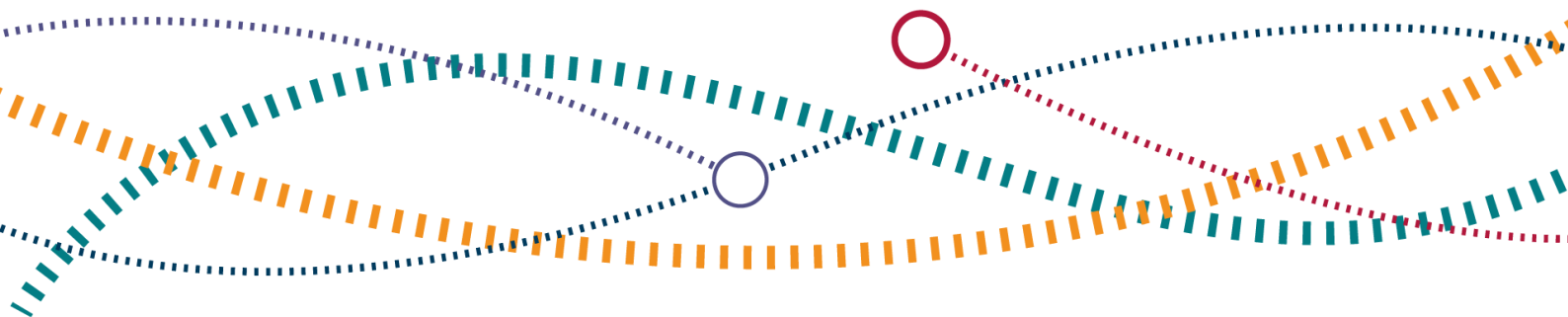




ORR's approach to monitoring and reviewing markets

28 April 2026



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Introduction

- 1.1 The Office of Rail and Road (**ORR**) is the independent economic and safety regulator for Great Britain's railways, the economic regulator for the Northern Ireland rail network and the monitor for England's strategic road network.
- 1.2 As the sector regulator for rail, we must keep the provision of railway services under review as per Section 69(1) of the Railways Act 1993 (the **Railways Act**). We are also required to monitor the competitive situation in the rail services markets as per Regulation 34 of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the **Access and Management Regulations**). We have a number of powers to address issues which we identify in the rail services markets.
- 1.3 The purpose of this guidance is to outline our approach to monitoring and reviewing rail markets. Our aim with these reviews is to secure value for money for users and funders and to support investment and growth in Britain's railway. When markets are working well, firms are able to innovate, invest, improve productivity and grow. Markets that work well should drive better outcomes for businesses, their customers and funders, as well as fostering economic growth.
- 1.4 This guidance also sets out the potential outcomes which may result from our rail market monitoring and reviewing activities, and the tools we may use to secure value for money, competition and support growth. These include our power to undertake market studies and to make market investigation references under the Enterprise Act 2002 (the **Enterprise Act**) that are binding on the Competition & Markets Authority (the **CMA**) in relation to services relating to railways, and our power to make directions under the Access and Management Regulations.
- 1.5 In undertaking our market monitoring and review functions we must, at all stages, have regard to our statutory duties under section 4 of the Railways Act.
- 1.6 Other bodies also review markets. These bodies include the CMA and [other sectoral regulators with concurrent competition powers](#). We liaise with concurrent regulators, via the [UK Competition Network](#) to ensure that the markets toolkit can be applied effectively, without duplication or inconsistency and by the regulator who is best placed to carry out markets work in the given circumstances. More detail about the cooperation arrangements between ORR and the CMA can be found in the [Memorandum of Understanding \(MoU\) between CMA and ORR](#) dated 9 February 2016.

- 1.7 This document replaces our earlier guide 'ORR's approach to reviewing markets' which we published in 2017. The updated guidance reflects targeted changes to ensure alignment with the current legal and regulatory framework. In summary, in this guidance we have:
- removed references to European legislation and the duty to liaise with overseas concurrent regulators such as the European Commission. We have clarified our concurrency arrangements to focus on UK regulators;
 - reflected changes introduced by the Digital Markets, Competition and Consumer Act 2024 (the **DMCCA**), which are also set out in more detail in CMA's guidance on market reviews, market studies, market investigations and the monitoring and review of market remedies ([CMA3](#)). For example, the sections on market studies and market investigation references and, where relevant, references to our consumer enforcement powers have been revised to reflect the DMCCA; and
 - updated references throughout the document for accuracy, for example when we refer to the CMA's updated [Administrative Penalties: Statement of Policy on the CMA's Approach \(CMA4\)](#). All changes are clarificatory and do not materially alter our approach to how we exercise our market monitoring powers.
- 1.8 This guidance reflects our current approach in keeping the provision of railway services under review but it does not incorporate forthcoming legislative developments, including the Railways Bill. We may revise and reissue this guidance in the light of experience and other developments in law and practice. We will align this guidance with the Railways Bill, when enacted, and with the legislative changes which the Department of Business and Trade (**DBT**) introduces following its consultation to refine the UK's competition regime.

