



ORR's approach to monitoring and reviewing markets

January 2017

Contents



1. Introduction	3
2. Monitoring markets	5
Research stage	6
Market Reviews	7
3. Market Studies and market investigation references	11
Market Studies	10
Making a market investigation reference	15
4. Directions in relation to markets	17
Power to make directions	17
When we may use this power	17
Process and timetables	18
Directions	19
Annex A: Prioritisation criteria and choice of tool	20
Annex B: Handling information	23
Annex C: Market study proposal form	24

1. Introduction

- 1.1 The Office of Rail and Road (**ORR**) is the combined economic and health and safety regulator for Great Britain's rail network¹ and the monitor for England's strategic road network. As the designated sectoral regulator for rail, we must keep the provision of railway services² under review. We are also required to monitor the competitive situation in the rail services markets³.
- 1.2 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 discharging our monitoring and reviewing responsibilities in relation to rail markets. This guidance also sets out the range of potential outcomes which may result from our monitoring and reviewing activities, and the range of tools we may utilise. These include our power to undertake market studies under the Enterprise Act 2002 (the **Enterprise Act**) and our power to make directions under the Access and Management Regulations⁴.
- 1.4 In undertaking our market monitoring and review functions we must, at all stages, have regard to our statutory duties⁵.
- 1.5 Other bodies also review markets. These bodies include the Competition & Markets Authority (the **CMA**), other sectoral regulators with concurrent competition powers⁶ and the European Commission⁷. We liaise with concurrent regulators⁸ and the

¹ Upon the implementation in Northern Ireland of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway (the **Recast Directive**) ORR will also be the economic regulator for the Northern Ireland rail network

² Section 69(1) of the Railways Act 1993 (the **Railways Act**)

³ Regulation 34 of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the **Access and Management Regulations**), which implement the Recast Directive

⁴ As defined in footnote 3 above

⁵ Under section 4 of the Railways Act

⁶ The other sectoral regulators are 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. Monitor (the regulator of healthcare services in England), has concurrent competition powers but not a statutory duty to promote competition; Monitor is not a member of the UKCN but attends its meetings with an observer status

⁷ The European Commission may decide to conduct an inquiry into a particular sector of the economy or into particular types of agreements across various sectors (Sector Inquiries), "*where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market*", Council Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 17(1). Examples include Sector Inquiries into e-commerce, pharmaceuticals, energy, roaming and media. These inquiries tend to last around 15 to

European Commission to ensure that our work does not duplicate theirs⁹ and in order to decide, in certain circumstances (such as in a cross market investigation), who is best placed to act¹⁰.

- 1.6 This document replaces our earlier guide *ORR's approach to reviewing markets* which we published in 2009. We may revise and reissue this guidance in the light of experience and other developments in law and practice.

24 months from inception to final report and include stakeholder consultation. Outcomes from Sector Inquiries may include: pursuing individual cases under competition rules; informing the European Commission's view in merger cases; and/or changing the regulatory framework

⁸ See the Memorandum of Understanding between CMA and ORR:

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318909/MoU - CMA and the ORR.pdf \(Memorandum of Understanding\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318909/MoU - CMA and the ORR.pdf (Memorandum of Understanding))

⁹ As an example, in March 2016, the CMA published its conclusions in relation to the possibilities for greater competition between train operators in passenger rail services: https://assets.digital.cabinet-office.gov.uk/media/56ddc41aed915d037600000d/Competition_in_passenger_rail_services_in_Great_Britain.pdf

¹⁰ The CMA has the power to decide which competition authority will lead on a case: see Annex B of CMA1: 'Towards the CMA', July 2013:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212285/CMA1 - Towards the CMA.pdf

2. Monitoring markets

- 2.1 As the economic and safety regulator 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 its five year price control¹¹.
- 2.3 We also gain intelligence from other engagement with industry and with users of railway services, for example:
 - through our freight panel¹² and consumer watchdogs;
 - through complaints and appeals which we receive through our role as an appeal body under certain parts of the Network Code¹³, which regulates the interaction between Network Rail and its access beneficiaries, and under the Access and Management Regulations¹⁴;
 - through interaction with the Rail Delivery Group¹⁵; and
 - from those providing funding to the sector.

