for concurrency, as reformed and strengthened by the ERRA reforms, is working well.

We believe that assessment of the efficacy of concurrency should go significantly beyond consideration of the number of competition cases undertaken in regulated sectors, (though we nonetheless highlight, below, ORR’s track-record of using the powers to generate successful outcomes). We consider a key strength of concurrency to be the facilitation of shared expertise between the Competition and Markets Authority (“the **CMA**”) and sectoral regulators to promote competitive outcomes.

Our integration of competition and regulatory powers means we are better empowered to ensure the effective operation of railway markets. By utilising these mechanisms in a complementary way, and through retaining specialist competition resource in-house, we are able:

- To ensure we exercise discipline in our approach to setting and applying the regulatory frameworks to control Network Rail’s market power, and regulate access to the network. ORR is institutionally aware of the need to balance direct regulatory controls with competition principles, and to use competition policy approaches where possible. A key development in this regard is ORR making greater use of public comparisons across Network Rail’s routes and the system operator, including on the performance levels delivered to customers, putting more scrutiny on those parts of the company that are lagging behind;
- To combine our sector specific expertise and understanding with our competition law and policy powers to apply the latter across the railways sector to protect and promote competition in the industry supply chain; and
- For the retention of relatively little additional resource, apply and advocate competition policy across the spectrum of our activities, notably on consumer,

network access and safety issues. We have identified and taken on cases and markets that would not otherwise have been prioritised by the CMA.

Consideration of competition approaches continue to be integral to our policy and decision-making framework. The reforms introduced by the ERRA have served an important purpose by further supporting competition thinking in our policy development process across the spectrum of our functions. A good example of this was ORR's liberalisation of the market for certification of entities in charge of maintenance. Whilst ostensibly this was a matter of safety policy, ORR's decision-making and approach was informed by a desire to liberalise and introduce competition to this market for certification services, noting the potential for rivalry to drive efficiencies and innovation.²

We note, and highlight within the wider package of reforms, the primacy duty and its associated reporting obligations.³ Given the narrow casting of the duty, it is rarely triggered formally, and, as stated above, may be a questionable barometer of the efficacy of the concurrency regime. We therefore query its value as a mechanism to enforce the consideration of competition enforcement. Whilst the presence of the duty is undoubtedly influential in terms of encouraging competition thinking in policy development, we suggest it could be useful to consider carefully the purpose and scope of the duty in the context of this review.

Whilst our approach is always to use the most appropriate regulatory tool to address any particular issue, with reference to our prioritisation criteria,⁴ we continue to have a reasonable record of applying the competition tools both pre and post ERRA, particularly given our relatively small size as an organisation.

For example, in December 2015 we concluded our competition enforcement investigation into the deep-sea container rail transport services (intermodal) markets, between ports and certain key inland destinations in Great Britain by publishing a commitments decision.⁵ Our continued monitoring of the impact of the commitments, which remain in force until 31 March 2019, suggests that there are notable improvements to the competitive situation in the relevant markets, and the intermodal sector more widely.

Harnessing the deterrent impact of the competition prohibitions, we have issued warning letters requiring action from rail undertakings. We consider this is an extremely effective means by which to rectify potentially anti-competitive conduct and outcomes, in a swift and efficient manner.

² http://orr.gov.uk/_data/assets/pdf_file/0017/25190/ecm-certification-consultaton-conclusions-july-2017.pdf

³ Inserted into sections 55 and 57 of the Railways Act 1993

⁴ <http://orr.gov.uk/about-orr/how-we-work/how-we-prioritise-our-activities>

⁵ <http://orr.gov.uk/rail/promoting-competition/competition-act-1998-investigations/freightliner-commitments-investigation>

We are the first sectoral regulator to conduct a market study under the Enterprise Act 2002 since the introduction of the ERRA reforms. In March 2018, we launched a market study into the supply of ticket vending machines and automatic ticket gates. In this study, we are investigating concerns that potential high concentration and lack of competition may be causing higher prices, reductions in quality, and, stifling innovation in these markets. We will publish an interim report setting out our prevailing views on these markets, and our proposed decision on whether or not to make a market investigation reference on or before 13 September 2018.

