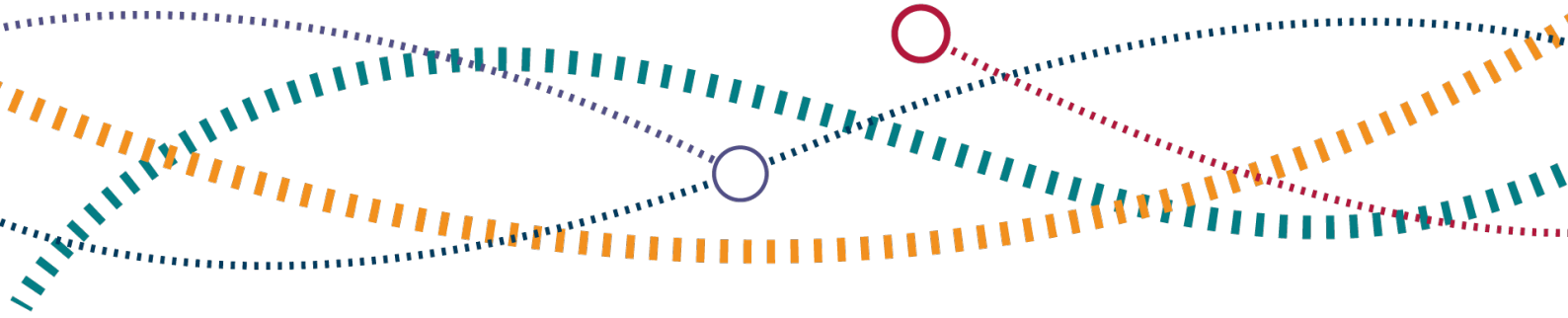
Competition Act 1998 Guidance

Guidance on ORR's competition enforcement powers and processes in the railway sector

22 September 2025



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Introduction

The Office of Rail and Road (**ORR**) is the independent safety and economic regulator of railways in Great Britain. We also regulate performance and efficiency on England's strategic road network. We are responsible for ensuring that these networks operate safely, efficiently, and in the interests of passengers, freight users, and taxpayers.

As part of our role, we promote fair and effective competition in the rail sector. Under the Railways Act 1993, we share powers with the Competition and Markets Authority (**CMA**) to enforce the prohibitions in the Competition Act 1998 (the **Act**) against anti-competitive agreements (Chapter I) and abuse of a dominant position (Chapter II). We are a member of the UK Competition Network (**UKCN**), which brings together the CMA and sector regulators to coordinate competition enforcement and policy across regulated industries. Other concurrent regulators and members of the UKCN include CAA (Civil Aviation Authority), Ofcom (Office of Communications), Ofgem (the Gas and Electricity Markets Authority), Ofwat (the Water Services Regulation Authority), FCA (the Financial Conduct Authority), PSR (Payment Systems Regulator), and the Northern Ireland Authority for Utility Regulation.

This guidance reflects ORR's current approach to the enforcement of the Act in the railways sector. It does not yet incorporate forthcoming legislative and policy developments, including:

- The proposed Railways Bill
- The CMA's updated leniency guidance; at the time of issue this piece of guidance is under consultation: Leniency and no-action in cartel cases | CMA Connect
- Any potential new order for the Public Transport Ticketing Block Exemption (Public Transport Ticketing Schemes Block Exemption - GOV.UK)
- We will revise this guidance in a timely and transparent manner to ensure continued alignment with the evolving legal and policy framework.

Purpose of this guidance

This guidance explains how ORR uses its powers under the Act to investigate and address anti-competitive behaviour in the rail sector. It is aimed at businesses, advisers, and other stakeholders who want to understand our approach to competition enforcement. The purpose of this guidance is to provide advice and information to businesses and to the public about how we expect to exercise our concurrent powers to enforce the competition prohibitions under the Act and to give practical guidance on how the competition prohibitions may apply in the railways sector.

This guidance provides information on:

- the scope of our jurisdiction to apply the competition prohibitions and how our relationship with the CMA will work in practice (Chapter 1);
- how we consider the competition prohibitions may apply in the railways sector and important considerations which businesses and individuals with an interest in this sector may wish to have regard to (Chapter 2);
- factors we will take into account when prioritising our resources and determining whether to use our powers under the Act or alternative sector-specific tools which may be available to us to resolve issues in railways markets, and the inter-relationship of our sector-specific powers with competition law (Chapter 3);
- how we expect to conduct investigations under the Act, notably the procedures we will adopt and how we will engage with complainants, other third parties and the parties under investigation (Chapter 4);
- the procedures we will follow in cases where we have issued a Statement of Objections and our approach to determining appropriate outcomes of our competition investigations (Chapter 5); and
- the procedures available to parties who wish to raise concerns about ORR's handling of investigations under the Act, including the internal complaints process, rights of appeal to the Competition Appeal Tribunal (**CAT**) or courts, and how ORR reviews its own processes (Chapter 6).

This guidance updates and replaces the previous version published in March 2016. It reflects developments in competition law and enforcement practice since then, including the UK's withdrawal from the European Union, competition law reforms, updates to sector-

specific legislation and policy, relevant case law, and our evolving experience in applying the Act.

This guidance is not intended to be an exhaustive guide to the legal and economic framework for the application of the competition prohibitions to agreements and conduct. It is not a definitive statement of, or a substitute for, the law itself and the legal tests which ORR applies in assessing breaches of competition law are not addressed in the guidance. This guidance should be used as a complement, rather than a substitute, for relevant legislation, case law and other applicable guidance.

The CMA alone has powers to make procedural rules, which we must follow when enforcing competition prohibitions. The CMA also has reserved powers to issue guidance on the specific areas of penalties and commitments; we must have regard to the CMA's policy and guidance in these reserved areas. For example, we follow the statutory guidance on accepting binding commitments, which is included within the CMA's CMA8 *guidance on investigation procedures in Competition Act 1998 cases*, and the CMA73 *guidance on the appropriate amount of penalty*. These documents provide detailed guidance on how penalties are calculated and how commitments may be accepted in lieu of a formal infringement decision.

As a general principle, where the CMA's guidance is more detailed than our own, we will have regard to its guidance in deciding how to proceed.

It is the responsibility of each business to self-assess its compliance with competition law. We recommend that businesses involved in the provision of services relating to railways have regard to this guidance (and, where appropriate, other guidance published by the CMA) in the course of reviewing their compliance. We will not endorse or approve any particular compliance programme or give pre-approval to specific agreements or practices. In line with our statement in 2023, ORR will have regard to the CMA's environmental sustainability guidance (CMA185 *Green Agreements Guidance*) in the application of its concurrent competition powers and may, where appropriate, engage with businesses on sustainability matters.

1. ORR's powers and concurrency

A. ORR's concurrent jurisdiction

1.1 ORR has the same powers as the CMA to apply and enforce the Act to deal with anti-competitive agreements or abuses of a dominant position where the relevant activities relate to the supply of services relating to railways in Great Britain. These powers are conferred on us by section 67 of the Railways Act 1993 (**Railways Act**), with the exception of the power to prosecute the criminal cartel offence under the Enterprise Act 2002, which remains solely with the CMA.

1.2 The term "services relating to railways" includes:

(a) railway services (i.e. the carriage of passengers and goods by railway, and light maintenance, station and network services);

(b) the provision and maintenance of rolling stock;

(c) the development, maintenance or renewal of a network, station or light maintenance depot; and

(d) the development, provision or maintenance of information systems designed wholly or mainly for facilitating the provision of railway services.

1.3 The meaning of railway includes tramways and also any transport system which uses another mode of guided transport but which is not a trolley vehicle system. This means that matters relating to or affecting infrastructure such as the London Underground network, or heritage railways, would fall within our concurrent jurisdiction to enforce the Act.

1.4 We will assess on a case-by-case basis whether a matter falls within our concurrent jurisdiction. This assessment is based on our statutory powers and the subject matter of the agreement or conduct, rather than the identity of the undertakings involved. Our jurisdiction is not limited to cases involving licenced railway undertakings or infrastructure directly. For example, we have previously investigated:

(a) the provision of train driver psychometric testing services;

(b) the supply of grease for use in electric trackside lubricants; and

(c) the provision of real time train information.

1.5 Our approach to concurrency is set out in the Competition Act 1998 (Concurrency) Regulations 2014 and it is guided by the principles laid in CMA's concurrency guidance, CMA10 *Regulated Industries – Guidance on the concurrent application of competition law to regulated industries*.

1.6 When we take investigative or enforcement action under the Competition Act we will apply the procedural rules set out in the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458 (the **CMA Rules**). ORR is required to carry out its investigations and make decisions in a procedurally fair manner according to the standards of administrative law and in exercising its functions, as a public body. ORR must also ensure that it acts in a manner that is compatible with the Human Rights Act 1998. .

ORR's powers

1.7 Where a matter relates to *services relating to railways* we may:

- consider complaints about possible infringements of the Chapter I and/or Chapter II prohibitions in the Act;
- impose interim measures to prevent significant damage (Section 35 of the Act);
- carry out investigations both in response to complaints and on our own initiative, including requiring the production of documents and information; interviewing any individual who may have relevant information; and searching premises (Sections 26 to 29 of the Act);
- impose financial penalties on undertakings, taking into account the statutory guidance on penalties issued by the CMA (CMA4 *Administrative Penalties: Statement of Policy on the CMA's Approach*);
- give and enforce directions to bring an infringement to an end (Section 32 to 34 of the Act);
- accept commitments that are binding on an undertaking (Section 31A of the Act), taking into account the statutory guidance issued by the CMA (included within the CMA8 *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*); and

- agree to settle a case, if a case is appropriate for settlement. ORR may commence settlement discussions where the business under investigation is prepared to admit that it has breached the Chapter I and/or the Chapter II prohibition of the Act and to agree to a streamlined administrative procedure to govern the remainder of the investigation, in return for which ORR may agree to impose a reduced penalty on the business.

