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OFFICE OF RAIL AND ROAD

Consumer and Competition Policy Directorate
Department for Business, Energy, and Industrial Strategy
[by email]

30 September 2021

Response to BEIS consultation on Reforming Competition & Consumer Policy

1. Thank you for the opportunity to comment on the proposals published in your consultation on Reforming Competition and Consumer Policy.

2. We welcome BEIS's intention to strengthen the protections for consumers both in terms of ensuring markets work correctly and that their rights are more easily enforceable. Similarly, we welcome the opportunity to express our support for Government proposals to strengthen competition in the interests of consumers within the UK.

3. We have a strong interest in this consultation as a designated enforcer under Part 8 of the Enterprise Act 2002 for certain consumer protection legislation (such as the Consumer Rights Act 2015 and the Consumer Protection from Unfair Trading Regulations 2008) in the rail sector, concurrently with the Competition & Markets Authority (CMA).

4. ORR holds powers concurrently with the CMA to apply and enforce competition law in markets relating to the supply of services relating to railways[1]. ORR keeps the provision of railway services under review[2], monitors the competitive situation in rail services markets[3] and has a general statutory duty to promote competition

[1] Under section 67 of the Railways Act, ORR has concurrent functions. The supply of services related to railways is defined under section 67(3ZA).

[2] Section 69(1) of the Railways Act 1993

[3] Regulation 34 of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016

Head Office: 25 Cabot Square, London E14 4QZ T: 020 7282 2000 www.orr.gov.uk

in the provision of railway services for the benefit of users of railway services.[4]

5. Our concurrent competition powers contribute significantly to ORR's ability to protect and promote competition in markets related to rail services and we therefore have a strong interest in this consultation from a competition perspective.

Competition proposals

6. We do not propose to respond in detail to each of the competition proposals within the consultation but have instead focussed on the proposals most relevant to ORR's work.

More effective market inquiries

7. Overall, we support the general proposals to reform the CMA's market inquiry tools, to make the process quick, efficient, and proportionate.

8. We strongly support **proposal 1**[5], to retain separate market studies and market investigations. We have utilised the market study tool on several occasions, and we value its efficiency. Whilst we do have sector specific powers as mentioned above, the market study power under the Enterprise Act 2002 is broader and provides us with a range of influence and information gathering powers which we would not have if reliant on our sector specific powers only (see case studies 1-3 below).

9. We support the Government's proposal to introduce a power to impose remedies at the end of the market study stage. Although BEIS has indicated that they have no a priori view on extending this to sector regulators, we would encourage the extension to allow for greater flexibility and quicker resolution of issues identified during a market study (see case study 3 below).

10. We support the proposal to introduce a power for the CMA to impose interim measures during the course of a market study. To the extent that ORR obtains new powers to impose remedies following this consultation, we would be interested to consider corresponding interim measures powers. We consider that this would allow both the CMA and ORR to ensure that irreparable damage does not occur whilst a market is being investigated.

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[4] Section 4 Railways Act 1993

[5] Paragraph 1.56 of consultation document

11. Similarly, we support the proposal to allow the CMA, and by extension ORR, to accept binding commitments at any stage during a market inquiry, to give greater flexibility and an ability to remedy any harms identified earlier in the process of a market inquiry.

12. We also support the proposals for more effective international co-operation. We consider that the CMA is best placed to act as the central authority for international co-operation and would expect the CMA to consult ORR where appropriate, on matters which pertain to the rail sector.

Stronger investigative and enforcement powers

13. We support the package of proposals which aim to strengthen the investigation and enforcement tools available to the CMA and sector regulators, in particular, those which seek to hold companies to account where they obstruct investigations, fail to comply with remedies or fail to honour commitments.

14. We consider that these proposals, (which also cover whistleblowing, increased scope for interim measures and early settlement, greater flexibility in decision making, and changes to the appeal procedures and standards) would enhance ORR's ability to tackle anticompetitive behaviour in the rail sector.

15. Similarly, we support the proposals for more effective international co-operation. We consider that the CMA is best placed to act as the central authority for international co-operation and would expect the CMA to consult ORR where appropriate, on matters which pertain to the rail sector.