Monitoring markets

2.1 As the independent economic and safety regulator for Great Britain's railways we have significant day to day interaction with the railway industry. We use intelligence gained in this way to monitor the competitive situation in railway markets and to keep under review the delivery of railway services.

2.2 We receive intelligence through, amongst other things:

- regulating health and safety for the entire mainline rail network in Great Britain, as well as London Underground, light rail, trams and the heritage sector;
- approving and directing access agreements for rail operators to track, stations and light maintenance depots;
- receiving accounting information from railway operators; and
- monitoring Network Rail and holding it to account for delivering its regulated outputs set as part of the five-year periodic review. For more information in relation to our regulation of Network Rail and five-year control periods, please see our [Periodic Review 2023 \(PR23\) final determination](#).

2.3 We also gain intelligence from other engagement with industry and with users of railway services, for example:

- through our freight panel which is comprised of freight customers who represent a wide range of expertise and interest from across the rail freight community;
- consumer watchdogs;
- through complaints and appeals which we receive through our role as an appeal body under certain parts of the [Network Code](#), which regulates the interaction between Network Rail and its access beneficiaries, and under Regulation 32 of the Access and Management Regulations;
- through interaction with the [Rail Delivery Group](#); and
- from those providing funding to the sector.

2.4 Information provided to us by market participants is very important. Our assessment of how markets are working has to be informed by the experience and knowledge

of those operating within those markets (both suppliers and customers). We remain open, therefore, to suggestions on what areas of the railway we should prioritise for review. We welcome suggestions regarding markets which may not be covered by our day-to-day interaction with the industry. Please use the form at Annex C to make any suggestions to us.

2.5 As part of our duty to monitor the competitive situation in the rail services markets we must, in particular, look for and prevent discrimination against applicants with an interest in obtaining capacity on railway infrastructure (**Applicants**). This entails controlling arrangements for: access to railway infrastructure and relevant network services; the allocation of such access; the charges levied for access; schemes for charging for access; and, the content of [network statements](#) produced by managers of railway infrastructure (**Infrastructure Managers**). In fulfilling this responsibility we must:

- control such matters on our own initiative with a view to preventing discrimination against Applicants, for example, by considering making a direction (see Chapter 4, below); and
- check that network statements do not contain discriminatory clauses or give infrastructure managers discretionary powers that may be used to discriminate against Applicants.

2.6 From time to time, and where our monitoring brings to our attention a potential competition or consumer issue, we will seek further information typically by researching what is publicly available, and sometimes by conducting interviews with a small number of relevant stakeholders. Alternatively, if our market monitoring identifies potential competition issues or other market issues which require more specific or urgent action, we may:

- consider moving into a research stage, which is described in more detail at paragraphs 2.7 to 2.10 below;
- consider it appropriate to move directly to giving directions under the Access and Management Regulations, the procedure for which we set out in Chapter 4;
- in certain circumstances, proceed directly to enforcement action using our other statutory powers; or
- progress to undertaking a formal market study if this is appropriate. The process for market studies is set out in Chapter 3.

Research stage

- 2.7 During the research stage we will typically gather information from our own records and from governmental and public sources to assess how a market is functioning and assess whether there appear to be market problems that warrant further attention. The research stage is not typically public.
- 2.8 We seek to impose the minimum burden on stakeholders at the research stage, but it may be the case that only industry participants can provide us with the information we need to come to a robust view on next steps in a particular case. Where a suggestion is made by an industry party, we may consider it necessary to contact that party to explore the matter they have raised to ensure we fully understand it. Involving one party may necessitate involving others to provide a balanced perspective.
- 2.9 There are several outcomes which are possible as a result of the research stage. We may decide to give a clean bill of health to a market where the results of our research do not suggest that there are any issues of significant concern. Where we think there is an issue which requires further analysis, we may choose to progress to a more in-depth review of the market which could take the form of a market review or a market study (see Chapter 3). The latter is more likely where:
- we already have significant information at our disposal, perhaps by way of a well-articulated complaint; and
 - that information is highly indicative of a matter which could result in a market investigation reference to the CMA and benefit from being investigated using the CMA's formal investigation powers (see also Chapter 3).
- 2.10 Alternatively, there are several other options following the research stage:
- we may decide that the issues we identify are not ones that we should prioritise under our prioritisation criteria – see Annex A;
 - we may progress to an investigation under the Competition Act 1998 (the **Competition Act**) pursuant to section 67(3) of the Railways Act where we have identified any activity and/or received any information that an infringement of the Competition Act prohibitions may have taken place and we believe we have sufficient grounds to conduct an investigation under the Competition Act;