Interaction with EU law

1.8 The UK left the EU on 31 January 2020. Following the end of the transition period, on 31 December 2020, the CMA and concurrent regulators such as ORR no longer have the power to enforce Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union (TFEU). ORR and the concurrent regulators also ceased to be subject to EU Regulation 1/2003.

1.9 Following EU withdrawal, anti-competitive behaviour in the supply of services relating to railways in Great Britain may be subject to separate (and potentially parallel) investigations by ORR and the European Commission where the relevant conduct may affect both trade within the UK and trade between EU member states.

1.10 Under section 60A of the Act, ORR must act with a view to securing that there is no inconsistency between (i) the principles that it applies, and the decisions it reaches, in determining a question arising under Part I of the Act in relation to competition within the UK; and (ii) the principles laid down by the TFEU and the Court of Justice of the European Union (CJEU) before 31 December 2020, and any relevant decision made by the Court before 31 December 2020. However, section 60A allows ORR to depart from CJEU case law where ORR considers it appropriate to do so while considering certain factors (see CMA125 *Guidance on the functions of the CMA after the end of the Transition Period*).

B. How concurrency works in practice

1.11 Our functions under the Act are exercised concurrently with the CMA and, where relevant, with other sectoral regulators. This means that where our jurisdiction overlaps, we share responsibility for enforcing the competition prohibitions in the rail sector. We will cooperate with the CMA and other sectoral regulators to ensure a consistent approach to enforcement. There are rules on concurrency to which we and other sectoral regulators must adhere (see The Competition Act 1998 (Concurrency) Regulations 2014 SI 2014 No.536 (the Concurrency Regulations). The CMA has published detailed guidance on how the concurrent application and enforcement of competition law works in practice and we follow this guidance

when we exercise our concurrent powers. The CMA and ORR have agreed a Memorandum of Understanding which sets out working arrangements between the two organisations in relation to the application and enforcement of the competition prohibitions in circumstances where there is concurrent jurisdiction. These documents contain greater detail on the concurrent enforcement of the competition prohibitions and should be read in conjunction with this guidance.

Case allocation

1.12 In all circumstances, there will be an overlap between ORR and the CMA in terms of which authority should take forward a case. There may also be instances where there are overlaps between ORR and other sectoral regulators. As only one authority can exercise prescribed functions in respect of a case at any moment in time (Regulation 6 of the Concurrency Regulations), cases must be allocated to one authority, and, where appropriate, transferred between concurrent authorities (Regulation 7 of the Concurrency Regulations). These functions include among others opening a formal investigation, making formal decisions such as requiring an infringement to cease, ordering interim measures, accepting commitments, or imposing fines. These are defined in Regulation 2 of the Concurrency Regulations.

1.13 In determining case allocation, the guiding principle to be applied is that a case will be allocated to the regulator that is better or best placed to exercise the concurrent competition enforcement powers. We will work with the CMA and, where relevant, with other sector regulators to reach agreement on which authority will have jurisdiction to exercise its powers and this assessment is informed by a range of factors set out in paragraph 3.22 of CMA10 *Regulated Industries – Guidance on the concurrent application of competition law to regulated industries*. Relevant considerations include the nature of the conduct, the regulator's expertise, and its relationship with the relevant market. If agreement cannot be reached, the CMA has the power under Regulation 5 of the Concurrency Regulations to determine which relevant competition authority should exercise its concurrent power.

1.14 The CMA may, under Regulation 8 of the Concurrency Regulations, direct that a case in progress be transferred from ORR to the CMA, if it is satisfied that to do so would further the promotion of competition within any market or markets in the United Kingdom, for the benefit of consumers.

Information sharing

1.15 We will share information with the CMA and other sectoral regulators for the purposes of general liaison and, in relation to specific cases where appropriate, to

facilitate the discharge of our functions under the Act. The procedures for sharing information when operating under the concurrency framework are set out in Regulation 9 of the Concurrency Regulations and the disclosure arrangements specifically with the CMA are set out in the Memorandum of Understanding (paragraphs 38 to 51).

1.16 Before sharing any information with the CMA and other sectoral regulators, we will have regard to the provisions in Part 9 of the Enterprise Act, particularly the considerations set out in section 244, which govern the disclosure of information obtained in connection with the exercise of our competition functions.

Criminal cartels

1.17 The criminal cartel offence was created with the intention of criminalising and deterring behaviour by individuals leading to the most serious and damaging forms of anti-competitive agreements. It covers agreements between competitors to fix prices, share markets, rig bids or limit supply or production in the UK at the expense of the interests of customers and without any countervailing customer benefits. Typically, these are secret arrangements, also called cartels, under which competitor businesses agree to coordinate their activity, usually in order to preserve or drive up prices. For further detail, see CMA9 *Cartel Offence Prosecution Guidance*.

1.18 We do not have concurrent jurisdiction to prosecute the criminal cartel offence; the CMA and the Serious Fraud Office have reserved jurisdiction over such cases. In the event that we uncover a suspected criminal cartel, we will refer the matter to the CMA.

Leniency in civil cartel cases

1.19 Given the secretive nature of cartel conduct, it is in the public interest to encourage undertakings to come forward with information. The CMA and ORR support a policy of granting lenient treatment to businesses that disclose cartel activity and cooperate with enforcement authorities. This approach prioritises the detection and prohibition of anti-competitive conduct over the imposition of financial penalties.

1.20 The CMA administers the UK's leniency programme and has published detailed guidance on the process and conditions for obtaining leniency, including immunity from fines and no-action letters in cartel cases. Chapter 3 of CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases* and CMA's specific guidance on leniency (for example OFT1495 *Applications for leniency and*

no-action in cartel cases - OFT's detailed guidance on the principles and process)–should be consulted in their most up-to-date form for further information.

1.21 The CMA and sectoral regulators operate a 'single queue system' for handling leniency applications within the regulated sectors. Under this system, applicants should always approach the CMA for leniency in the first instance, regardless of whether the suspected cartel activity may fall within the railways sector or is already under investigation by a sectoral regulator.

1.22 In the event that any initial leniency enquiries or applications are made to us, we will immediately direct the person making the initial leniency enquiry or leniency application to the CMA. The applicant's place in the leniency queue is always determined by the order in which applications are made to the CMA for leniency. We will follow CMA's guidance on applications for leniency and no-action in cartel cases (currently OFT1495 *Applications for leniency and no-action in cartel cases - OFT's detailed guidance on the principles and process*) alongside the arrangements for the handling of leniency applications within the regulated sectors amongst the UKCN. For cases in the railways sector, leniency information given to the CMA may be passed to us if the case is allocated to ORR for enforcement under the Act. We will use leniency information passed to us only for the purposes of enforcing the Act unless the leniency applicant agrees otherwise.

1.23 In considering immunity from, or applying any reduction in, financial penalties under the Act, we will follow the CMA's guidance and policy.

2. Application in a railways context

A. The Competition Act 1998

2.1 For the purposes of this guidance, a competition infringement is a breach of the competition prohibitions contained in the Act.

2.2 This Chapter first sets out principles and concepts applicable across both prohibitions namely, the Chapter I prohibition (which addresses anti-competitive agreements) and the Chapter II prohibition (which concerns the abuse of a dominant position), before providing guidance on how each of the prohibitions may apply in the railways sector.

Undertakings

2.3 The competition prohibitions apply only to agreements between *undertakings*, and abuses committed by dominant *undertakings* respectively.

2.4 The term 'undertaking' is a broad concept which may, in the particular circumstances of each case, refer to any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The term may therefore include: companies, firms, businesses, partnerships, individuals operating as sole traders, associations of undertakings (including trade associations), non-profit making organisations, and (in some circumstances) public entities that offer goods or services in a given market. For further guidance on the application of competition law to public bodies, see the: OFT1389, *Public bodies and competition law*.

2.5 The Act applies equally to privately owned, publicly owned, or partly publicly owned companies or organisations. In the rail sector, this means that undertakings throughout the value chain may fall within scope. This includes suppliers (e.g. equipment or rolling stock), infrastructure managers (not limited to Network Rail), vertically integrated entities (such as Transport for London), passenger and freight operators, retailers, and others involved in the provision of rail services.

2.6 Organisations with separate legal personalities (for instance distinct limited companies) may be considered to be part of one and the same undertaking if they are found to form a 'single economic unit'. This typically arises where a parent company exercises a decisive influence over the subsidiary, even if it holds less than 100% of the shares. This principle also applies to joint ventures and corporate groups. In the railways context, holding companies that exercise decisive influence over subsidiaries, such as those created to deliver specific rail

contracts, should be aware that they may be held liable for the conduct of those subsidiaries.

2.7 It is for businesses to self-assess the extent to which they form part of the same undertaking with other legal entities.

Case study

In 2021, we conducted an investigation into the Railway Assessment Centre Forum (RACF), an association of railway companies, regarding potential anti-competitive practices. RACF, as an "association of undertakings", played a key role in setting industry standards for the recruitment and assessment of railway personnel. We investigated concerns that RACF's policies might restrict competition, possibly by limiting entry or influencing competitive practices.

To address these issues, RACF committed to modifying its practices, highlighting the regulatory need to balance cooperation with fair competition in the sector.

Market definition

2.8 To assess the application of the competition prohibitions, it will generally be necessary for us to define a relevant market or markets within which the investigated behaviour occurs.

2.9 Defining a relevant market is not an end in itself; rather, it provides a framework for competition analysis. Defining the market is generally a key step in identifying the competitive constraints acting on a supplier of a given product or service and analysing the effects of agreements or conduct. Markets are defined in terms of the products or services involved, geographical scope and, in some cases, the time period in which those products or services are sold.

2.10 When defining the market we may assess a number of issues, which will be case specific, including substitutability, for example, how readily customers or suppliers can switch in response to changes in price or other competition conditions. This includes:

(a) Demand-side substitution: whether customers would switch to alternative products or services in response to a small but significant non-transitory increase in price (what is called the hypothetical monopolist or Small but Significant Non-transitory Increase in Price (SSNIP) test).

(b) Supply-side substitution: whether suppliers could switch production to offer competing products or services in a timely and cost-effective manner.

