

March 2015

Memorandum of Understanding between the Competition and Markets Authority and the Office of Rail Regulation on the use of concurrent powers under consumer protection legislation.

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Introduction

This Memorandum of Understanding (“MoU”) sets out working arrangements between the Competition and Markets Authority (“CMA”) and the Office of Rail Regulation (ORR) in relation to their concurrent powers under specific consumer protection legislation as regards the sector or sectors for which ORR is responsible.

The purpose of this MoU is to establish an understanding between the CMA and ORR as to how these working arrangements will work in practice. It draws on the legislation that sets out the formal framework for how concurrency in this area will operate. It records our commitment to the sharing of expertise, information, ideas and experience, and to doing this efficiently and with a mutual regard for each other’s statutory position and strategic objectives.

We believe that this MoU offers a valuable basis for co-operation in the interests of the CMA, ORR, and consumers.

This MoU and the practices which it provides for will be reviewed from time to time by the CMA and ORR as the need arises or at the request of the CMA, ORR or members of the UK Consumer Concurrency Group. This MoU may be revised by agreement between the CMA and ORR.

This MoU is not legally binding.

Date 11 March 2015

Signed

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Competition and Markets Authority

Office of Rail Regulation

Purpose of this MoU

1. This MoU sets out working arrangements between the CMA and ORR in relation to their concurrent powers to enforce (in the railways sector):
 - (a) certain consumer laws under Part 8 of the Enterprise Act 2002 (EA02),
 - (b) The Unfair Terms in Consumer Contracts Regulations 1999.

Background

2. The CMA inherited most of the functions and powers which the OFT had retained as at 1 April 2013 and together these constitute a different but significant role in the consumer landscape from that previously held by the OFT. The CMA will use its full range of consumer powers to address systemic failures in a market, where changing the behaviour of one business would set a precedent or have other market-wide implications, where there is an opportunity to set an important legal precedent or where there is a strong need for deterrence or to secure compensation for consumers.

Role of the CMA

3. The CMA is a non-ministerial department, established under the Enterprise and Regulatory Reform Act 2013 whose aim is to promote competition, both within and outside the United Kingdom, for the benefit of consumers, to make markets work well for consumers, businesses and the economy.
4. In exercising its statutory responsibilities, the CMA will co-operate with sectoral regulators and encourage sectoral regulators to use their powers, including their powers to apply relevant consumer legislation, in the interests of competition for the benefit of consumers.

Role of the ORR

5. The ORR is a body corporate established under the Railways and Transport Act 2003. It is a non-ministerial government department. The ORR is the safety and economic regulator of railways in Great Britain.
6. The ORR's principal economic direct regulatory functions are set out in the Railways Act 1993 and in various regulations implementing European rail liberalisation legislation. In summary, they are to:

- regulate Network Rail's stewardship of the national rail network
 - license operators of railway assets (the network, stations, light maintenance depots and trains);
 - approve access by parties to track, stations and light maintenance depots; and
 - keep under review the provision of railway services.
7. The ORR also has powers concurrently with the CMA to investigate where there may be breaches of certain consumer protection laws and competition prohibitions and to conduct market studies and to refer markets where there may be competition and consumer problems in the railways.
8. The ORR has 24 duties (which it balances in the exercise of its sector specific regulatory and EA02 market study functions). These duties contain a number of objectives, for example, they require the ORR:
- to promote the use of the railway network in Great Britain for the carriage of passenger and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;
 - to promote competition in the provision of railway services for the benefit of users of railway services;
 - to protect the interest of users of railway services;
 - to have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways or railway services; and
 - to contribute to the achievement of sustainable development.
9. The ORR will co-operate with the CMA and other sectoral regulators, in the exercise of its concurrent functions, for the purpose of strengthening the consumer protection and competition frameworks and to ensure consistency of approach.

General co-operation

10. The CMA and ORR will work together with the aim of ensuring that a consistent and co-ordinated approach is generally taken in relation to issues covered by concurrent enforcement powers and to discuss which body is best placed to lead in each case.
11. In addition to the provisions for co-operation between the CMA and ORR specific to particular powers of the CMA and ORR as set out in this MoU and elsewhere, the CMA and ORR are committed to the following general principles and

practices for co-operation between themselves in respect of the sectors for which ORR has responsibility.

12. Officials of the CMA and ORR will meet and communicate regularly, at appropriate levels of seniority, to discuss matters of mutual interest, both through the Consumer Concurrence Group and bilaterally.
13. The CMA and ORR will always consult each other before exercising their powers on a case where it appears that they have concurrent powers, even if the CMA and ORR do not go on to exercise their concurrent powers.
14. Where either the CMA or ORR exercises their concurrent powers, the CMA and ORR will, to the extent permitted by law, engage with each other in open dialogue and by sharing relevant information as appropriate.
15. The CMA and ORR will consult each other at an early stage on any issues that might have significant implications for the other.
16. The CMA and ORR will share (for comment) documents intended for publication, such as consultation papers and briefings that affect the other's functions.
17. The CMA and ORR agree that in deciding upon any enforcement action in respect of a potential breach of consumer protection legislation, causing potential consumer harm, they will have regard to the principles that regulatory activities should be carried out in a way which is proportionate, consistent, transparent, accountable and targeted. The CMA will enforce consumer protection legislation with regard to published guidance on the use of its consumer powers¹ and prioritisation principles.² ORR will take action having regard to its Enforcement Guidelines.³ The aim of these arrangements is to avoid, as far as is reasonably practicable, duplication of enforcement or other action.