¹¹ For more information in relation to our regulation of Network Rail and five year control periods, please see: <http://orr.gov.uk/what-and-how-we-regulate/regulation-of-network-rail/how-we-regulate-network-rail/periodic-review-2018/about-periodic-review-18-pr18>

¹² This panel comprises freight customers who represent a wide range of expertise and interest from across the rail freight community. This panel forms part of our work to ensure that our policies and regulatory decisions take into account the commercial environment in which freight customers work

¹³ The Network Code is a set of rules which is incorporated into, and therefore forms part of, each bilateral access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail

¹⁴ Regulation 32 of the Access and Management Regulations

¹⁵ <http://www.raildeliverygroup.com/>

- 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. In particular 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 under European legislation, 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 statements¹⁶ produced by managers of railway infrastructure (**Infrastructure Managers**). In fulfilling this responsibility we must, in particular:
- control such matters on our own initiative with a view to preventing discrimination against Applicants¹⁷, 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:

¹⁶ Network statements are produced by Infrastructure Managers and set out in detail the general rules, deadlines, procedures and criteria for charging and capacity-allocation schemes, including such other information as is required to enable applications for infrastructure capacity. Infrastructure Managers are required to produce a network statement by Regulation 13 of the Access and Management Regulations

¹⁷ 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. An explanation of how our power to give directions overlaps with our roles as an appeals body, together with a list of the matters which may be subject to an appeal, is set out at paragraph 4.7 to 4.9, below

We have produced separate guidance on how we will discharge our function as an appeals body. This guidance is also subject to consultation and is available on our website.

- consider moving into a research stage, which is described in more detail at paragraphs 2.7 to 2.10 below;
- progress immediately to undertaking a formal market study if this is appropriate – the process for market studies is set out at paragraphs 3.1 to 3.15 below;
- consider it appropriate to move directly to giving directions under the Access and Management Regulations, the procedure for which we set out at paragraphs 4.1 to 4.4 below; or
- in certain circumstances, proceed directly to enforcement action using our statutory powers.

Research stage

- 2.7 During the research stage typically we will 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 may take up to three months, but can be shorter, for example, if we receive a detailed submission or complaint or if sufficient information is readily available. 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. We are conscious however that 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 and benefit from being investigated using formal investigation powers.

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**)¹⁸ or take action under consumer law¹⁹ where we have identified a specific potential breach of competition or consumer law which would appropriately be addressed through direct enforcement action; or
- we may decide that there are matters which are capable of resolution under our sector-specific powers, for example licence enforcement.

Market reviews

2.11 A market review is a more formal stage of enquiry, which is likely to impose burdens on industry to some extent. 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 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 the Enterprise Act²⁰.

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,

¹⁸ http://orr.gov.uk/_data/assets/pdf_file/0019/21367/competition-act-guidance.pdf

¹⁹ We are a designated enforcer of consumer law under Part 8 of the Enterprise Act, so that we are a civil enforcer of the Consumer Protection from Unfair Trading Regulations 2008. We will also be a designated enforcer under Part 8 of the Enterprise Act for the purposes of the Consumer Rights Act 2015 when that takes effect in relation to railway transport services

²⁰ Under section 205 of the Enterprise Act designated consumer bodies may make super-complaints to sectoral regulators, about market features that may be harming consumers. A super-complaint may be made to us in relation to the rail industry. Under section 11 of the Enterprise Act, we must respond to a super-complaint within 90 days after receipt stating whether we will take action and if so what that action will be. There is a statutory duty obliging us to consider the complaint, but this does not extend to requiring 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

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, telephone surveys);
 - 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 holders²¹, however we anticipate only using these powers where the particular circumstances of a matter render it 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 undertake public consultation in a particular case, we will publish the outcomes of all market reviews in an appropriate manner, most likely 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 following²²:

²¹ Under section 80 of the Railways Act

²² 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

- 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 Act²³ or take action under consumer law²⁴ where we have identified a specific potential breach of competition or consumer law which would appropriately be addressed through direct enforcement action;
- that there are matters which are capable of resolution under our sector specific powers, for example licence enforcement;
- to commence a market study²⁵ (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 effectual in addressing the facts identified during our review;
- that there are issues which could be more effectively dealt with elsewhere, for example, by Government, a franchising authority or other public body. We may in such a circumstance write to the relevant authority setting out recommendations on how our competition 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.