2.11 For example, in rail passenger transport, peak and off-peak services may constitute separate markets if passengers with fixed travel times (e.g. commuters) do not view off-peak services as viable substitutes. Similarly, in rail freight, the availability and cost of alternative modes (e.g. road or maritime) may determine the boundaries of the relevant market.

2.12 There is a broad range of economic tools which may be used to determine substitutability of products and services. We may apply, for example, the hypothetical monopolist test (SSNIP test) to assess whether a hypothetical sole supplier could profitably impose a price increase. This involves considering:

(a) The extent and speed of customer switching.

(b) The likelihood of entry or expansion by rival suppliers.

(c) The geographic reach of customer and supplier responses.

2.13 We will also consider product characteristics, customer preferences, and the commercial realities of the railway sector. For example, in freight, the substitutability of rail with road haulage may depend on factors such as volume, distance, and handling requirements.

2.14 We will define the relevant market(s) on a case-by-case basis, using evidence appropriate to the circumstances. Our approach is informed by the conceptual framework set out in OFT403 *Market Definition*.

B. Agreements between undertakings – Chapter I

2.15 ORR may investigate a case where it has reasonable grounds to suspect there are agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition to an appreciable degree (Chapter I prohibition). The Chapter I prohibition applies to agreements which may affect trade within the United Kingdom. This prohibition does not apply to agreements between companies that are part of the same undertaking (i.e. a single economic unit).

2.16 Agreements, decisions and concerted practices which are, or are intended to be, implemented in the United Kingdom fall in scope of the Chapter I prohibition insofar as they may affect trade within the United Kingdom.

2.17 In addition, agreements, decisions and concerted practices which are likely to have an immediate, substantial and foreseeable effect on trade within the United Kingdom are also within the scope of the Chapter I prohibition of the Act, even when these are not implemented in the United Kingdom.

Anti-competitive agreements

2.18 Reference to 'agreements' also includes informal co-operation falling short of a formal agreement, concerted practices and decisions taken by associations of undertakings (often taking the form of trade associations). General guidance on assessing whether such arrangements and concerted practices are anti-competitive is provided in: OFT401 *Agreements and concerted practices*, CMA184 *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements*, and OFT408 *Trade Associations, Professions and Self-Regulating Bodies*.

2.19 These prohibitions apply to agreements which have the purpose or, when not the purpose, then the effect to:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar trading conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2.20 Examples of potentially anti-competitive agreements which may constitute an infringement of the Chapter I prohibition in the railways sector include (but are not limited to):

- Agreements or conscious cooperation between companies not to compete for certain business, for example contracts, such as freight contracts; contracts to supply rolling stock; and contracts to supply Network Rail.
- Agreements regarding the setting of technical standards for the supply of products and services to Network Rail or train operators. Such agreements may lead to efficiencies by reducing costs, and/or raising quality or compatibility, but could be harmful overall where their principal overall effect is to limit competition, for example by raising entry barriers.
- Agreements between competing industry participants about prices to be charged for certain products or services.

- Agreements where companies divide markets geographically or allocate specific customers or routes to each other. For instance, competitors agreeing not to operate on certain rail routes or dividing up customers in a way that limits their choices.

- Arrangements where a supplier requires buyers to purchase exclusively from them, or where a buyer agrees to only use one supplier. For instance, an exclusive supply agreement with Network Rail could limit other suppliers' ability to compete.

- Rules set by an industry trade body, such as a group of railway suppliers, that set exclusionary membership criteria. For example, membership rules that are not based on objective and transparent criteria, rules requiring members to purchase exclusively from specific suppliers, or setting high financial or operational thresholds that smaller competitors cannot meet. These restrictions may foreclose the market to potential new entrants or smaller players, thereby limiting competition and consumer choice.

- Agreements or arrangements that involve the exchange of commercially sensitive information. A more detailed assessment of what can be considered as anticompetitive information exchange is included in Chapter 8 of CMA184 *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements*, which we will have regard to.

2.21 Such agreements or arrangements may also fall within the scope of the prohibitions if they are carried out in the context of discussions between members of a trade association or the agreement manifests itself in the form of a decision by a trade association to be recognised and/or enforced by its members.

2.22 The list above is non-exhaustive and is only illustrative. We may apply the Chapter I prohibition to other types of agreements which have the object or effect of preventing, restricting, or distorting competition to determine whether they constitute an infringement of competition law.

Exemptions to Chapter I

2.23 An agreement may be exempt from the Chapter I prohibition if all the criteria set out at section 9(1) of the Act are satisfied.

2.24 The criteria are that the agreement in question:

- contributes to improving production or distribution or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit;

- does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

2.25 We will not give pre-approval for a particular practice or agreement. It is for businesses to self-assess whether the agreement or arrangement in question is covered by this exemption

2.26 In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of the section 9(1) exemption shall bear the burden of proving that the conditions outlined there are satisfied.

Block exemptions

2.27 The Secretary of State may, by order, on a recommendation from us or the CMA, exempt categories of agreements from the Chapter I prohibition (section 6 of the Act) where they fall within the criteria set out in section 9 of the Act (**Block Exemption Orders or a Block Exemption**). A Block Exemption will give businesses the confidence that if their agreement meets the conditions of the Block Exemption, it is legal under the Chapter I prohibition, without needing to scrutinise that agreement against each of the conditions in the Section 9 exemption. It is for businesses to self-assess whether their conduct falls within a block exemption.

Block Exemptions – public transport ticketing schemes

2.28 An agreement that falls within the category of agreements specified in a Block Exemption Order will be automatically exempt from the Chapter I prohibition, insofar as it meets certain specified conditions. For example, it may allow for public transport operators to enter into agreements to offer passengers tickets that they can use on the services of two or more operators. This normally increases the mobility of passengers and makes travel more flexible.

2.29 The current exemption is set out in the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, as amended by the 2016 Amendment Order. The exemption is in force until February 2026. This block exemption covers ticketing schemes that provide multi-operator travel cards, multi-operator individual tickets, through tickets and short and long distance add-on tickets for local travel on buses, trains, trams and domestic ferry services. The block exemption sets out a number of conditions which a ticketing scheme must satisfy in order to benefit from it.

Withdrawal of block exemptions

2.30 We may, in certain circumstances, withdraw the benefits of a block exemption. For example, we may withdraw the benefit of the Public Transport Ticketing Services Block Exemption in relation to an agreement if we are satisfied it does not meet the statutory exemption criteria, notwithstanding the fact that it would otherwise meet the conditions of the block exemption itself. Before taking this step, we must give notice in writing of our proposal and consider any representations made. We will have regard to CMA53 *Guidance on the public transport ticketing schemes block exemption*.

C. Abuse of a dominant position – Chapter II

2.31 Chapter II of the Act prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position in a market. The Chapter II prohibition applies if the dominant position is held within the whole or part of the UK and the conduct in question may affect trade within the whole or part of the UK.

Dominance

2.32 To infringe Chapter II, an undertaking or undertakings must first be found to be dominant or, in some cases, collectively dominant in a relevant market.

2.33 A dominant market position is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and consumers. The central question in assessing dominance is whether the undertaking possesses substantial market power to act independently. In assessing whether an undertaking enjoys a dominant position we will have regard to guidance adopted by the CMA, including OFT415 *Assessment of market power*.

2.34 Dominant undertakings have a "special responsibility" not to exercise their market power in a way that impairs genuine undistorted competition on the market. A non-exhaustive list of factors that we will take into account when assessing dominance under Chapter II includes:

- the behaviour and performance of the undertaking under investigation that may provide evidence of market power;
- the presence of existing competitors;
- the likelihood of potential competitors entering the market;
- whether countervailing buyer power exists;

- barriers to entry; and
- the market share of the undertaking(s) over a period of time.

2.35 There are no specified market share thresholds for dominance under Chapter II but established case law has stated that dominance can be presumed, in the absence of evidence to the contrary, if an undertaking has a market share persistently above 50%.

Abuse

2.36 In general terms, conduct by a dominant undertaking may be abusive when it is directly exploitative of customers (for example through the charging of excessive prices) or where it has an adverse effect on the competitive process (for example conduct which raises barriers to entry, increases competitors' costs or aims in other ways to exclude them from the relevant market).

2.37 Examples of conduct within the railways sector which could potentially constitute an abuse of a dominant position include, but are not limited to:

- A dominant undertaking that owns facilities that are essential to operating a downstream rail transport service, and which denies downstream competitors access to their facilities without justification, or charges excessive or discriminatory prices for those competitors to use those facilities. Similar issues may exist where dominant undertakings have access to essential non-physical inputs, such as data or information.
- A dominant undertaking that is vertically integrated and controls an essential upstream input may be able to eliminate downstream competition by creating a 'margin squeeze' between downstream retail prices and costs, where the latter includes the cost of procuring the essential upstream input.
- Railway undertakings in a dominant position boycotting certain suppliers, as a result of, for instance, ancillary matters unrelated to the service being tendered for.
- Pricing practices that limit rivals' ability to compete. Competition on prices (alongside quality, choice, etc.) is generally a sign of a market working well so that consumers benefit, but in certain circumstances low pricing and discounting, when exercised by dominant firms, may be anti-competitive. One example of anti-competitive pricing is 'predatory pricing', whereby a dominant firm sets very low prices so as to attract customers with the aim of driving its competitors out of the market and then, acting independently, raise

prices to anti-competitive levels. Other examples include certain types of rebate schemes.

2.38 An undertaking can also contravene Chapter II where it is dominant in one market but the abuse takes place in a separate related market where the undertaking is not dominant (by leveraging its market power in the secondary market). An example of this in a railway context could be a dominant supplier of specialist railway equipment tying in a purchaser (perhaps by means of warranty conditions which are not objectively justifiable) to long-term maintenance services or products, thereby preventing other suppliers of those services or products from competing effectively in the market.

Exemptions from Chapter II

2.39 There is no legal exemption regime specific to Chapter II. However, conduct that might otherwise be considered anti-competitive may fall outside the scope of the prohibition if it qualifies for a general exclusion under the Act or if the dominant undertaking can demonstrate that the conduct is objectively justified.

