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Dear Stakeholder

Office of Rail and Road's (ORR's) conclusions on the consultation on its guidance regarding its approach to monitoring and reviewing markets

We are grateful for responses to the consultation (the **Consultation**) on our *Draft Guidance on ORR's approach to monitoring and reviewing markets* (the **Draft Guidance**).

We have today published our final guidance; this is available on our website¹.

This letter sets out how we have taken responses to the Consultation into account. Following the Consultation, we have made a number of amendments to the Draft Guidance, which are listed in a table at Annex A².

The Consultation

On 21 July 2016 we opened the Consultation on the proposed publication of updated guidance regarding ORR's approach to monitoring and reviewing railway markets; the actions we might take; and, how and in what circumstances, we intend to use our powers to make directions under the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the **Regulations**), and to undertake market studies and make market investigation references to the Competition and Markets Authority (**CMA**). The Consultation Closed on 13 October 2016.

We received responses from Angel Trains Limited and Rail Delivery Group Limited (**RDG**). These responses are available on our website³.

¹ <http://orr.gov.uk/what-and-how-we-regulate/competition/market-studies>

² Some additional minor changes have been made in light of further internal review, to correct typographical errors, update referencing and to improve readability of the document

³ <http://orr.gov.uk/consultations/closed-consultations/competition-consultations/orrs-approach-to-monitoring-and-reviewing-markets>

Angel Trains Limited had no comments on the content or planned introduction of the revised guidance.

RDG respondent raised a number of points which we address in turn.

Responses to the consultation

Reactive monitoring

RDG noted that since one of ORR's duties is the promotion of competition, it would be expected that ORR would take a proactive approach from the beginning of the process, rather than describing its monitoring activities as "reactive" in the initial stages.

We note RDG's concern and recognise that referring to our business as usual activities as reactive rather than proactive is not a helpful distinction and can lead to the inaccurate perception that we do not actively seek intelligence as part of our regulatory role. We have removed this distinction from the Guidance.

Information sources

RDG commented that the list of information sources by which ORR receives intelligence and an understanding of markets set out in paragraphs 2.2 and 2.3 of the Draft Guidance could be more specific and focused. It suggested that a more systematic approach to data collection that goes beyond "business as usual" functions could make the monitoring stage more effective.

The list of data sources is not meant to be comprehensive or focused on our market monitoring role. It is simply there to provide examples of how we are exposed to intelligence during our business as usual interaction with the industry and its key stakeholders. We do not list, for example, all of the data that we receive as part of our licence monitoring functions or that we publish by way of our data portal.

We continue to keep our need for data under review including in support of our monitoring functions and may consider the introduction of the systematic collection of data in specific areas and in response to specific circumstances. At this stage, however, we are of the view that the list of data sources requires no further specification.

Industry participation and prioritisation of the use of data sets

RDG commented that it is not clear from paragraph 2.8 of the Draft Guidance the level of obligation on industry to participate in the research phase when such participation is voluntary. RDG commented further that under paragraph 3.10 of the Draft Guidance, stakeholders should have the opportunity to comment on the scope and issue(s) identified by ORR under a market study in addition to the criteria and methodology, especially where the stakeholder is the focus of the market study.

RDG also commented that it would be helpful if paragraph 2.7 of the Draft Guidance were to clarify the prioritisation of the use of data sets that would minimise the requirement for industry support, such as the utilisation of ORR's access to MOIRA and LENNON.

Participation is voluntary at the research stage. This stage does, however, help us to determine the extent to which a full market review or study (both of which would require a deeper level of participation by key stakeholders, potentially engaging our formal powers of investigation) would be a proportionate response to what the intelligence is telling us. As such we consider that it is in the best interests of market participants to engage positively and fully with us. We aim to conduct the research stage, however, with minimal burden on the industry and its key stakeholders and endeavour, as far as is practicable, to discuss how to frame our information requests in ways that help participants to respond in a way that is helpful to us but creates least burden on resources and systems. We have added a paragraph to this effect within the Guidance in response to RDG's request for more clarity on this point.

We will also, where practicable, rely on data already available to us and will only seek information to the extent that it is necessary to help us to determine next steps. We think that the Guidance is sufficiently clear on this point.

RDG also commented that ORR's prioritisation criterion of proportionality set out in Annex A of the Draft Guidance should include the likely level of input required from the industry. RDG said further that the risks, and potential benefits, to the reputation of the industry from any intervention should be part of the prioritisation criteria.

ORR's prioritisation criteria apply to a number of areas of ORR's work, and it would not be appropriate to amend them for the purposes of the Guidance. However, as part of taking a proportionate approach, we will always weigh up the costs and impacts to all stakeholders involved, and this element is included in the 'costs' criterion, which covers both internal and external costs to ORR and to the wider industry.