²³ See footnote 17 above

²⁴ See footnote 18 above

²⁵ Where we identify an issue which we anticipate may lead us to proceed to a market study, we would expect to liaise with the CMA and keep them informed as to the issue we have identified

3. 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 behaviour²⁶. 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 markets²⁷.

Market study notices

- 3.3 Market studies are conducted under our general function to keep under review the provision, both in Great Britain and elsewhere, 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 commenced through the publication of a market study notice (a **Market Study Notice**). When we are carrying out our functions to monitor markets²⁸ and we consider it appropriate to use formal investigation powers²⁹, we may publish a Market Study Notice.
- 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 CMA³⁰, who would then conduct an

²⁶ Market studies should not be confused with market investigations carried out by the CMA or sector inquiries carried out by the European Commission as described at paragraph 1.5, above

²⁷ Memorandum of Understanding, paragraph 78

²⁸ Section 69(1) of the Railways Act

²⁹ Under section 174 of the Enterprise Act

³⁰ 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

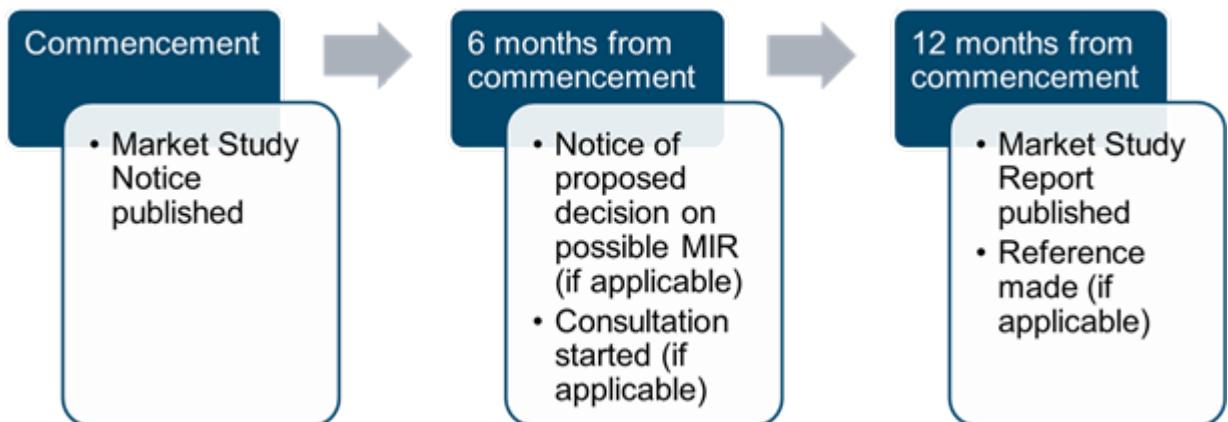
in-depth examination of the relevant markets (see below). In assessing whether a matter is ‘appropriate’ under this test, we will have regard to our prioritisation principles and the feasibility of using other tools³¹. Market studies are resource intensive processes and can create significant burdens 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 publish a Market Study Notice.

3.6 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 completed³².

Statutory time limits for market studies

3.7 When we publish a Market Study Notice, this initiates the following statutory timetable³³, which is illustrated below:



where we are proposing to carry out our functions under section 69(1) of the Railways Act for the purposes of:

- 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
- assessing the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects

³¹ See Annex A

³² Section 130A(3) of the Enterprise Act

³³ Under section 131C of the Enterprise Act, the Secretary of State has a power to amend the time limits set out in section 131B of the Enterprise Act

3.8 **Within six months** of the date of publication of the Market Study Notice:

- **where we propose to make a MIR**³⁴ in relation to the subject matter of the market study, we must publish a notice of our proposed decision and begin the process of consulting relevant persons³⁵; or
- **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 MIR³⁶, we must publish a notice of our proposed decision and begin a process of consultation; or
 - if we have not received any representations to the contrary, we must publish a notice of our decision³⁷.