2.40 A dominant undertaking may defend its conduct by showing that it is either:

(a) objectively necessary (for example, to achieve a legitimate aim such as safety or technical integrity); or

(b) efficiency-enhancing, such that the pro-competitive benefits outweigh any anti-competitive effects on consumers.

2.41 In the railway context, arguments that conduct is objectively necessary may arise in relation to health and safety. While health and safety considerations can be legitimate justifications, they must be substantiated with evidence. We will assess such claims carefully, drawing on our regulatory expertise in railway safety, and applying the legal standard for objective necessity as developed in the case law.

D. General exclusions to the competition prohibitions

2.42 Certain types of conduct are excluded from the application of the competition prohibitions under the Act. Businesses are responsible for self-assessing whether their conduct qualifies for an exclusion. Two key exclusions are:

(a) **Services of general economic interest (SGEI):** Conduct by undertakings entrusted with the operation of services of general economic interest, or which have the character of revenue-producing monopolies, is excluded from the competition prohibitions where applying those prohibitions would obstruct the performance of the specific tasks assigned to the undertaking. This

exclusion is interpreted narrowly and is subject to a high legal threshold. We will have regard to the CMA's guidance on this point (see OFT421 *Services of general economic interest exclusion*).

(b) **Conduct required by legal direction**: Where national legislation or legally binding directions require undertakings to engage in specific conduct, and such requirements eliminate any scope for competitive behaviour or autonomy, the conduct is excluded from the competition prohibitions. However, where undertakings retain discretion or where residual competition is possible, the prohibitions may still apply. In the railways sector, this may include agreements entered into pursuant to directions under sections 16A, 17, 18, 19, 19A (and Schedule 4A), 22A and 22C of the Railways Act 1993. We will assess the extent to which the conduct is strictly necessary to comply with legal obligations and whether it could be achieved through less restrictive means (see Competition Act 1998, section 19 and related exclusions).

3. Case initiation

A. Introduction

3.1 Our competition enforcement powers operate in parallel to a number of other regulatory tools which we may utilise in discharging our duties as an economic regulator.

3.2 We have published separate guidance in relation to economic enforcement and our approach to regulating access to the rail network and service facilities, infrastructure management and appeals.

B. Sources of potential investigations

3.3 Information which could trigger an investigation under the Act can come from a variety of sources:

(a) complaint made or information supplied by a customer, a competitor, or a party to a possible infringement;

(b) super-complaints from bodies designated as consumer bodies such as the Consumers' Association (Which?), Citizens Advice, Citizens Advice Scotland, Consumer Council for Water (CCW), and General Consumer Council for Northern Ireland. Further guidance on super-complaints is available in the CMA's guidance - What are super-complaints?;

(c) referrals from other public authorities. This could include information shared by the CMA under the concurrency arrangements or information received from overseas competition authorities and/or other regulators;

(d) leniency applications made to the CMA;

(e) our own enquiries and supervisory activities over regulated companies;

(f) market studies;

(g) other areas of our work, for example in the course of generally monitoring or reviewing markets; or

(h) where a business voluntarily informs us that they believe they have or may have breached competition law.

3.4 Complaints from the public or businesses about possible infringements of the Act can be made by contacting the Competition Team by calling on 020 7282 2000 or emailing: Competition@orr.gov.uk.

Competition Team
Economics, Finance, and Markets Directorate
Office of Rail and Road
25 Cabot Square
London E14 4QZ

3.5 We aim to respond to new competition complaints within 10 working days of receipt. This initial response will outline the next steps in the complaint-handling process. Including whether further information is required, the applicable prioritisation criteria, and the indicative timeline for assessment.

C. Prioritisation criteria

3.6 We apply prioritisation principles to help us focus our resources in a way that will deliver most value from our interventions. When applying the prioritisation principles in the context of discharging our concurrent functions under the Act, we will place particular weight on prioritising the protection of consumers and other users of railway services. The weight attached to each of the criteria will also be influenced by our strategic objectives. The criteria below are not ordered by priority or significance. Our prioritisation criteria are:

- **Strategic significance** – We will consider how our intervention will deliver outcomes which are in line with our strategic objectives; for example to secure value for money from the railway, for users and funders.

- **Is ORR better/best placed to act?** – We will examine whether an investigation is best carried out by ORR. Consideration of this criterion will typically involve determining which regulator is better or best placed to investigate according to the factors set out in Chapter 1 of this guidance (see section 'case allocation') and CMA10 *Regulated Industries – Guidance on the concurrent application of competition law to regulated industries*.

- **Impact of our intervention** – An important consideration for us will be the likely impact of our intervention. Factors which we will take into consideration in measuring that impact include:

  - the actual or potential level of harm (which, depending on the circumstances, could be harm to passengers, taxpayers or other users of the railways);
  - evidence to suggest a systemic issue, rather than an isolated incident;
  - circumstances that suggest conduct that is recurrent and/or ongoing;
  - whether the conduct in question is leading or could lead to inefficiencies in the market, either in terms of costs or end prices to consumers; and
  - the likely deterrent effect or any other beneficial effects, such as raised awareness amongst consumers. This impact can be in the market in question or in related markets.

- **Costs and resources** – We will consider the internal and external costs attached to our intervention against the resources we have available. We will also consider any opportunity costs (for example, knock-on effects on ORR's current and future portfolio of work) and external costs that are indirect costs or consequences that ORR's intervention might impose on parties, such as unintended side effects. It is important that the costs of our intervention are proportionate to the impact that we are seeking.
- **Risks** – We will adopt a risk-based approach when assessing whether a matter constitutes a priority. The risks that we will consider include:
  - the probability of a successful outcome particularly in terms of better outcomes for taxpayers, passengers or other users of the railways; the legal risks, notably the strength of the evidence available or likely to become available during the investigation; and
  - the impact of our decisions on our reputation, since credibility plays an important role in the overall effectiveness of the regime;

3.7 The list of criteria set out above is not exhaustive and we may consider other factors where appropriate. We will keep our prioritisation assessment of any case under review.

D. Choice of tool

3.8 Anti-competitive agreements or abusive conduct in the railways sector may breach conditions or requirements in licence agreements or may give rise to grounds for us to take action under one, or a range, of our sector-specific regulatory powers.

3.9 In certain circumstances we are required to give 'primacy' to pursuing enforcement action under the Act. This 'primacy' obligation means that we must, before making a final order or confirming a provisional order for the purpose of securing compliance with a licence condition or requirement, consider whether it would be more appropriate to proceed under the Act instead of making use of our sector-specific powers. Before exercising our sectoral enforcement powers to make a final order, confirm a provisional order, impose a penalty, or make a consumer redress order, we must consider whether it would be more appropriate to exercise our powers under the Act (Sections 55(5A) and (5AA) of the Railways Act).

3.10 In practice we will, at an early stage, both in relation to licensing and other matters, determine on a case-by-case basis which tool is most appropriate to deal with the issues being raised. The appropriateness of the tool being utilised to address a particular issue will be kept under review at regular stages in enforcement cases.

3.11 The overriding principle is that we will seek to use the most effective and efficient solution where an issue arises. In order to make this assessment we will have regard to our prioritisation criteria with particular consideration of:

- the resource and timing implications;
- the potential outcomes which may be achieved; and
- any other advantages or disadvantages between using particular tools, for example potential deterrent effects and establishing case precedent.

Procedure

3.12 We will keep interested parties informed of what powers we are using in relation to ongoing investigations. If we decide midway through an investigation to investigate under different powers, we will write to all parties involved and explain our reasons for switching between powers.

3.13 We will typically keep the CMA informed of the choice of tool and our decision to use different tools in cases that could potentially fall under the concurrency framework, even if ultimately we decide to deal with the case under sector specific legislation.

E. Resolution through means other than formal enforcement: advisory and warning letters

3.14 In some cases, ORR may be able to resolve an issue without the need for formal enforcement action. For example, we may consider it appropriate to deal with suspected infringements of competition law which do not constitute an

administrative priority by issuing an advisory letter or a warning letter. We usually issue advisory and warning letters where there may be a potential infringement of competition law, but we decide not to open an investigation on grounds of our prioritisation criteria.

3.15 Such letters do not constitute formal decisions relating to infringements of competition law. They explain the concerns about the business practices, give the firm involved an opportunity to investigate and to consider whether the behaviour meets its obligations under competition law. The purpose of an advisory or warning letter is to inform businesses that ORR has been made aware of a possible breach of competition law by them and that, although we are currently not minded to pursue an investigation, we may do so in future if we receive further evidence of a suspected infringement or our prioritisation assessment changes.

3.16 Our decision about which type of letter we send is based on various factors, including the seriousness of any potential anti-competitive practices, the strength of the evidence we have, and the potential for the practices to harm competition in the sector. We have developed our use of such letters in light of the CMA's guidance and practice.

F. Opening a formal investigation

The legal test

3.17 In order to open an investigation, we must have reasonable grounds for suspecting that at least one of the competition prohibitions is being infringed, or has been infringed at some time in the past (Section 25 of the Act) (the '**Reasonable Suspicion**' test).

Informing the CMA

3.18 Before launching an investigation under the Act, we will consult the CMA, and discuss whether we, the CMA (or possibly another concurrent regulator) should lead the investigation (see section 'case allocation').

3.19 If we determine, in relation to any matter, that the Reasonable Suspicion test is met, we will inform the CMA within10 workings days in order to announce our intention to investigate the case and commence the case allocation procedure. We will inform the CMA of each case which we consider meets the threshold for opening an investigation.

3.20 If we decide not to open an investigation into a matter under the Act on prioritisation grounds, it would nonetheless remain open to the CMA, or any other regulator with concurrent jurisdiction in relation to the matter in question, to take action under the Act, following consultation with us.

Communication with parties

3.21 If we decide to open an investigation under the Act, we will generally send the businesses under investigation a case initiation letter setting out brief details of the conduct which we will be investigating, the relevant legislation, our proposed timescale, and relevant contact details of the allocated case team.