- we may progress to an investigation under the DMCCA where we have identified a commercial practice which constitutes a relevant infringement under section 148 of the DMCCA; or
- we may decide that there are matters which are capable of resolution under our sector-specific powers, for example through direct licence enforcement or directions under the Access and Management Regulations.

Market reviews

- 2.11 Under section 69(1) of the Railways Act, we have a duty to keep the provision of railway services under review. In discharging this duty we may launch a market review, which is a more formal stage of enquiry with the purpose to collect information with respect to the provision of those services. For example, we may issue information requests with set deadlines or publish a call for evidence from other interested stakeholders. As described above, we may initiate a market review as an outcome of the research stage we conduct on our own initiative or as the result of a complaint from an interested party.
- 2.12 We may also initiate a market review in response to a super-complaint. Under section 11 of the Enterprise Act (which, pursuant to section 205 of the Enterprise Act and The Enterprise Act 2002 (Super-complaints to Regulators) Order 2003 applies to the ORR), designated consumer bodies may make super-complaints to sectoral regulators about market features that may be significantly harming the interests of consumers. A super-complaint may be made to us in relation to the rail industry. We must respond to a super-complaint within 90 days after the day on which the complaint is received, stating whether we will take action and, if so, what that action will be, together with reasons for our proposals. This statutory duty therefore obliges us to consider the complaint if the complaint concerns the rail sector, but does not require us to take any action following that initial review. We would typically characterise this initial review as equivalent, or at least comparable, to a market review.
- 2.13 Although there is no statutory timescale for the conduct of market reviews, we will endeavour to conclude the process within six months. Our ability to do so will, however, be highly dependent on the information available to us and, therefore, the response of stakeholders to our information gathering.

Information gathering

2.14 We may choose to gather information from market participants and other parties, for example other public bodies and consumer groups. We may gather information in a number of ways including:

- making requests for information or issuing questionnaires;
- conducting our own market research (for example, through web scraping);
- holding industry-wide seminars, meetings and/or interviews; and/or
- commissioning research from external consultants where we require specific technical expertise and advice.

2.15 In conducting market reviews, we will typically seek to gather information on a cooperative basis, i.e. without using statutory powers to compel the production of information or documents from parties. We do have statutory powers to compel the production of information from licence holders under section 80 of the Railways Act, however we anticipate only using these powers where it is proportionate to do so. An example of where we may consider using our formal powers would be where a business refused to provide us with key information on a cooperative basis.

Outcomes

2.16 Although there is no formal requirement to do so, we may decide to consult the industry in relation to the outcome of a market review. Whether or not we consult in a particular case, we may publish the outcomes of our market reviews in a report or in a public letter to stakeholders. The manner in which we communicate the outcomes of market reviews will be determined on a case-by-case basis.

2.17 Following a market review, we may decide any of the following:

- that the issues we identify are not ones that we should prioritise under our prioritisation criteria – see Annex A;
- to progress to an investigation under the Competition Act pursuant to section 67(3) of the Railways Act where we have identified any activity and/or received any information that an infringement of the Competition Act prohibitions may have taken place and we believe we have sufficient grounds to conduct an investigation under the Competition Act;

- to take action under consumer law powers in the DMCCA where we have identified a commercial practice which constitutes a relevant infringement under section 148 of the DMCCA;
- that there are matters which are capable of resolution under our sector specific powers;
- to commence a market study (see Chapter 3);
- to make a Market Investigation Reference to the CMA (see Chapter 3);
- to engage with industry to develop an industry-led solution to an issue which we identify, for example, a Code of Practice, or we may ask the industry to review established industry mechanisms which have been created to deal with similar issues but which may not be entirely effective in addressing the facts identified during our review;
- that there are issues which could be more effectively dealt with elsewhere, for example, by government, or another public body. We may in such a circumstance write to the relevant authority setting out recommendations on how our concerns could be met; or
- that there is a significant issue or a pattern of behaviour identified for which a remedy is not available and the matter is one which would not be suitable for a Market Investigation Reference. In such a circumstance, we may make a detailed report to government. The report may, for example, include recommendations for changes to laws or regulations.