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

- We must publish a report setting out our findings and our reasoning on any action which we propose to take³⁸. Where we have decided:
 - to make a MIR;
 - not to make a MIR, where we have received representations to the contrary; or
 - to accept undertakings in lieu of a MIR.

then 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 decision³⁹. Where our report sets out a decision to make a MIR, we must make that reference at the same time as publishing the report⁴⁰.

³⁴ See paragraphs 3.19 to 3.24

³⁵ Section 131B(1) of the Enterprise Act

³⁶ Section 131B(1) of the Enterprise Act

³⁷ Section 131B(3) of the Enterprise Act

³⁸ Section 131B(4) of the Enterprise Act

³⁹ Section 131B(5) of the Enterprise Act

⁴⁰ Section 131B(6) of the Enterprise Act

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 power⁴¹ 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 guidance⁴².

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 functions⁴³ and we would expect to use them. These powers are:

- to give notice to require any person to attend at a time and place specified in the notice to give evidence to a person nominated by us for the purpose;
- to give notice to any person requiring that person to produce specified documents or categories of documents which are in that person's custody or control; and
- to give notice to any person carrying on business to supply us with specified estimates, forecasts, returns or other information 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 quickly as practicable so as to limit the perception of risk and uncertainty in the industry and

⁴¹ Under section 139 of the Enterprise Act

⁴² CMA3 - "Market Studies and Market Investigations: Supplemental guidance on the CMA's approach", January 2014, paragraphs 2.18 to 2.30

⁴³ Section 174 of the Enterprise Act

the imposition of disproportionate burdens on businesses. We aim to be fair and reasonable in the use of our information gathering powers and in setting the deadlines which we set for parties to provide information to us.

3.14 Where we consider that a person has, without reasonable excuse, failed to comply with any requirement of a notice issued by us using our investigatory powers under the Enterprise Act, we have the power to impose an administrative penalty⁴⁴.

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 feature⁴⁵, or combination of features, of the market under scrutiny prevents, restricts or distorts competition, in which case:

- we may progress directly to making a MIR to the CMA (see paragraphs 3.19 to 3.24 below); or
- we may decide that we have sufficient information available to us to accept undertakings in lieu of a MIR⁴⁶ (see paragraphs 3.16 to 3.18 below). In order to assist in accepting undertakings in lieu of a MIR, we may then progress to a remedies study (which can include the exercise of formal powers of investigation⁴⁷).

Undertakings in lieu of a MIR

3.16 We have the power to accept undertakings in lieu of a MIR⁴⁸. In exercising this power, we must have regard to:

⁴⁴ Sections 174A(1) to (3) of the Enterprise Act. See also section 174 of the Enterprise Act. For more information on penalties, see the Competition and Markets Authority (Penalties) Order 2014

⁴⁵ 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. Conduct is described as including “any failure to act (whether or not intentional) and any other unintentional conduct”

⁴⁶ Section 154 of the Enterprise Act

⁴⁷ As set out in section 174 of the Enterprise Act

⁴⁸ Section 154 of the Enterprise Act

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

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

3.18 Before accepting undertakings in lieu of a MIR, we are obliged to 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 in accordance with the notice in relation to the undertakings before accepting them.

Making a market investigation reference

3.19 As set out above, one of the possible outcomes of a market study is that we make a MIR to the CMA⁴⁹. A MIR can be either:

- an ‘ordinary reference’, where we have reasonable grounds for suspecting that any feature, or combination of features, of a market for goods or services relating to railways in the UK prevents, restricts or distorts competition; or
- a ‘cross-market reference’, where the feature or each of the features concerned exists in more than one market⁵⁰.

3.20 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;
- 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 3.16 to 3.18 above); and/or

⁴⁹ Section 131(1) of the Enterprise Act

⁵⁰ Under sections 131(2A) and (6) of the Enterprise Act. In such a case, there is no statutory requirement to refer the whole of each market as a MIR, but we would consider the wider implications of doing so on a case by case basis

- 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.