Duty to preserve documents relevant to investigations

3.22 Under Section 25B of the Act, any person who knows or suspects that an investigation under the Act is being, or is likely to be, carried out by ORR must not falsify, conceal, destroy or otherwise dispose of a document that they know or suspect is or would be relevant to the investigation (or cause or permit this to be done). For further information, please see CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*. Failure to comply with this requirement without reasonable excuse may result in a financial penalty imposed by ORR under section 40ZE(1), in accordance with section 40A of the Act. Further information on potential penalties is available in the CMA's guidance: CMA4 *Administrative Penalties: Statement of Policy on the CMA's Approach*.

3.23 ORR will regard documents as being relevant to an investigation if they relate to any matter relevant to the investigation (bearing in mind that the scope of an ORR investigation may change over time, including by expanding into areas which are adjacent to the original subject matter of the investigation.

3.24 As a matter of good practice, where a person knows or suspects that ORR is, or is likely to be, carrying out an investigation, they should take a broad view of relevant documents for these purposes and ensure their preservation and integrity. Where a business knows or suspects that ORR is carrying out, or is likely to carry out, an investigation under the Act, it should ensure that relevant documents are not destroyed under the business' document retention policy. For example, ORR would expect a person to suspend routine document destruction in respect of documents which they know or suspect are or would be relevant to the investigation. A document retention policy should provide for the preservation of documents relevant to an investigation under the Act as for example, *Example 6* in CMA4 *Administrative Penalties: Statement of Policy on the CMA's Approach* provides in relation to document retention. ORR is unlikely to regard automatic destruction of relevant documents following a business' document retention policy as a 'reasonable excuse' for the purposes of any penalty that might be applicable for failing to comply with the duty to preserve documents relevant to an investigation. Inter-relationship with sector specific regulation

3.25 Alongside our economic functions, we also regulate health and safety for the entire mainline rail network in Great Britain, as well as the London Underground, light rail, trams and the heritage sector. As well as giving advice to the industry, we also have a range of formal enforcement powers given to us under the Health and Safety at Work etc. Act 1974.

3.26 Where compliance with health and safety law is raised as a possible justification for otherwise anti-competitive conduct, we may draw on our experience of enforcing health and safety law in a railway context. Health and safety law generally places obligations on an employer to ensure safety 'so far as is reasonably practicable' which involves judgements based on the assessment of health and safety risks. The legal framework is supported by industry and company standards which are recognised as setting good practice and often these standards provide a baseline for compliance. In considering arguments that otherwise anti-competitive conduct is justified on health and safety grounds, we would expect an undertaking to be able to demonstrate how compliance with health and safely law supports their decisions.

4. Conduct of an investigation

A. Introduction

4.1 In conducting investigations under the Act, we are required to follow the procedural rules set out in the CMA Rules. We will also have regard to the CMA's CMA8 *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* where needed. This guidance is intended to be a supplement to those documents and explain ORR's approach to conducting investigations under the Act in the railways sector.

Transparency and proportionate use of powers

4.2 We aim to exercise our functions in a transparent manner. We aim to ensure that appropriate information is provided on our decision-making process and that we are open and accessible to affected stakeholders. This applies throughout the course of any investigation which we undertake. Interested parties are encouraged to make representations to us at appropriate times during the course of investigations and otherwise engage with us so as to assist our decision making.

4.3 We are committed to carrying out our investigations and making decisions in a procedurally fair, transparent and proportionate manner. Where and when appropriate, we will have regard to CMA6 *Transparency and Disclosure: Statement of the CMA's policy and approach*.

B. The case team and decision making

4.4 Each investigation will be conducted by a case team comprising a case officer, legal and economic advisers, and other ORR specialists as needed.

4.5 Each case team will always include a Senior Responsible Officer (**SRO**), the identity of whom will be notified to the parties as soon as practicable. Over the course of the investigation, the SRO will have the responsibility of taking decisions in relation to whether:

- there is sufficient evidence to issue a Statement of Objections;
- to issue a Draft Penalty Statement;
- to close the case on the grounds of administrative priorities;
- to make an interim measures direction;
- to accept commitments offered by a party under investigation; and

- the case is appropriate for settlement.

C. Keeping parties informed

4.6 We will provide case updates to businesses under investigation either by telephone or in writing. We will also, where possible and subject to the confidential nature of cases, provide broad details of the nature of the case under investigation.

4.7 The amount and frequency of communications with the party under investigation will vary depending on a number of factors, including the number of parties under investigation, the extent to which they co-operate with us and the complexity of the conduct under investigation.

4.8 We will keep businesses under investigation informed of the anticipated case timetable and any changes to this.

4.9 We will also offer 'state of play' meetings to businesses under investigation in person or via teleconference. We use these meetings to ensure that the business is aware of the stage the investigation has reached and inform it of the next steps and the likely timing of these, subject to any restrictions due to confidentiality or market sensitivity. State of play meetings are an opportunity for those being investigated to meet with the case team and the SRO. We are likely to hold state of play meetings once we have undertaken some investigatory steps (unless this could prejudice the ongoing investigation). In the meeting we will provide where appropriate, our provisional thinking on the case, including the key potential competition concerns identified. We will also offer a state of play meeting before the decision is taken to issue a Statement of Objections and after we have received the oral and written representations on the Statement of Objections.

D. Information gathering and sharing

4.10 In order to make informed decisions, we expect to require information from both the subjects of our investigations and from third parties.

4.11 We appreciate that requests for information can be sometimes time consuming and resource intensive. We will endeavour to make the process as efficient and clear as possible without prejudicing the ongoing investigation. In certain circumstances, where it is practical and appropriate to do so, (having regard to all the circumstances of the case and to ORR's duty of expedition) we may share draft information requests before they are formally issued, or discuss with parties how they hold data in order to tailor the scope and/or our requests.

4.12 We will offer follow-up calls, when necessary, and we will consider extending the deadline for response for a reasonable amount of time.

Use and disclosure of information under the Act

4.13 Once we have opened an investigation under Section 25 of the Act, we may use a number of formal information-gathering powers. Further detail on how these powers are exercised is set out in Chapter 6, CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*, which ORR follows in exercising its own powers under the Act.

4.14 In summary, ORR's powers under the Act include:

- Power to issue written information requests (Section 26 of the Act): ORR may issue written information requests (commonly referred to as section 26 notices) requiring any person including any undertaking to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation This includes documents or information held outside the UK (section 44B(2)(b)). Section 26 notices issued to a person outside the UK (section 44B(2)(a) of the Act) in the circumstances set out in section 44B(3) of the Act (these circumstances are that the person's activities are being investigated as part of an investigation under section 25 of the CA98 or that person has a UK connection (as defined in section 44B(5) of the Act). In addition, and as confirmed by the Court of Appeal in *CMA vs BMW AG [2023] EWCA Civ 1506*, section 26 of the CA98 has extraterritorial effect generally, and the expression 'any person' in section 26 includes any person with or without a territorial connection to the United Kingdom.

- Power to conduct compulsory interviews (in person or remotely) with any individual to answer questions on any matter relevant to the investigation after giving formal written notice (section 26A of the Act). This power can be used whether or not the individual has a connection with a business which is a party to the investigation.

- Power to enter business premises without a warrant (Section 27 of the Act): Authorised investigating officers may enter business premises in connection with an investigation, provided written notice is given at least two working days in advance. In certain circumstances (e.g. reasonable suspicion or inability to give notice), entry may occur without prior notice. Officers may inspect documents, take copies, and access electronically stored information.

- Power to enter business premises under a warrant (Section 28 of the Act): Where there are reasonable grounds to suspect non-compliance or risk of concealment, ORR may apply to the court or Tribunal for a warrant. This authorises entry (using reasonable force if necessary), search, seizure of documents, and access to electronic information. Warrants remain valid for one month and allow retention of seized documents for up to three months.

4.15 These powers allow us to obtain information relevant to the investigation. We will set deadlines based on the scope and urgency of the request.

4.16 Chapter 7 of *CMA8 Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases* describes the limits on its information gathering powers under the Act. These limits also apply to us. As such we:

- cannot require the production or disclosure of privileged communications;
- cannot force a business to provide answers that would require an admission that it has infringed the law; and
- are subject to strict rules governing the extent to which we are permitted to disclose confidential and sensitive information.

Use and disclosure of information under sector specific powers

4.17 We also have extensive powers to obtain information from those subject to our regulation under the Railways Act, and we may be able to use information we gain in other ways during an investigation under the Act. However, once an investigation has been formally launched under the Act, or transferred to ORR for enforcement under the Act, we would expect to rely on the tools and powers provided by the Act to conduct that investigation.

4.18 ORR's information-gathering powers under the Railways Act are subject to restrictions on disclosure, particularly where the information relates to the affairs of a business or an individual. Disclosure is generally only permitted with the consent of the affected party or where it is necessary to facilitate the performance of ORR's statutory functions. In such cases, information obtained under sectoral powers may be used to support ORR's functions under the Act, provided the relevant legal conditions are met.

4.19 Similarly, Part 9 of the Enterprise Act 2002 restricts the disclosure of information obtained under the Act if it relates to the affairs of an individual or a business ('specified information'). Disclosure of specified information is only permitted where a statutory gateway applies, for example, where the individual or business consents (sections 239(3) and (4)), or where disclosure is necessary to facilitate

the performance of a function conferred on ORR by any enactment (section 241(1)). Schedule 15 of the Enterprise Act lists the relevant enactments for this purpose.

4.20 Before making any such disclosure of specified information, ORR must have regard to the considerations set out in section 244 of the Enterprise Act:

(a) the first consideration is the need to exclude from disclosure (so far as practicable) any sensitive information;

(b) the second consideration is the need to exclude from disclosure (so far as practicable) any commercial or private information; and

(c) third consideration is the extent to which the disclosure of the information is necessary for the purpose for which the authority is permitted to make the disclosure.