2.18 We note that a number of the potential outcomes following a market review are the same as those following the research stage. However, we would expect that the outcomes listed in paragraph 2.17 are more likely to follow as a result of a market review than following the research stage, given the additional information gathering and analysis that we would have been able to undertake in the market review process.

Market studies and market investigation references

Market studies

- 3.1 Market studies are examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour. Through gathering intelligence from a range of sources, we can identify markets which appear not to be working well. A market study can then examine whether there is a problem, in which case the study looks at its effects, the causes of those effects, and considers how those causes may be best addressed by the most appropriate means.
- 3.2 We will consult with the CMA before exercising any of our concurrent powers in relation to markets.

Market study notices

- 3.3 Market studies are conducted under our general function to keep under review the provision of railway services. In the course of market studies, we may utilise formal investigation powers in order to gather evidence from relevant parties.
- 3.4 Market studies are formally commenced through the publication of a market study notice (a **Market Study Notice**). When we are carrying out our functions to monitor rail markets under section 69(1) of the Railways Act and we consider it appropriate to use formal investigation powers under section 174 of the Enterprise Act, we must publish a Market Study Notice under section 130A of the Enterprise Act.
- 3.5 The legal test for deciding whether to publish a Market Study Notice requires us to consider whether an issue is one where the use of formal information gathering powers is appropriate with a view to deciding whether to make a Market Investigation Reference (**MIR**) to the CMA. This consideration is made in accordance with the legal test set out at section 130A of the Enterprise Act as applied by section 67(2C) of the Railways Act. Namely we make this assessment in circumstances where we are proposing to carry out our functions under section 69(1) of the Railways Act for the purposes of: (i) considering the extent to which a matter in relation to services related to railways has or may have effects adverse to the interests of consumers; and (ii) assessing the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.

3.6 In assessing whether a matter is 'appropriate' under this test, we will have regard to our prioritisation principles and the feasibility of using other tools, see Annex A. Market studies are resource intensive processes and can create significant burdens on industry. We will therefore carefully consider whether the legal test has been met and consider our duties under section 4 of the Railways Act before making a decision to launch a market study.

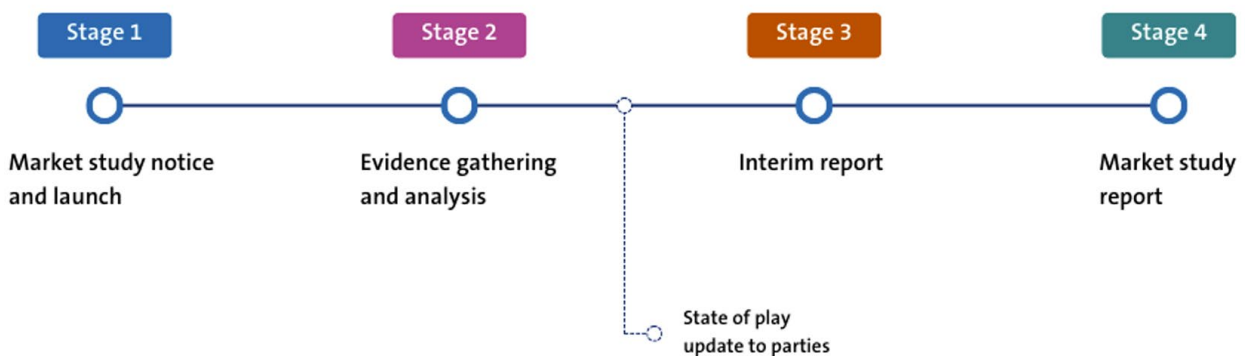
3.7 Under section 130A(3) of the Enterprise Act a Market Study Notice will set out:

- the scope of the market study;
- the period during which representations can be made to us in relation to the market study; and
- the timescales within which the market study will be completed.

Statutory time limits for market studies

3.8 Market studies are subject to a 12-month maximum statutory timeframe (section 131B(4) Enterprise Act), beginning with the date on which we publish a Market Study Notice. The key stages of a market study are illustrated below:

Key stages of a market study



Source: CMA3

Within 12 months of the date of publication of the Market Study Notice:

- We must publish a report setting out our findings and the action (if any) which we propose to take.