A further benefit to the introduction of the ERRA reforms, notably the creation of the UKCN and the improved arrangements for information sharing, has been its role in deepening our working relationship with the CMA. Our discussions with the CMA on case allocation pursuant to the memorandum of understanding between our respective organisations⁶ have been constructive and helpful. Our work has been significantly improved by the challenge presented by the CMA, and their willingness to share their expertise in anti-trust and markets work. The strengthening of the relationship between ORR and the CMA has also had ancillary benefits, outside of the formal concurrency framework. ORR and the CMA have closely cooperated and shared expertise across a range of competition policy, markets and merger projects and initiatives. For instance, ORR recently responded to the CMA's consultation on its methodology for assessing rail franchise mergers. Sharing of training resources has also improved post-ERRA. ORR staff regularly attend CMA training events, and, we have our own internal and external training programme. For example in October 2017, we hosted a seminar on "Barriers to Entry" with speakers from the Payment Systems Regulator and OFWAT.

A notable success emanating from the wider relationship between ORR and the CMA was the completion of the 'Competition in passenger rail services in Great Britain' policy project. This involved close cooperation and working between the respective organisations to produce a well-received report covering the issue of on-rail competition and setting out options for increased rail-on-rail competition, including the role of open access. As part of its period review of Network Rail, ORR has proposed to implement one of these options regarding a restructuring of charges. The potential for greater rail on rail competition means we consider it more important than ever that ORR retains its antitrust tools in order to protect the process of competition in these markets.

We intend to continue to work closely with the CMA going forwards, and to utilise our competition tools, where appropriate, to protect and promote competition in railways markets.

⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502672/ORR_MoU.pdf

Efficacy of the competition tools

We consider that our concurrently held competition enforcement and market study powers are important and effective facets to our regulatory toolkit. Indeed, it is notable that the operation of some of our sector-specific regulatory powers have increasing synergies with the competition tools. Notably, the recently introduced Access and Management Regulations 2016 (implementing European legislation)⁷ require ORR to give appropriate directions to correct undesirable developments in relation to the competitive situation in the rail services markets, or market distortions.⁸ This regulation has broadened ORR's toolkit for efficiently tackling anti-competitive behaviour and promoting competitive outcomes in issues relating to access to the network.

We consider, in general terms, that the information gathering powers as modified by the ERRA for both competition enforcement and market studies, are sufficient for the purposes of carrying out required investigations. It is vital, in our view, that in order to reach robust conclusions, supported by a firm evidence base in enforcement and market cases, that ORR is able to efficiently compel the production of confidential information, and, where appropriate, to carry out dawn raids in enforcement cases to reduce the risk of evidence destruction or concealment.

We have recently utilised the newly introduced mandatory information gathering powers in the context of our market study. Generally, our experience has been that the tools have worked well. We consider the introduction of civil penalties for non-compliance has been a positive means to improve the efficacy of information requests and other information gathering powers. We note, with approval, recent CMA action to enforce civil penalties for non-compliance with statutory notices to provide information, which will undoubtedly increase the incentives on recipients of notices to respond within set deadlines.

Experience of using the tools in fast-moving digital markets

We have, and will continue to use competition policy and law to tackle issues arising in fast moving digital markets. In our retail market review,⁹ for instance, we considered the role of third party retailers and the technology unpinning the sale of rail tickets in making a series of recommendations about how market governance should be improved. Our on-going market study also covers complex digital systems that control the operation of ticketing vending machines and automatic ticket gates.

We remain cognisant however, of the need to exercise caution when exercising competition tools in fast-moving markets, where, for instance, parties with apparent market power may

⁷ Recast Directive 2012/34/EU

⁸ See regulation 34(3), we have published guidance on our approach to this function:

http://orr.gov.uk/_data/assets/pdf_file/0007/23974/orr-approach-to-monitoring-and-reviewing-markets.pdf

⁹ <http://orr.gov.uk/rail/consumers/consumer-consultations/retail-market-review>

be displaced swiftly, through the introduction of new technology. We note that the risk of regulatory intervention, in any form, having negative or stifling effects in such markets, is comparatively greater than in slower, more entrenched, markets. We nonetheless consider that competition tools can effectively and flexibly be deployed alongside sector-specific regulation to achieve sound outcomes in such markets.

Next steps

If you wish to discuss any part of this response in further detail, please do not hesitate to contact me. We would be very happy to meet with you and your team to discuss the issues raised in this review and to share our experience of applying competition policy in the rail sector.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'T. Cole', with a stylized flourish extending from the end.

Thomas Cole