4.21 Please note section 244 has been amended. For definitions of "sensitive information", "commercial information" and "private information", see section 246A of the Act.

4.22 Where appropriate, we may limit disclosure to a defined group of individuals using mechanisms such as confidentiality rings or data rooms (see further information in CMA6 *Transparency and Disclosure: Statement of the CMA's policy and approach*).

Freedom of Information Act

4.23 As a public authority, ORR is subject to the Freedom of Information Act 2000 (**FOIA**), which gives individuals the right to request non-published information. While we are committed to openness and transparency, we recognise that information obtained during competition investigations may be sensitive and, in some cases, must not be disclosed.

4.24 Information obtained by us under the Act, or other sector specific legislation, may be exempt from disclosure under section 44 of FOIA, where disclosure is 'prohibited by another enactment'. For example, Part 9 of the Enterprise Act 2002 (sections 237–238) restricts disclosure of "specified information" relating to the affairs of a living individual or an existing business, where that information was obtained through prescribed statutory functions.

4.25 We might also seek to rely on other absolute or qualified exemptions contained within the FOIA, including (but not limited to):

- section 31(1)(g) of the FOIA, which allows us to withhold information if we consider that its disclosure would, or would be likely to, prejudice our ability to

exercise our statutory functions for the purposes set out at section 31(2) of the FOIA. This is a qualified exemption and is subject to a test of whether, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information; and

- section 32 of the FOIA, which provides an absolute exemption where the requested information is held by a public authority in a document placed in the custody of a person conducting an inquiry, for the purposes of that inquiry.

Confidentiality

4.26 During the course of an investigation, we are likely to request confidentiality representations on the information that we obtain from the subjects of our investigations and from third parties. In some cases, we may request that confidentiality representations are provided at the same time as information is submitted to us (e.g. through the submission of a separate, non-confidential version of the relevant document or materials alongside a clear explanation of why each piece of redacted information should be considered confidential). Alternatively, we may decide to seek confidentiality representations on information at a later point in the investigation ahead of providing access to the file.

4.27 We may consider whether it is appropriate to disclose such information to a limited group of persons using practices such as a confidentiality ring or a data room to facilitate further disclosure of documents.

Exchange of information and restrictions on use of information

4.28 We may exchange information with the CMA to determine which authority is best placed to exercise concurrent functions under the Act (as defined in regulation 2 of the Concurrency Regulations). This exchange is permitted under regulations 3 and 9 of the Concurrency Regulations and is further detailed in paragraphs 3.41-3.62, CMA10 *Regulated Industries – Guidance on the concurrent application of competition law to regulated industries* and the Memorandum of Understanding between ORR and the CMA.

Penalties for non-compliance

4.29 We expect recipients to provide correct and complete information in response to a written information request by the given deadline, and to comply with ORR's other information gathering powers.

4.30 Where a party fails to comply without reasonable excuse, we may impose administrative penalties under section 40A of the Act, following the CMA4 *Administrative Penalties: Statement of Policy on the CMA's Approach*.

4.31 Under sections 43 and 44 of the Act it is a criminal offence punishable by fine and/or imprisonment to destroy, falsify or conceal documents or to provide false or

misleading information (subject to certain statutory conditions),. However, a person cannot be penalised under both the civil and criminal enforcement regimes For further information, see paragraph 6.13 of CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*.

E. Interim measures

4.32 We have the power to require a party to comply with temporary directions, called 'interim measures', where:

(a) the Reasonable Suspicion Test has been met, an investigation has been started but not yet concluded; and

(b) it is necessary to act urgently either to prevent significant damage to a person or category of persons, or in order to protect the public interest (section 35 of the Act).

4.33 We can impose interim measures on our own initiative or in response to a request to do so. If a person wishes to make an interim measures application, they should contact the case team in the first instance to discuss the process and information requirements. Where no investigation has yet been opened, the applicant may request a pre-complaint discussion and indicate their interest in applying for interim measures.

4.34 Applications must include sufficient information and evidence to support the request and should clearly specify the nature of the interim measures sought. The application must also include a declaration of truth by the applicant or an authorised representative, confirming that:

(a) to the best of their knowledge and belief, the information and evidence provided is true, correct, and complete in all material respects; and

(b) they understand that it is a criminal offence under section 44 of the Act to knowingly or recklessly supply false or misleading information, including where such information is passed to another person for onward submission to ORR.

4.35 Applicants must also submit a non-confidential version of their application and supporting evidence, along with a clearly marked annex explaining why any redacted information should be treated as confidential. We may share the non-confidential version with the party against whom the interim measures are sought to enable a fair and timely process.

4.36 In some cases, we may use confidentiality rings or data rooms to facilitate access to sensitive material, in line with CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*.

4.37 If we provisionally decide to impose interim measures, we will notify the affected party of the proposed directions and the reasons for them. That party will be given a reasonable opportunity to make representations and inspect relevant documents on our file. The time allowed for this may be short, given the urgency of interim measures.

4.38 In deciding whether the imposition of interim measures is appropriate in the relevant circumstances, we will seek to ensure that the particular interim measures sought prevent, limit or remedy the significant damage that we have identified, and are proportionate for the purpose of preventing, limiting or remedying that significant damage

4.39 We consider "significant damage" to include actual or potential financial loss, restrictions on access to supply or customers, or harm to goodwill or reputation. Damage will be considered significant where it materially impairs a person's or group's ability to compete effectively in the market. The damage may be temporary or permanent and does not need to be irreparable.

4.40 The SRO will assess each application on a case-by-case basis and make the final decision, consulting other senior officials as appropriate.

4.41 If we provisionally decide to reject an application, we will issue a provisional dismissal letter setting out our reasons and allow the applicant to respond within a specified timeframe. If, after considering the response, we maintain our decision, we will notify both the applicant and the subject of the application.

4.42 Interim measures take effect immediately. Failure to comply without reasonable excuse may result in enforcement action, including court orders and/or financial penalties (CMA4 *Administrative Penalties: Statement of Policy on the CMA's Approach*).

4.43 Appeals against interim measures may be brought before the CAT. Appeals are subject to judicial review standard..

F. Possible outcomes following investigations

4.44 There are a number of possible outcomes which may arise following an investigation. Each of these possible outcomes is addressed below.

Issue a Statement of Objections

4.45 If the SRO reaches the provisional view that the conduct under investigation amounts to an infringement of competition law, the SRO can decide to issue a Statement of Objections to each business under investigation.

4.46 We will generally follow the CMA's approach (see Chapter 11 of CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*) in relation to the issue of a Statement of Objections. We will normally announce the issue of a Statement of Objections on our website and on the Regulatory News Service. However, depending on the circumstances of the case and any market sensitivities, we may vary the extent of publication or decide not to announce the issue of the Statement of Objections.

4.47 The Statement of Objections sets out our provisional findings based on our legal and economic assessment of the case. It also sets out our proposed next steps and gives the business under investigation an opportunity to know the full case against it and to respond formally in writing and orally. The processes to be followed and possible outcomes following a Statement of Objections are set out in Chapter 5.

Closing a case on the grounds of administrative priorities

4.48 At any time before or after issuing a Statement of Objections, the SRO may decide that a formal investigation no longer merits the continued allocation of resources because it no longer fits within ORR's priorities. At regular intervals throughout an investigation the merits of continuing the case will be assessed against our prioritisation principles.

4.49 If the SRO decides that a case no longer constitutes an administrative priority, we will inform the business under investigation as well as any complainants in writing and set out our reasons for not taking forward the investigation. We may, where we consider it appropriate, give l complainants an opportunity, usually within two to four weeks, to submit representations and any additional information. Businesses under investigation will also be allowed the same time frame to submit representations.

4.50 After considering any representations and further evidence received, the SRO will reach a view on whether to close the case. If the SRO decides to close the case on the grounds of administrative priorities, we will inform the business under investigation. In appropriate cases, we may issue a warning letter stating that although we are not minded to pursue the investigation further at the current time, we may pursue an investigation in the future. We will always reserve the right to keep our prioritisation decisions under review.

4.51 A decision to de-prioritise a case by us is not binding on other competition authorities (e.g. the CMA or other concurrent regulator). Other competition authorities with the requisite jurisdiction may choose to undertake an investigation in relation to a matter otherwise deprioritised by us.

Issuing a no grounds for action decision

4.52 If the SRO considers that there is insufficient evidence of a competition law infringement, the SRO may issue a decision that there are no grounds for action. In such a case, we may, where we consider it appropriate, provide a non-confidential provisional version of our proposed 'non-infringement' decision to any complainant(s). We will invite representations from any complainants within a time frame of two to four weeks. We will consider any representations made before proceeding to make a non-infringement decision or not.

Accepting commitments on future conduct

4.53 The SRO may accept commitments from one or more businesses for the purposes of addressing the competition concerns that we have identified in a particular case (section 31A of the Act). Commitments constitute binding promises from a business in relation to its future conduct. We will follow the CMA's guidance (see Chapter 10, CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*) on the circumstances in which it is appropriate to accept commitments.

4.54 Commitments may be offered at any time during a case once a case has formally begun, but before any infringement decision has been made. However, the SRO is less likely to exercise their discretion to accept commitments the further a case has progressed.

4.55 If the SRO accepts commitments, we will close our investigation without making a final decision, issuing directions or imposing a financial penalty (section 31B(2) of the Act). However, we may reopen the case, make a decision or give a direction if we have reasonable grounds:

- to believe that there has been a material change of circumstances since the commitments were accepted;
- to suspect that a business has not adhered to the commitments it has accepted; or
- to suspect that the information that led us to accept the commitments was incomplete, false, or misleading.

4.56 We will give notice of any proposal to accept commitments and allow at least 11 working days for interested parties to give their views on the proposed commitments. Where appropriate, we will have a meeting with each business that offered commitments to inform them of the nature of responses received during our consultation. If necessary, we will indicate whether we consider that changes are required to the commitments before we consider accepting them. If the parties offering commitments offer material modifications to the proposed commitments, we will allow interested third parties a further consultation period of at least six working days in which to comment on the modified commitments.