- Where we are proposing to make a MIR in relation to the subject matter of the market study, we must publish a notice of our proposal and consult the relevant persons about the proposal before deciding whether to make a reference.
- Where we do not propose to make a MIR:
 - if we have received representations in response to the Market Study Notice which suggest that we should make a MIR, we must publish a notice of our proposal not to make an MIR, and consult the relevant persons about the proposal before deciding whether to make a reference; or
 - we must otherwise publish a notice of our decision not to make a MIR or to accept undertakings partially or fully in lieu of a MIR.
- The report must contain our decision, the reasons for such decision and such information as we consider appropriate for facilitating a proper understanding of the reasons for our decision, see section 131B(5) of the Enterprise Act. Where our report sets out a decision to make a MIR, we must make that reference at the same time as publishing the report, see section 131B(6) of the Enterprise Act.

3.9 The Secretary of State has the power to shorten the 12-month maximum statutory timeframe subject to consultation with the CMA and any other persons the Secretary of State considers appropriate.

3.10 Through the consultation which we undertake as part of a market study, stakeholders will be given the opportunity to comment on matters such as the criteria being used to assess competition in the particular market(s) under review and on our proposed methodology.

Cases raising public interest considerations

3.11 The Secretary of State has a power, under section 139 of the Enterprise Act, to intervene in a markets case where the case raises public interest considerations, by giving us a notice that one or more than one public interest consideration is relevant to the matter. At present, the interests of national security constitute the only specified public interest consideration, although the Secretary of State has the power to introduce other specified public interest considerations. As such, we would not anticipate the power to make public interest interventions to be commonly used in the rail sector. Further guidance in relation to this power can be found in the CMA's guidance ([CMA3](#)).

Investigatory powers

3.12 Once we publish a Market Study Notice, we are able to use certain formal investigatory powers to assist us in carrying out our functions under section 174 of the Enterprise Act, and we would expect to use them. These powers are:

- to give notice to require any person to attend at a time and place and in a manner specified in the notice to give evidence to a person nominated by us;
- to give notice to any person requiring that person to produce, specified documents or categories of documents that are in that person's custody or under that person's control and
- to give notice to any person carrying on business to supply us with estimates, forecasts, returns or other information as specified in the notice, at a time and place and in a specified form and manner.

3.13 These information gathering powers will enable us to make a fuller assessment of any concerns identified during the market review stage. The overarching principle we follow during a market study is to reach a decision as efficiently as possible to limit any perception of risk and uncertainty and minimise burdens on businesses. We aim to be fair and reasonable in the use of our information gathering powers and in setting the deadlines for parties to provide information to us.

3.14 Where we consider that a person has, without reasonable excuse, (a) failed to comply with any requirement of a notice issued by us using our investigatory powers under Section 174 of the Enterprise Act, (b) obstructed or delayed another person in the exercise of their powers to copy a document under Section 174(7) of the Enterprise Act, or (c) altered, suppressed or destroyed any document they are required to produce by a notice under Section 174 of the Enterprise Act, we have the power to impose an administrative penalty. We can also impose an administrative penalty where we consider that a person has, without reasonable excuse, supplied information to us that is false or misleading in a material respect in connection with the exercise of our markets functions, either directly or through another person. See Section 174A(1) and (1A) of the Enterprise Act. In deciding whether and if so, how, to impose an administrative penalty, we will also have regard to the most recently published CMA guidance on this point (currently, Administrative Penalties: Statement of Policy on the CMA's approach ([CMA4](#))).

Outcomes of a market study

3.15 Following a market study, we may reach any of the same outcomes as we might reach following a research study or a market review, as set out in paragraphs 2.09, 2.10 and 2.17, above. There is also a further possible outcome from a market study, where we find reasonable grounds to suspect that any feature, or combination of features, of the rail market under scrutiny prevents, restricts or distorts competition, in which case:

- we may progress directly to making a MIR to the CMA (see paragraphs 3.20 to 3.25 below); or
- we may decide that we have sufficient information available to us to accept undertakings partially or fully in lieu of a MIR (see paragraphs 3.17 to 3.19 below). In order to assist in accepting undertakings in lieu of a MIR, we may then progress to consider remedies (which can include the exercise of formal powers of investigation, as set out in section 174 of the Enterprise Act).