Notifications

18. ORR will comply with its legislative obligations to notify the CMA of its intention to take certain enforcement action, and of the outcome of the action by entering the required information on the Trading Standards Sanctions Database.⁴

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288624/CMA7_Consumer_Protection_guidance.pdf

² <https://www.gov.uk/government/publications/cma-prioritisation-principles>

³ http://orr.gov.uk/__data/assets/pdf_file/0017/5552/guidance_on_our_consumer_law_role_310310.pdf

⁴ www.nafn.gov.uk

19. Where the CMA has an obligation to publish the information it will do so by publishing it on www.gov.uk/cma

Liaison between CMA and ORR

20. Where CMA identifies a consumer law issue relating to matters falling within ORR's remit which it considers merits regulatory attention the CMA will, prior to taking any action, contact ORR. It will do so in the first instance to discuss whether the matters raise issues which ORR agrees is appropriate for it to consider under its consumer law and/or sectoral regulatory powers, having regard to matters such as its sectoral expertise and its Enforcement Guidelines.

Sharing information – legal aspects

21. The CMA and ORR will share such information as is necessary to enable there to be efficient and effective handling of consumer law issues provided that the requirements of Part 9 of the EA02 governing the disclosure of “specified information”⁵ are met and that such sharing of information is also compliant with the Data Protection Act 1998 (DPA98) Where appropriate, this includes sharing complaint data, together with relevant correspondence regarding those complaints.
22. Under Part 9 EA02, information that comes to the CMA in connection with the exercise of its functions (as defined) is “specified information” (see section 238(1) of the EA02). Where “specified information” relates to the affairs of an individual or any business of an undertaking (see section 237(1) of the EA02) the CMA can only disclose it, during the lifetime of the individual or while the undertaking continues in existence, under permitted gateways (see section 237(2) of the EA02). Disclosure outside those gateways is a criminal offence.
23. Unless the “specified information” is already properly and lawfully in the public domain (see section 237(3) of the EA02), or a power or duty to disclose it exists outside Part 9 of the EA02 (see section 237(6) of the EA02), the CMA may only disclose it where one of the following gateways exists:
- (a) where the CMA obtains consent from both those providing the information and those to whom it relates (section 239 of the EA02);
 - (b) disclosure is required to meet an obligation under EC law (section 240 of the EA02);

⁵ See s. 238(1) of the EA02 for definition of specified information

- (c) disclosure facilitates the exercise of the CMA's statutory functions (section 241 of the EA02);
- (d) disclosure facilitates the exercise of any function another body has under certain specified statutes (section 241 of the EA02);
- (e) disclosure is for the purposes of, or in connection with, prescribed civil proceedings or prospective proceedings in the UK or elsewhere, or for the purposes of taking legal advice in relation to them, or otherwise for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings (section 241A of the EA02).
- (f) the disclosure is for certain purposes connected with criminal investigations and proceedings in the UK (section 242 of the EA02); or
- (g) the disclosure is to facilitate the performance of an overseas public authority's functions, in certain circumstances (section 243 of the EA02).

24. Even where a gateway exists, the CMA is also required to consider excluding from disclosure (so far as practicable):

- (a) information whose disclosure the CMA thinks is against the public interest (see section 244(2) of the EA02);
- (b) information relating to the private affairs of an individual, or any commercial information relating to a business, whose disclosure might, in the CMA's opinion, significantly harm the individual's interests or the legitimate business interests of the undertaking to which it relates (see section 244(3) of the EA02); and
- (c) The CMA must also consider the extent to which any disclosure under (b) above is necessary to fulfil the purpose for which it is made (see section 244(4) of the EA02).

Transfer of personal data

25. In receiving any "personal data" through the gateways set out above or otherwise the CMA and ORR will comply at all times with the DPA98.

Process for sharing information

26. The CMA and ORR will each designate in its organisation a relationship manager at official level to take responsibility for relations between the two authorities. In each authority, the relationship manager's responsibilities will include (but not be limited to):

- (a) maintaining an overview of joint projects between the two authorities and matters of mutual interest;
- (b) maintaining an overview of the authority's contacts from all areas of joint working and mutual interest; and
- (c) holding meetings with the relationship manager in the other authority from time to time to identify potential new issues with a view to circulating information to appropriate individuals within each organisation.

The existence of relationship managers does not in any way preclude direct communication between other staff at the CMA and ORR.