Case study 1:
In March 2019 we published recommendations, following a Market Study, into the supply of automatic ticket gates and vending machines. The market study revealed weaknesses in competition that could have a negative impact on price, quality and innovation, and therefore a clear impact on passengers and taxpayers. Our sector-specific powers give us limited powers to gather information from rail companies, other than the train operators and infrastructure managers. The market study tool enabled us to gather information from all relevant stakeholders, including ticket gate suppliers and manufacturers. The threat of a market investigation reference makes stakeholders receptive to industry-led pro-competitive solutions.

Case study 2:
In April 2020 we concluded a review of the remedies in the rolling stock leasing market which had been put in place by the then-Competition Commission (CC) in

2008-09 following a market investigation reference (MIR) made by the ORR. We concluded that, after 10 years, the CC's remedies remained necessary and proportionate. ORR has no economic regulatory powers vis-à-vis the rolling stock leasing companies (ROSCOs), meaning that neither the CC's remedies themselves nor the ROSCOs' co-operation with our review would have been obtainable absent the MIR regime.

Case study 3:
In November 2020 we re-launched a formal market study into the market for major signalling projects. The study builds on previous work we have undertaken in the market, notably the representations we made against the proposed merger of two major players in the GB sector. The study set out to look at whether the supply chain is fair and competitive, and whether the way that it operates delivers the best quality and value for money to infrastructure managers like Network Rail, and ultimately rail users and taxpayers. The use of the market study tool has allowed us to analyse aspects of the supply chain that would not have been addressable under our sector specific powers. We are soon to publish our final report which will contain a package of remedies which take the form of recommendations to, in particular, Network Rail. Our decision not to make a reference to the CMA was based on the balance of a number of considerations, including the relative efficacy of an ORR-led solution versus an MIR and the CMA's wider remedial toolkit. One consideration was the considerable timescales that would be involved in an MIR, given the need for the CMA to begin its review from scratch. In this context, the availability of further formal remedial powers to us could have led to a more interventionist, and hence more impactful, outcome.

Consumer proposals

16. We welcome the wide range of proposals to improve protections for consumers and have commented in more detail below on the proposals most relevant to ORR.

Administrative enforcement powers

17. We strongly support the proposal to give the CMA administrative enforcement powers. We agree with BEIS's assessment of the benefits they would bring to consumers, by allowing the CMA to conclude cases more quickly, bring infringements to an end sooner and secure redress for consumers more promptly, but with appropriate fair and transparent processes to ensure confidence in decisions made.

18. We believe that the CMA's current scope of general and sectoral consumer law powers works well, providing flexibility within a joined-up, coordinated approach and the opportunity to share expertise and resource where necessary, and we cannot see any drawbacks to continuing this.

19. We are interested to see that BEIS is also seeking views on whether sector regulators' civil consumer enforcement powers under Part 8 of the Enterprise Act 2002 should be reformed to allow for enforcement through an administrative model. We note that these proposals are more of an open question at this stage and there is little detail in the consultation document. However, our experience of enforcement action supports BEIS's statement that sector regulators generally use their sectoral powers more frequently than the court-based consumer enforcement powers.

20. Cumbersome court action can be a significant factor in the decision whether to use sectoral or court-based powers. We have not yet taken a company to court for a consumer law breach, either because we have resolved the issue through informal means (such as the action on Eurostar's refund policy for cancelled services in 2020[6]), or because the licence regime also applies and we have decided that this tool is more appropriate.

21. We would welcome having administrative enforcement powers available to us concurrently in the rail sector. We strongly believe that an administrative enforcement model would enable us to be more agile and effective in correcting incidences of consumer harm and would provide greater control over the process. It would avoid the uncertainty, significant costs and length of time that court action may bring.

22. Using ticket retailing as an example, most consumers purchase a ticket shortly before travel and the substantive part of the contract ends once the journey has been completed (although rights to refund, compensation etc continue) – usually, legislative breaches would broadly be limited to those arrangements and short-term. Speed of action is key and the time it takes to seek an enforcement order in court could mean that the harm continues for longer than it would if the enforcement decision-making were within our direct control.

23. There is also currently an imbalance in sanctions available to us via the regulatory licensing regime (which is a framework in which we make enforcement decisions without court action) and our Enterprise Act 2002 Part 8 powers. The enforcement of protections for consumers of those companies who are not subject to the regulatory licensing regime, for example third party rail ticket retailers (who have a significant share of the rail ticket retail market), could be less effective due to the increased difficulty and risk in pursuing sanctions through the courts.