3.16 Section 131(2) of the Enterprise Act defines a “feature” of a market as: the structure of the market concerned or any aspect of that structure; any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services. Section 131(3) of the Enterprise Act defines conduct as including “any failure to act (whether or not intentional) and any other unintentional conduct”.

Undertakings in lieu of a MIR

3.17 We have the power to accept undertakings fully or partially in lieu of a MIR under Section 154A of the Enterprise Act. In exercising this power to accept undertakings fully in lieu of a MIR, we must have regard to:

- the need to achieve as comprehensive a solution as is reasonable and practicable to any adverse effects on competition identified; and
- the need to achieve as comprehensive a solution as is reasonable and practicable to any detrimental effects on customers so far as they result or may be expected to result from such adverse effects.

3.18 We may also have regard, as appropriate, to the effect of the undertakings on any relevant customer benefits arising from a feature or features of the markets concerned.

3.19 Before accepting undertakings in lieu of a MIR, we shall publish a notice of the proposed undertakings, which must state the purpose and effect of the undertaking and identify the situation which the undertaking is seeking to deal with, as well as setting out any other facts which we consider justify the acceptance of the undertaking. We must consider any representations we receive which are made (and not withdrawn) in accordance with the notice in relation to the undertakings before accepting them.

Making a market investigation reference

3.20 As set out above, one of the possible outcomes of a market study (or market review) is that we make a MIR to the CMA. A MIR can be either:

- an 'ordinary reference' under section 131(1) of the Enterprise Act, where we have reasonable grounds for suspecting that any feature, or combination of features, of a market for goods or services relating to the supply of services relating to railways prevents, restricts or distorts competition; or
- a 'cross-market reference' under sections 131(2A) of the Enterprise Act, where the feature or each of the features concerned exists in more than one market relating to the supply of services relating to railways. In such a case, there is no statutory requirement to refer the whole or any aspect of the structure of a market as a MIR, but we would consider the wider implications of doing so on a case-by-case basis.

3.21 Before making a decision to make a MIR we will apply our duties as set out in section 4 of the Railways Act and take into account a number of factors including:

- the nature and significance of the competition problems that we believe exist in the market(s) concerned and whether a matter warrants investigation under the Competition Act;
- whether a MIR would be a proportionate response to the scale of the competition problems identified;
- whether it would be possible to accept commitments/undertakings in lieu of a MIR (see paragraphs 3.17 to 3.19 above); and/or
- whether appropriate remedies are likely to be available to the CMA, or in the absence of appropriate remedies, whether a CMA report might provide a useful alternative contribution.

- 3.22 In some cases we may have direct regulatory powers which may be used to address issues raised by a market study. In such cases we will carefully weigh the advantages and disadvantages of using our direct regulatory powers prior to making a decision on whether or not to make a MIR.
- 3.23 If we make a MIR, it must specify, as per Section 133(1) of the Enterprise Act:
- the enactment under which it is made;
 - the date on which it is made; and
 - the description of goods and services to which the feature or combination of features concerned relates.
- 3.24 More information in relation to the CMA's procedure for undertaking a Market Investigation can be found in [CMA's Guidance \[CMA3\]](#).
- 3.25 Upon receiving a MIR, the CMA will conduct a detailed investigation and reach its own conclusions about the market. The CMA has the power to impose remedies which may include divestiture, behavioural remedies or recommendations for action by Government or other agencies. Further details of the UK market investigation regime and remedies available to the CMA can be found in the [CMA's guidance \[CMA3\]](#).

Directions in relation to markets

- 4.1 Under Regulation 34 of the Access and Management Regulations we must, where appropriate, give directions in order to correct:
- discrimination against applicants for access to the rail network;
 - market distortion; or
 - undesirable developments in relation to the competitive situation in the rail services markets.
- 4.2 Our power to issue directions is separate from our concurrent competition power to undertake market studies under the Enterprise Act. This power is designed specifically to address issues we identify in the competitive functioning of the rail services market and allows us to swiftly intervene to correct such issues.
- 4.3 We may exercise this power on our own initiative, for example as a result of an issue which we have identified through our monitoring activities. We may also choose to exercise this power in response to an issue raised by an interested or affected party.
- 4.4 Any party to whom a direction is given must comply with and give effect to that direction. We have a power to impose a financial penalty for a failure to comply with a direction under Regulation 38 of the Access and Management Regulations. Please refer to our [Economic Enforcement Policy and Penalties Statement](#) for more information

When we may use this power

- 4.5 In determining whether a direction under Regulation 34 is appropriate in any particular case we will have regard to the need to act proportionately.
- 4.6 Subject to consideration of our prioritisation principles (set out in Annex A), giving directions is likely to be appropriate in cases where:
- concerns relate, in particular, to matters referred to in Regulation 34(2). The particular issues we must control as part of our duty to monitor the railway are the same as those to which Applicants have a right of appeal to us under Regulation 32(1) of the Access and Management Regulations in the event that they believe that they have been unfairly treated, discriminated against or otherwise aggrieved.