4.57 The SRO will make the decision as to whether to accept commitments. Once accepted we will publish the commitments, and a decision explaining our reasons for accepting commitments, on our website.

Informing the CMA

4.58 We will share a draft of key documents of an investigation (e.g. notice, decision or copy of commitments) with the CMA and/or other concurrent regulators prior to:

- issuing a Statement of Objections;
- making a decision or publishing a notice of intention to accept commitments;
- issuing an infringement decision;
- issuing a non-infringement decision; or
- making any decision not to proceed with an investigation (including on administrative priority grounds.

4.59 This is in line with Regulation 9 of the Concurrency Regulations and paragraph 3.49 of CMA10 Regulated Industries – Guidance on the concurrent application of competition law to regulated industries.

4.60 We will allow the CMA, and any relevant concurrent regulator,10 working days to provide comments on the relevant documents shared with them. We will take into account any comments provided before reaching any final decision.

5. Statement of Objections and following steps

A. Decision to issue a Statement of Objections and appointment of a Case Decision Group

5.1 Businesses who receive a Statement of Objections have the opportunity to exercise their rights of defence (otherwise known as the 'right to reply'). The stages in this process and the approach we will take to allow parties to exercise this right are set out below.

The Statement of Objections

5.2 The Statement of Objections sets out our provisional findings and views on the alleged infringement, the supporting evidence, and proposed next steps. It gives the party being accused of a breach of competition law an opportunity to know the full case against it and, if they choose to do so, to respond formally in writing and orally.

5.3 The Statement of Objections will set out:

- the specific competition law prohibition(s) ORR considers having been infringed;
- the facts, evidence, and legal and economic analysis underpinning our provisional view that an infringement has occurred;
- the action we propose to take, such as imposing financial penalties and/or issuing directions to stop the infringement if we believe it is ongoing, as well as our reasons for taking that action; and
- the deadline for written representations and confidentiality claims in accordance with Rule 5(2) and Rule 6(1) of the CMA rules.

5.4 We will keep parties under investigation and relevant third parties informed of the anticipated case timetable and any changes to this as far as possible while complying with our legal obligations, and to the extent that doing so would not prejudice ongoing investigations.

5.5 We will normally announce the issue of a Statement of Objections on our website and make an announcement on a Regulatory News Service. However, we may decide not to announce the issue of a Statement of Objections, or may vary the

extent of any publication, depending on the circumstances of the case and in particular the market sensitivity of any information we would otherwise publish. However, in the case of market sensitive announcements, where appropriate, ORR will apply the Guideline for the control and release of price sensitive information by Industry Regulators (originally published by the Financial Services Authority, the predecessor of the Financial Conduct Authority).

Draft of Penalty Statement

5.6 Where we provisionally consider that the infringement alleged in the Statement of Objections warrants the imposition of a financial penalty, we will normally at the same time issue a Draft Penalty Statement to each business on which we propose to impose such a penalty(section 36 of the Act; Rule 11 of the CMA Rules). We may impose a financial penalty on the infringing party of up to 10% of the undertaking's worldwide turnover (section 36(8) of the Act).

5.7 The Draft Penalty Statement will set out:

(a) the proposed penalty amount;

(b) the key factors relevant to the calculation of the penalty; and

(c) a brief explanation of our reasoning for each aspect of the penalty calculation.

5.8 When deciding on the appropriate amount of a penalty, ORR will have regard to CMA73 *CMA's guidance on penalty calculation*.

5.9 We will not publish the Draft Penalty Statement or the amount of any proposed penalty and will not comment publicly about issuing a Draft Penalty Statement.

5.10 We will normally place a non-confidential version of each party's Draft Penalty Statement on the file. Each non-confidential version will generally be disclosed to the other parties under investigation.

Appointment of a Case Decision Group

5.11 Once a Statement of Objections has been issued, a Case Decision Group (CDG) will be appointed to act as the final decision-maker on whether the business or businesses under investigation have infringed the prohibitions in Chapter I and/or Chapter II of the Act.

5.12 The CDG will consist of expert individuals who were not part of the original case team (Rules 3(2) and (3) of the CMA rules). The identity of the CDG members will be notified to the parties. The CDG is responsible for deciding on the investigation after the Statement of Objections has been issued, scrutinising the case as set out in the Statement of Objections, considering all written and oral representations,

and determining whether an infringement has occurred. Where a Draft Penalty Statement has been issued, the CDG will also decide whether a financial penalty should be imposed and, if so, the appropriate amount.

5.13 We will inform the parties under investigation of the identities of the CDG members once appointed. However, the case team will remain the primary point of contact throughout the process. Parties should not contact CDG members directly.

5.14 The CDG may receive advice and assistance from the original case team but will make its determination independently.

B. Right to reply

Access to the file

5.15 After issuing a Statement of Objections to a business, we will give it a reasonable opportunity to inspect the disclosable documents which we have on our case file and which relate to the matters referred to within the Statement of Objections. We will follow the CMA's guidance and practical approach in relation to streamlined access to the file (see Chapter 11, CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*). We will exclude from disclosure certain confidential information and internal documents (Rules 6 (2) of the CMA Rules). We may also exclude routine administrative documents from the file, for example correspondence for setting up meetings or acknowledgments of receipt of correspondence.

5.16 We will comply with the provisions in Part 9 of the Enterprise Act 2002, including Section 244 and 246A, when considering what information is confidential and/or whether it is appropriate for such information to be disclosed for the purposes of facilitating our functions under the Act. We treat the following as confidential information:

- commercial information, information relating to any business of an undertaking whose disclosure might significantly harm the undertaking's legitimate business interests;
- private information, information relating to the private affairs of an individual whose disclosure might significantly harm the individual's interests;
- sensitive information, information whose disclosure would be contrary to the public interest;

5.17 In order for us to determine what information is confidential, it is our policy to request that third parties who provide information to us indicate which parts of that information they consider to be confidential, in line with the above criteria. We

have discretion, even where third parties have claimed confidentiality, to disclose such information if we consider that it is necessary to do so in the exercise of our powers under the Act. Requests to restrict disclosure of confidential information should therefore be supported by reasoned arguments as to what harm would be caused from its disclosure and why.

5.18 We will consider representations on confidentiality from affected parties and assess the merits of each case put before us, following the procedure in Rule 7 of the CMA Rules and CMA6 *Transparency and Disclosure: Statement of the CMA's policy and approach*. If we propose to disclose confidential information provided by a person, we will inform that person of the proposed disclosure and give them a reasonable opportunity to make representations on the proposed action. We will typically not accept blanket requests for confidentiality (i.e. confidentiality over an entire document, or large part of it) and may request that parties specifically redact parts of documents which they consider to be confidential and ask them to explain the reasons.

5.19 Depending on the nature of the information to be disclosed, we may make use of electronic disclosure techniques, or, where appropriate, utilise confidentiality rings or data rooms to effect access to file. The arrangements for disclosure of information will be assessed on a case-by-case basis.

Written representations

5.20 Recipients of a Statement of Objections will have an opportunity to make written representations. We would expect to give parties no more than 12 weeks from the issue of the Statement of Objections and any Draft Penalty Statement to submit written representations. We will ask for a confidential and a non-confidential version of their representations at the same time or shortly after submission of those representations to us (see paragraph 5.17 above).

5.21 We may give initial complainants and third parties, who may be able to assist with the CDG's assessment of the case, an opportunity to submit written representations. In order to facilitate that process we will provide them with a non-confidential version of the Statement of Objections or the particular part on which we are seeking their representations, not usually including annexed documents. Any documents disclosed in this regard should be used solely for the purpose of providing representations to us and should not be disclosed further to other third parties.

Oral hearings

5.22 The CDG will invite the party under investigation to attend an oral hearing to discuss the matters set out in the Statement of Objections. The oral hearing will be held after the deadline for the submission of the written representations on the

Statement of Objections and any Draft Penalty Statement, allowing time for the CDG to consider the representations. If appropriate, third parties may also be invited to attend and make representations at oral hearings. Hearings will be attended by members of the case team as well as the CDG.

5.23 The hearing will be chaired by the Procedural Officer. The identity of the Procedural Officer will be communicated to relevant parties as soon as possible after appointment, as described in CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*.

5.24 We will agree with the party under investigation an agenda for any oral hearing in which it is involved in advance of the hearing. The party under investigation will have an opportunity to highlight to the CDG directly any issues of importance to its case, and to clarify the detail set out in its written representations. Although it is helpful to us if the party under investigation answers the questions raised in the oral hearing, there is no obligation to do so, and it is possible to respond to questions in writing following the hearing. A transcript of the hearing will be taken. The parties will be asked to confirm the accuracy of the transcript and, if necessary, to identify any confidential information. ORR will not accept blanket or unsubstantiated confidentiality claims.

5.25 Following the oral hearing, the chair will prepare a report on any procedural issues raised and assess the fairness of the hearing process.

C. Steps following representations

5.26 Following an oral hearing, the CDG will consider the Statement of Objections, the Draft Penalty Statement and the representations which have been submitted in writing and orally. It may then take any or all of the steps set out below.

Letter of Facts

5.27 If the CDG receives new evidence supporting the objections contained in the Statement of Objections, and the CDG intends to rely on it to establish an infringement, it will put the new evidence to the addressee of the Statement of Objections in a 'Letter of Facts' and allow time for it to respond.

Supplementary Statement of Objections

5.28 If the CDG receives new information in response to the Statement of Objections which indicates that there is evidence of a different suspected infringement from that set out in the Statement of Objections, or that there is a material change in the alleged infringement, the CDG will issue a 'Supplementary Statement of Objections' setting out the new facts on which it proposes to rely, and giving the addressee an opportunity to respond in writing and orally, and to inspect the new

documents, subject to the considerations listed above in relation to access to the file.

D. Possible decisions

5.29 Following consideration of the Statement of Objections and the representations received, the CDG will decide whether to either issue an infringement decision or a decision that there are no grounds for action.