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[6] ORR's action on Eurostar's refund policy for cancelled services - December 2020

24. Currently in the rail sector, train operators and station managers have some consumer-related obligations in their licences which we enforce in accordance with our published economic enforcement policy and penalties statement[7]. This transparently sets out the procedures and processes we follow during the course of an investigation and subsequent enforcement action. Our approach is guided by regulatory best practice and the principles of proportionality, targeting, consistency, transparency and accountability, and we use our enforcement powers firmly but fairly in a timely manner. We believe that sector regulators' licence enforcement frameworks could be used as a basis for developing the CMA's administrative enforcement model.

25. Our licence enforcement decisions are subject to judicial review. We support the fundamental principle of a fair and independent appeals process, although our experience (primarily in relation to access and charging decisions) of judicial review is that it can involve a significant amount of time and resource, and is not a particularly swift process. We note that BEIS has proposed the option of a specialised tribunal with relevant expertise as one option for the appeals process in the administrative enforcement model, and we would be interested to understand how this might work as we believe it could be an effective mechanism for scrutiny.

Strengthening sanctions for rule breaking

26. We support in principle BEIS's proposal of additional civil sanctions for enforcers, specifically the option of fines, as a better deterrent against non-compliance with information gathering powers, breaches of undertakings and breaches of consumer protection law.

27. In our experience of enforcement in the regulatory licensing regime, fines can act as a deterrent and backstop, to strengthen companies' engagement with the enforcement process. However, we are also mindful that in the rail sector most train operators are now public entities, and we would consider the application of any new powers in the context of rail reform, including how such powers may apply to third-party retailers and non-GBR rail operators. We would also expect to consult on a rail sector-specific approach to enforcement and the use of fines within an administrative model, similar to our current approach to regulatory licence enforcement within which we are able to issue financial penalties for licence breaches.

Alternative Dispute Resolution (ADR)

28. We welcome BEIS's intention to improve consumer awareness and signposting to ADR, including to halve the upper threshold of eight weeks in markets where ADR is mandatory. We have an existing ADR scheme in the rail sector in the form of the Rail

[7] ORR's economic enforcement policy and penalties statement - Great Britain - 8 November 2017

Ombudsman, membership of which is a licence condition for train operators. Currently, passengers must wait 40 working days or deadlock before they are able to escalate a complaint to the Rail Ombudsman. We published a consultation on a Complaints Code of Practice[8] which included seeking views on options to reduce this, including to potentially halve the timescale to 20 working days.

29. We note that BEIS has also outlined proposals to increase the quality and oversight of ADR. We are currently also considering the arrangements for taking over sponsorship of the Rail Ombudsman from the Rail Delivery Group, as outlined in the Williams-Shapps Plan for Rail[9].

Next steps

30. We look forward to continuing our engagement with BEIS, CMA, concurrent regulators, the UK Regulators' Network, and other stakeholders as these proposals develop and next steps become clearer.

31. In relation to the consumer proposals, we would welcome a consistent, joined-up approach to the introduction of any administrative enforcement powers (for CMA and sector regulators who wish to have them), with the same processes, procedures and appeals system. From a consumer perspective, there could be an imbalance in protection if some enforcers have administrative enforcement powers (and so are more active and effective in consumer protection) and some do not; or if there is a significant delay between the CMA obtaining administrative enforcement powers and the equivalent being given to sector regulators.

32. We have provisionally started to discuss these proposals and their implications with the Department for Transport (DfT) as our parent department, both in terms of any legislative requirements for a sectoral administrative enforcement model, and also in the context of the current work on rail reform[10].

33. With regard to competition proposals, we would welcome early engagement with BEIS post-consultation on evolving thinking on the proposals. Given the importance we place on retention and enhancement of ORR's market study powers, we would particularly welcome early engagement on which of the market regime options

[8] Consultation on a draft Complaints Code of Practice | Office of Rail and Road (orr.gov.uk), published 3 August 2021, closing on 30 September 2021

[9] Great British Railways: Williams-Shapps Plan for Rail, Chapter 3, paragraph 17, page 47

[10] Great British Railways: The Williams-Shapps Plan for Rail - May 2021

(retention of two-stage regime or introduction of single stage market enquiry) BEIS intends to pursue.

Yours sincerely

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