- swift targeted intervention is an optimal approach to correct relatively straightforward and easily identifiable market issues, without the need for in-depth investigation; and
- there are no established regulatory means such as a licensing or access solution which would be equally as effective and expedient in resolving the issue.

Overlap between appeals function and power to give directions

4.7 An appeal can be submitted to us under Regulation 32 of the Access and Management Regulations, relating to:

- the network statement produced in accordance with regulation 13 of the Access and Management Regulations, in its provisional and final versions;
- the information which must be included in that network statement;
- the allocation process for infrastructure capacity;
- the charging scheme and charging system and the Channel Tunnel charging framework;
- the level or structure of infrastructure fees which an applicant is or may be required to pay;
- the arrangements for access under Part 2 of the Access and Management Regulations, which covers access to railway infrastructure and services; and
- access to and charging for services provided under Part 2 of the Access and Management Regulations.

4.8 The Access and Management Regulations allow for the possibility that we may be required to consider an issue under the appeal function of Regulation 32 of the Access and Management Regulations which may also be appropriately addressed through our power to make directions under Regulation 34(3) of the Access and Management Regulations. Where we receive an appeal under the Access and Management Regulations, our power to make a decision extends only as far as the matters which are brought to us as part of the appeal. Our power to issue directions, however, is more wide reaching and allows us to address related issues which may

not have been brought directly as part of an appeal but which we nonetheless consider need to be addressed.

- 4.9 If applicants have a preference as to which function is applied, then reasons for this should be submitted to us. Ultimately we will determine, having considered representations received, which function should be utilised in each case. We may, in certain circumstances, determine that it is most appropriate to operate the appeal and directions functions in parallel. We will keep interested parties informed of the approach being adopted in each particular case.

Process and timescales

- 4.10 If we are considering making a direction under regulation 34 in relation to an issue which has been appealed under regulation 32 (i.e. exercising the functions in parallel), we will seek to exercise both powers, so far as possible, to the same timescales. Specifically, we will publish our final decision in relation to both the appeal and whether we consider it appropriate to issue directions within a maximum of 6 weeks of the date of receipt of all relevant information.
- 4.11 In all other circumstances we will endeavour to complete our enquiries and make a determination on whether directions are appropriate within a 6 week timeframe. If it is apparent that we are likely to require significantly longer than this, we may consider whether it is more appropriate to undertake a market review, or publish a Market Study Notice under the Enterprise Act.
- 4.12 When exercising this power we will have regard to the principles of good regulation which are proportionality, transparency, accountability, consistency and targeting. Before issuing a direction, we will consult with the relevant parties and consider their representations, this includes consultation with the Secretary of State where the decision in question affects a rail link or the operation of a development agreement.

Directions

- 4.13 Given the nature of the power to issue directions and the timescales within which it will be used, we expect directions given under the Access and Management Regulations to constitute straightforward actions required by individual persons or businesses. We do not anticipate issuing directions which require changes in business structures or on-going monitoring by ORR. If it is apparent that such intervention may be appropriate, we may consider whether it would be more appropriate to use alternative regulatory powers (such as licensing enforcement) or

we could proceed to the issue of a Market Study Notice. Either course of action could be preceded by a market review.

Annex A: Prioritisation criteria and choice of tool

Prioritisation criteria

- A.1 Our prioritisation criteria solely apply to areas of work in respect of which ORR has discretion to intervene. Therefore, the criteria do not apply where we have a duty to take action (e.g. ORR appeal function under Regulation 32 of the Access and Management Regulations).
- A.2 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 a particular course of action is best carried out by ORR. We work in partnership with concurrent competition and consumer protection authorities. Consideration of this criterion will typically involve determining whether other organisations are better or best placed to address the issue in question.
 - **Impact** – We will consider 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;
 - whether conduct is recurrent and/or ongoing;
 - whether the issue in question is leading or could lead to inefficiencies in the market, either in terms of costs or end prices to consumers; and
 - other indirect benefits such as deterrence or raised awareness amongst businesses and consumers. This impact could be in the market in question or in related markets.