Infringement decision

5.30 If the CDG finds that an infringement has occurred, ORR will issue a decision setting out the facts, legal reasoning, and any action to be taken. This may include:

(a) a financial penalty (section 36 of the Act); and/or

(b) directions to bring the infringement to an end (sections 32-33 of the Act).

5.31 If a party then fails to comply with our directions, we may seek a court order to enforce these directions (section 34 of the Act).

5.32 We would normally issue a press announcement regarding an infringement decision and make an announcement on the Regulatory News Service. A summary and a non-confidential version of the infringement decision will also be published.

No grounds for action

5.33 If the CDG does not find sufficient evidence of a breach of competition law, the CDG, following a consultation, may decide to close the case.

5.34 We would expect to follow the same procedure as for issuing an infringement decision; we would normally issue a press announcement regarding a no grounds for action decision and make an announcement on the Regulatory News Service.

5.35 We will also publish a summary and a non-confidential version of the decision.

E. Sanctions for infringement

Penalties

5.36 If we find an infringement of competition law, we may impose a penalty on the infringing undertaking(s). The infringement decision will explain how the CDG decided on the appropriate level of penalty, having taken into account our statutory obligations (section 36(7A) of the Act) and the parties' written and oral representations on the draft penalty calculation.

5.37 We will follow the CMA's penalty guidance when setting the amount of a penalty.

Settlements

5.38 In the context of enforcement cases under the Act, settlement is a voluntary process in which:

(a) a business under investigation is prepared to admit that it has infringed competition law; and

(b) the business confirms that it agrees to a streamlined administrative process for the remainder of the investigation in return for a reduction in its financial penalty.

5.39 Where a case is appropriate to be settled, we will issue an infringement decision but impose a reduced penalty on the settling party. The streamlined procedure is intended to achieve procedural efficiencies and resource savings (see Chapter 14, CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*).

5.40 We will retain broad discretion in determining which cases are appropriate for settlement. Businesses do not have a right to settle in any given case. We will follow the CMA's guidance in relation to:

(a) determining which cases are appropriate for settlement;

(b) the procedure to be followed in settlement cases; and

(c) calculating discounts from financial penalties/granting immunity from sanctions such as competition disqualification orders.

5.41 If a party would like to explore settlement, it should contact the case team. The decision to engage in settlement discussions and to settle is at our discretion. There should be no expectation that we will offer or accept settlement in Competition Act cases. The assessment of whether a case is suitable for settlement will be made on a case-by-case basis. Any decision to settle will be taken in accordance with the Act, Rule 9 of the CMA rules, and Chapter 14 of CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*.

5.42 In determining whether a case is appropriate for settlement, we will have regard to paragraph CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases* and we will consider a number of factors. First, we will consider if settlement is appropriate only where the evidential standard for giving notice of a

proposed infringement decision is met. We will not proceed with settlement discussions unless this standard is satisfied.. Other relevant factors include:

(a) The likely procedural efficiencies and resource savings that settlement would deliver

(b) The number of parties interested in settlement, taking into account the total number involved in the investigation; and

(c) The realistic prospect of reaching a settlement within a reasonable timeframe.

5.43 We will not allow parties to use settlement discussions in order to delay an investigation. We will set clear and challenging timetables for settlement discussions to ensure that they result in a prompt outcome and do not divert resources unnecessarily from the formal process.

5.44 The settlement procedure is separate from leniency or the commitments procedure, although it is possible for a leniency applicant to benefit from both leniency and settlement discounts.

Requirements for settlement

5.45 We will require a settling party to take a number of actions:

- make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement. The scope of the infringement will include, as a minimum, the material facts of the infringement as well as the legal characterisation of the infringement;

- cease the infringing behaviour immediately from the date that it enters into settlement discussions with us, where it has not already done so. It must also refrain from engaging again in the same or similar infringing behaviour;

- confirm that it accepts that there will be a formal and published finding of infringement against it, that it will pay a penalty and that it will comply with any directions imposed; and/or

- confirm it will pay a penalty set at a maximum amount. The maximum penalty in this context refers to the highest amount a business agrees to pay as part of a settlement if an infringement decision is issued. This amount is calculated as the total penalty (£X) minus a settlement discount (Y%), resulting in a reduced penalty (£Z). The reduced amount (£Z) is what is referred to as the maximum penalty the business will actually pay—provided it complies with the settlement terms. This maximum penalty (which will apply

provided the business continues to follow the requirements of settlement) will reflect the application of a settlement discount to the penalty that would otherwise have been imposed. This discount will reflect the circumstances of the case, in particular whether the case is being settled before or after issuing a Statement of Objections.

Settlement discount

5.46 Where a business enters into a settlement, we will impose a reduced penalty on the business. The reduced penalty will be calculated as a percentage discount on the penalty which would otherwise be payable.

5.47 The actual discount awarded will take account of the procedural savings achieved in settling that particular case at that particular stage in the investigation.

Timing of settlement	Cartel conduct	Non-cartel conduct
Before Statement of Objections	**Up to 20%**	**Up to 40%**
After Statement of Objections	**Up to 10%**	**Up to 25%**

5.48 'Cartel conduct' for these purposes is any conduct for which leniency is available because it meets the definition of 'cartel activity' in paragraphs 2.2 and 2.3 of the OFT1495 *Applications for leniency and no-action in cartel cases - OFT's detailed guidance on the principles and process* or in any updated definition in any revised Leniency Guidance that the CMA may publish.

5.49 In addition, in order to achieve our objective of resolving the case efficiently, settling parties must accept that:

(a) the infringement decision will be final and binding on them, even if other parties appeal;

(b) they may be required to assist us in any ongoing investigation or appeal; and

(c) they will not challenge or appeal against the infringement decision to the CAT.

5.50 Parties must not disclose the content of settlement discussions or the fact that those discussions have taken place to any third parties – including other parties engaged in settlement discussions – without the prior written authorisation of ORR.

5.51 The terms of any settlement will be recorded in writing and agreed by both parties. If settlement is reached before a Statement of Objections is issued, the admission will be based on a draft Statement of Objections provided by ORR.

5.52 Further information on settlement is provided in Chapter 14, CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*. Given the CMA's more extensive experience in applying settlement procedures under the Act, we have not sought to replicate the detail of its guidance. Where CMA8 provides more comprehensive or nuanced direction than this guidance, we will have regard to it in determining how to proceed in individual cases.

Voluntary redress schemes

5.53 Under the Competition Act 1998 (Redress Scheme) Regulations 2015 (SI 2015/1587), ORR and the CMA have concurrent powers to approve certain voluntary redress schemes. These schemes allow businesses that have infringed competition law to offer compensation to affected parties without the need for litigation. ORR may also apply a penalty reduction where a party obtains approval for a voluntary redress scheme before or at the same time as we adopt an infringement decision. CMA's CMA40 *Guidance on the approval of voluntary redress schemes for infringements of competition law* provides further detail.

Directions

5.54 If we have made a decision that one of the competition prohibitions has been infringed, we may impose directions on the infringing parties which we consider are appropriate to bring the infringement to an end. If a party subject to directions fails to comply with them, we may apply to the court for an order requiring the relevant party to make good their default.

Competition disqualification orders

5.55 We can make an application to the court for a competition disqualification order under Section 9A(10) of the Company Directors Disqualification Act 1986. This applies where a director's conduct in connection with a breach of competition law makes them unfit to be involved in company management.

5.56 Before making such an application, we will give notice to the director concerned and give that person an opportunity to make representations (Section 9C of the Act).

Cooperation under the Concurrency framework

5.57 We will share a draft copy of any proposed infringement decision with any other competition authority with concurrent jurisdiction prior to finalising the decision. We will allow concurrent regulators 10 working days to provide comments on the draft infringement decision shared with them. We will take into account any comments provided before reaching any final decision.

6. Complaints about ORR's investigation handling, right of appeal and reviewing ORR's processes

A. Procedural complaints process for investigations under the Act

6.1 We are committed to ensuring that investigations under the Act are conducted fairly, transparently and in accordance with the CMA Rules. Parties who are dissatisfied with any procedural step taken during an investigation are encouraged to raise their concerns through the following staged complaints process.

6.2 Procedural issues should first be raised with the case team. The case team will seek to resolve the matter promptly and informally.

6.3 If the issue remains unresolved, the party may escalate the complaint to the appointed SRO. The SRO will review the matter independently of the case team and respond in writing.

6.4 Where concerns persist, the party may submit a formal application to the Procedural Officer. The identity of the individual handling the complaint will be communicated to relevant parties as soon as possible after appointment. This process is consistent with Rule 8 of the CMA Rules and the approach set out in Chapter 15, CMA8 *Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*.

6.5 This internal complaints process does not affect the party's statutory rights to seek judicial review or to appeal to the Competition Appeal Tribunal (CAT).

B. Right of appeal to the Competition Appeal Tribunal or court

6.6 Parties retain the right to challenge ORR's decisions through judicial review and/or appeal to the Competition Appeal Tribunal (CAT), as appropriate.

6.7 Addressees of ORR's appealable decisions and third parties with a sufficient interest in appealable decisions have a right to appeal against the decision

concerned to the CAT, within two months of the date upon which the appellant was notified or the date of publication of the decision, whichever is the earlier.

6.8 Appealable decisions include:

(a) findings of infringement under the Act;

(b) decisions to impose interim measures; and

(c) decisions on penalties, including their amount.

6.9 The standard of review varies depending on the type of decision. For interim measures and decisions on accepting binding commitments, the CAT applies judicial review principles. For infringement and penalty decisions, the CAT conducts a full merits review (see Sections 46 and 47 of the Act). This excludes settling businesses that have accepted they will not appeal against the decision (see paragraph 14.8, *CMA8 Guidance on the CMA's Investigation Procedures in Competition Act 1998 cases*).

6.10 Where no statutory right of appeal exists, parties may consider applying for judicial review before the Administrative Court of the King's Bench Division under Part 54 of the Civil Procedure Rules. Independent legal advice should be sought in such cases.

This publication is available at orr.gov.uk

Any enquiries regarding this publication should be sent to us at orr.gov.uk/contact-us