Other competition authorities

RDG asked for clarification in paragraph 2.17 of the Draft Guidance as to whether ORR's powers would extend to other competition authorities who may be better placed to implement ORR's recommendations following a market review.

RDG also noted that the Guidance could elaborate in relation to the division of responsibilities between competition authorities, in particular in relation to 'for market' competition.

Finally, RDG noted that paragraph 1.5 of the Draft Guidance refers to ORR's relationship with the CMA, and suggested that the Guidance should make clear that for formal market reviews or investigations, the CMA has the power to decide whether ORR should lead on a case.

The concurrency framework is designed to safeguard against any gaps in the approach to monitoring competition issues and ensure the correct allocation of cases to the appropriate authority in the circumstances. ORR would consider making recommendations to other authorities with different powers, for example the Department for Transport (**DfT**), who might be better placed to deal with a particular issue, or to the CMA if the issue was not limited to ORR's jurisdiction. However it is our view that this level of detail would not be appropriate for the Guidance. RDG may also be referring to the roles of the DfT and the CMA in relation to merger control and franchising, which is not within the scope of the Guidance.

Whilst we recognise that the CMA does have the power to decide which competition authority will lead on any given case, ORR's relationship is governed by the MoU with the CMA, as set out in footnote 10 of the Guidance. However, for clarity, we have added a new footnote which sets out the CMA's power to allocate cases.

Prioritisation of competition concerns RDG commented that it would be useful for ORR to provide an expanded list of priority areas for potential competition concerns in order to give clearer guidance for those looking to make suggestions to ORR under Annex C, and to provide a better signal to industry around ORR's attention to its statutory duty to promote competition. RDG also noted that footnote 61 of the Draft Guidance makes clear that prioritisation criteria do not apply where ORR has a duty to take action, and asked for clarification as to why this is the case.

ORR sets its priorities through its annual business plan, and these can vary throughout the course of a reporting year depending on circumstances. It would therefore not be appropriate to provide more granular detail around prioritisation in the Guidance.

ORR is not able to deprioritise work which it has a positive statutory duty to undertake, and therefore the prioritisation criteria cannot apply in such circumstances. It is our view that this is sufficiently clear in the Guidance.

Overlap with Guidance on enforcement of competition law

RDG noted that ORR published a separate Guidance in relation to its approach to the enforcement of competition law in the railways sector earlier this year, and suggested that it might be more helpful to have one document which covered all the issues including those set out in this Guidance. RDG also said that regardless of this, it would be beneficial to have greater clarity in the various Guidance documents about how ORR selects the most appropriate regulatory tools and under which legislation.

We have decided in this instance to produce two separate documents covering the various aspects of competition powers and enforcement, and monitoring markets. In particular, it is our view that the recent developments in European legislation in relation to market monitoring powers should be contained within this standalone Guidance in relation to markets. We intend to keep this under review.

Directions in respect of ORR

RDG commented that chapter 4 could benefit from further clarity around whether directions to correct discrimination against access to the rail network under the Regulations could be made in respect of ORR itself, since it is responsible for directing access agreements.

How ORR exercises its functions under the Railways Act is governed by various statutory duties which we must take into account when making a decision on a specific matter. These duties include the promotion of competition. Our promotion of competition duty which we balance along with our other statutory duties in making decisions on whether or not to give directions in relation to access to infrastructure should mean that our decisions should not be in tension with our responsibilities under the Regulations. The need to make further directions under the Regulations would, however, be fact specific and may result, for example, from a change of circumstances over time. The need to make further directions would have to be assessed, therefore, on a case by case basis.

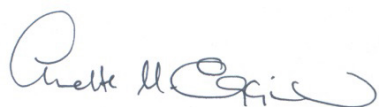
Conclusions

As stated above, we are grateful for the representations received by stakeholders in

relation to the Draft Guidance. These representations have resulted in a number of amendments which we consider improve our final publication both in terms of clarity and practicality.

If you wish to discuss this guidance further, or have any other questions about the application of competition law in the railways sector, please do not hesitate to contact us using the details on this letter or our website.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Annette M. Egginton". The signature is fluid and cursive, with a large initial 'A' and a long, sweeping tail.

Annette Egginton

Annex A – Table of Amendments to Draft Guidance

This table sets out the most relevant amendments to the Draft Guidance

Chapter	Paragraph	Change
2	6	<i>'reactive monitoring'</i> amended to <i>'day to day monitoring'</i> ;
1	5	<i>New footnote 10</i>