- **Costs** – We will estimate the internal and external costs attached to our intervention. The internal costs will include any opportunity costs (for example, knock-on effects on ORR's current and future portfolio of work). 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 or not 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.

A.3 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 particular intervention under review throughout the course of such intervention.

Choice of tool

A.4 As set out in Chapters 3 and 4, we have a statutory power to undertake market studies and to make MIRs, and, to make directions under the Access and Management Regulations. However, our monitoring toolkit encompasses a number of other tools to address competition and/or consumer protection issues. This means that we will typically have to make a decision as to which tool is more appropriate to deal with a particular issue. The appropriateness of the tool being utilised to address a particular issue will be kept under review.

A.5 The overriding principle is that we will seek to use the most effective, efficient and expeditious solution where an issue is found to exist. In order to make this assessment we will have regard to our prioritisation criteria with particular consideration of:

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

A.6 Where ORR is confronted with a serious and clear breach of the law, taking enforcement action will usually be the most appropriate response rather than launching a market review. However, in certain circumstances we might consider that there are issues with the way that the market is working and there would be merit in looking at the issue from a whole market rather than individual conduct perspective. In such circumstances we will consider the use of our market review or study functions.

Annex B: Handling Information

- B.1 The Freedom of Information Act 2000 (**FOIA**) gives any person the right to request non-published information from us. However, we recognise that we will obtain information in the context of market reviews, market studies and competition investigations that should not be widely disclosed. There are certain exemptions in the FOIA that could be relevant to information held by us through the exercise of our functions. The application of exemptions in the FOIA will be considered on a case-by-case basis.
- B.2 Part 9 of the Enterprise Act restricts our ability to disclose information we receive in the course of our work. In particular, Part 9 of the Enterprise Act contains a general prohibition against disclosure of information that relates to the affairs of a business or an individual, unless disclosure is otherwise permitted (for example where the parties have given their consent, or where the disclosure is for the purpose of facilitating the exercise of a public authority's statutory function). It is a criminal offence to disclose information in breach of those provisions.
- B.3 Section 145(1) of the Railways Act restricts the disclosure by ORR of information it has obtained under or by virtue of the Railways Act. However, section 145(2) of the Railways Act allows disclosure for the purpose of facilitating our carrying out of our functions under the Railways Act, the Transport Act 2000 and the Railways Act 2005, including our concurrent competition powers. Therefore, we can use or disclose information gathered under the Railways Act to facilitate our Enterprise Act functions. Any disclosure in breach of section 145 is a criminal offence.
- B.4 Similarly, section 71 of the Railways Act allows us to publish such information and advice as appears to us expedient to give to users or potential users of railway services. This is subject to a requirement for us to exclude from publication any matter which relates to the affairs of an individual or body of persons, where publication would or might seriously and prejudicially affect the interests of that individual or body of persons.
- B.5 Where information we have obtained in the course of investigations falls within the prohibitions of disclosure contained in sections 71 or 145 of the Railways Act or Part 9 of the Enterprise Act, it would be exempt from disclosure under section 44 of the FOIA. There are also exemptions from disclosure, for example, for information that would prejudice any civil proceedings (including competition or consumer proceedings) if disclosed.

Annex C: Market study proposal form

Office of Rail and Road market study proposal form	
Name Organisation Contact details	Please state whether you think your or your organisation's identity should be kept confidential and give reasons for this. We will consider your representations before making a decision.
Proposed market for review	This need not be an economic market defined according to competition law but can be anything relating to railways within Great Britain.
Description of problems	Please set out the problems and how they are likely to lead to significant harm to users of the railways.
Market importance	Please explain why this is an important area for us to look at, with reference to our prioritisation criteria at Annex A to this guidance. Please be as specific as possible and include details such market turnover or the significance of the service/product to the railways and views on where this would fit within ORR's strategic objectives .
Supporting information	Please either attach the evidence you have to support this proposal, or provide your sources if these are easily accessible, such as internet hyperlinks to reference documents.
Further assistance	Please state the level of further assistance that you or your organisation would be able offer us if we prioritise your proposal for review.
Please note that we normally assess and identify areas to review on an annual basis, to inform corporate planning for the forthcoming business year. This means your proposal will usually be assessed alongside other proposals in the Autumn for review from the following Spring. However, please indicate if there is any degree of urgency to your proposal, giving reasons.	



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