3.21 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 the possible approaches prior to making a decision whether or not to make a MIR.

3.22 If we make a MIR, it must specify⁵¹:

- 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.

3.23 More information in relation to the CMA's procedure for undertaking a Market Investigation can be found on the CMA's website⁵².

3.24 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 guidance⁵³.

⁵¹ Section 133 of the Enterprise Act

⁵² See footnote 46 above

⁵³ This can be found at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf and
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462715/CMA3_Markets_Guidance_-_updated_September_2015.pdf

4. Directions in relation to markets

Power to make directions

- 4.1 Under the Access and Management Regulations we must, where appropriate, give appropriate 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 markets⁵⁴.
- 4.2 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.
- 4.3 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 direction⁵⁵.
- 4.4 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 functioning of the rail services market and allows us to swiftly intervene to correct such issues.

When we may use this power

- 4.5 In determining whether issuing a direction 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), typically we consider that giving directions is likely to be appropriate in cases where:

⁵⁴ Regulation 34 of the Access and Management Regulations

⁵⁵ Regulation 38 of the Access and Management Regulations. We will be amending our Enforcement Policy and Penalties Statement to reflect this power. The current version is available here: http://orr.gov.uk/_data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf

- 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 the Access and Management Regulations, relating to⁵⁶:
- 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 Regulations⁵⁷; 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 function⁵⁸ which may also be appropriately addressed through our power to make directions⁵⁹. 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

⁵⁶ Regulation 32(2) of the Access and Management Regulations. This list is also the list of matters which we have a duty to control, on our own initiative and with a view to preventing discrimination, under Regulation 34(2)(a) of the Access and Management Regulations

⁵⁷ Part 2 of the Access and Management Regulations covers access to railway infrastructure and services

⁵⁸ Regulation 32 of the Access and Management Regulations

⁵⁹ Regulation 34(3) of the Access and Management Regulations

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 endeavour to 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; namely, 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 (see paragraphs 2.11 to 2.17 above), or publish a Market Study Notice under the Enterprise Act (see paragraphs 3.4 to 3.6 above).
- 4.12 When exercising this power we will have regard to the principles of good regulation which are proportionality, transparency, accountability, consistency and targeting⁶⁰. Before issuing a direction we will consult with the relevant parties and consider their representations⁶¹.

Directions

⁶⁰ These principles are set out here:

<http://www.google.co.uk/url?url=http://webarchive.nationalarchives.gov.uk/20100407162704/http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwifksLw4dbLAhWEVhQKHfsVAIwQFggUMAA&usg=AFQjCNED8JAFFYVj3Z6mEpBhM4QbKkgFAA>

⁶¹ This includes consultation with the Secretary of State where the decision in question affects a rail link or, as the case may be, the operation of the development agreement

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 of 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 to resolve the relevant issues, we may consider whether it would be more appropriate to use alternative regulatory powers available to us (such as licensing) 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

1. We apply prioritisation principles at regular intervals during our internal projects and formal investigations, in order to help us focus our resource in a way that delivers most value from our interventions. When applying the prioritisation principles in the context of our market monitoring powers we will afford particular weight to 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 priorities. Otherwise, the criteria below are not ordered by priority or significance⁶².
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 a number of 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 on-going;
 - 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

⁶² It should be noted that 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).

- other indirect benefits such as deterrence or raised awareness amongst 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.
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

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, ORR's monitoring toolkit encompasses a number of other tools to address competition and/or consumer protection issues. This means that in some circumstances we may have to make a decision as to which tool is more appropriate to deal with a particular issue.
5. In practice we will, at an early stage, determine which tool is most appropriate to deal with the particular issues being raised. The appropriateness of the tool being utilised to address a particular issue will be kept under review.
6. 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.
7. 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

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 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.
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.
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.
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.
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 our guide to <u>ORR's approach to reviewing markets</u> . 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: <u>http://orr.gov.uk/about-orr/what-we-do/our-strategic-objectives</u> .
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.
<p>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.</p>	



© Crown copyright 2017

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at orr.gov.uk

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