

9 February 2016

## **Memorandum of understanding between the Competition and Markets Authority and the Office of Rail and Road – concurrent competition powers**

### **Contents**

|  | <i>Page</i> |
|--|-------------|
| Foreword .....   | 2           |
| Memorandum of understanding between the Competition and Markets Authority and the Office of Rail and Road .....  | 4           |
| Part A – Cooperation in relation to the competition prohibitions (Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union)..... | 10          |
| Part B – Cooperation in relation to the market provisions: market studies and market investigations (Enterprise Act 2002) .....  | 20          |

## Foreword

The changes to the United Kingdom's (UK) competition law system, introduced under the Enterprise and Regulatory Reform Act 2013 and in force since April 2014, are designed to improve the effectiveness of competition law enforcement in this country.

The Competition and Markets Authority (CMA) has competition law powers which apply across the whole economy. Sectoral regulators such as the Office of Rail and Road (ORR) may exercise the competition law powers to enforce the prohibitions on anti-competitive agreements and on abuse of a dominant position, and to make market investigation references, concurrently with the CMA in those sectors for which they have responsibility.

The Enterprise and Regulatory Reform Act 2013 introduced a number of changes to improve the working of concurrency and to enable closer working between the CMA and sectoral regulators.

The CMA and the sectoral regulators have demonstrated their commitment to making the concurrency framework more effective through the establishment of the UK Competition Network (UKCN). This represents an enhanced forum for cooperation which will enable closer working with the objective of more consistent and effective use of competition powers across all sectors. In their statement of intent in December 2013, the members of the UKCN affirmed: 'The mission of the UKCN will be to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate.'<sup>1</sup>

This memorandum of understanding (MoU) represents a further stage in the process of cooperation between the CMA and the regulators, setting out more practical detail on how the CMA and the ORR will work together within the framework of competition law.<sup>2</sup>

The main purpose of this MoU is to establish an understanding between the CMA and the ORR as to how this closer working will work in practice. It draws on the legislation which sets out the formal framework for how concurrency will operate and also, importantly, sets out our bilateral commitment to look for opportunities to work together, including within the framework of the UKCN, to promote competition for the

---

<sup>1</sup> UKCN (2013), [Statement of Intent](#).

<sup>2</sup> This MoU does not relate to 'regulatory appeals' – that is, the separate role that the CMA has in considering references relating to proposed direct regulatory action by the ORR under the sectoral statutes. This is a separate role, to be undertaken by the CMA panel, and the CMA is committed to ensuring that its cooperation with the ORR - whether under this MoU (and under comparable MoUs agreed with other sectoral regulators), through the UKCN, or otherwise in connection with their concurrent powers - will not impair the impartiality and fairness of the CMA's conduct of such regulatory appeals (or indeed of market or merger investigations undertaken by the CMA panel).

benefit of consumers. We shall do this by the sharing of expertise, information, ideas and experience and each of us will commit 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 that cooperation, in the interests of the CMA, the ORR, the railways services industry in Great Britain and, most importantly of all, the consumers.

**Alex Chisholm**  
**CEO, CMA**

**Joanna Whittington**  
**CEO, ORR**

# Memorandum of understanding between the Competition and Markets Authority and the Office of Rail and Road

## *Purpose of this memorandum of understanding*

1. This MoU sets out working arrangements between the CMA and the ORR in relation to:
  - (a) their concurrent powers to apply the prohibitions on agreements that prevent, restrict or distort competition, and on the abuse of a dominant position, under the Chapter I prohibition and the Chapter II prohibition of the Competition Act 1998 and under Article 101 and Article 102 of the Treaty on the Functioning of the European Union – referred to in this MoU as the ‘competition prohibitions’; and
  - (b) their concurrent powers to undertake market studies, and to make references to the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the UK under the Enterprise Act 2002 – referred to in this MoU as the ‘market provisions’;in the rail sector.<sup>3</sup>
2. This MoU is not intended to have legal effect.
3. This MoU is to be read alongside other material concerning the relations between the CMA and the ORR, including: the Railways Act 1993; the Competition Act 1998; the Enterprise Act 2002; the Enterprise and Regulatory Reform Act 2013; the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004; the Competition Act 1998 (Concurrency) Regulations 2014, referred to in this MoU as the concurrency regulations; and the CMA’s guidance on concurrent application of competition law to regulated industries, referred to in this MoU as the concurrency guidance.<sup>4</sup> This MoU supplements and does not supplant that material.
4. The arrangements covered by this MoU are, wherever possible, set out in terms providing sufficient flexibility for the relationship between the ORR and

---

<sup>3</sup> For the purpose of this MoU, the term ‘rail sector’ encompasses services relating to railways in Great Britain. These are defined in section 67(3ZA) of the [Railways Act 1993](#) as: (a) railway services (meaning the carriage of passengers and goods by railway and light maintenance, station and network services); (b) the provision and maintenance of rolling stock; (c) the development, maintenance or renewal of a network, station or light maintenance depot; and (d) the development, provision or maintenance of information systems designed wholly or mainly for facilitating the provision of railway services.

<sup>4</sup> CMA (2014), [Regulated industries: Guidance on concurrent application of competition law to regulated industries](#) (CMA10).

the CMA to develop in the light of experience. The CMA and the ORR commit to review these arrangements from time to time to evaluate their continuing fitness for purpose. Such review can be initiated at the request of the CMA, the ORR or a member of the UKCN. This MoU may only be revised by agreement between the CMA and the ORR.

5. Nothing in this MoU applies in relation to the functions of the CMA in its separate role of considering references related to proposed action by the ORR under the sectoral statutes. The CMA and the ORR acknowledge the importance of maintaining the CMA's impartiality and fairness in carrying out those functions, and indeed of market or merger investigations undertaken by the CMA panel.

### **Context**

6. This MoU operates within the framework of the legislative provisions referred to in paragraph 1 and any applicable sector-specific legislation from time to time.

### *Role of the CMA*

7. The CMA is a non-ministerial department, established under the Enterprise and Regulatory Reform Act 2013.
8. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.
9. The CMA's statutory responsibilities, in so far as relevant to the matters that are the subject of this MoU, include:
  - (a) investigating where there may be breaches of the competition prohibitions; and
  - (b) conducting market studies and market investigations where there may be competition and consumer problems.
10. In connection with its statutory responsibilities, the CMA will cooperate with sectoral regulators and encourage sectoral regulators to use their powers, including their powers to apply the competition prohibitions, in the interests of competition for the benefit of consumers.

## *Role of the ORR*

11. 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.
12. 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:
  - (a) regulate Network Rail's stewardship of the national rail network;
  - (b) license operators of railway assets (the network, stations, light maintenance depots and trains);
  - (c) approve access by parties to track, stations and light maintenance depots; and
  - (d) keep under review the provision of railway services.
13. The ORR also has powers concurrently with the CMA to investigate where there may be breaches of the competition prohibitions and to conduct market studies and to refer markets where there may be competition and consumer problems in the rail sector.
14. The ORR has 24 duties (which it balances in the exercise of its sector-specific regulatory and Enterprise Act 2002 market study functions). These duties contain a number of objectives, for example, they require the ORR:
  - (a) 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;
  - (b) to promote competition in the provision of railway services for the benefit of users of railway services;
  - (c) to protect the interest of users of railway services;
  - (d) 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
  - (e) to contribute to the achievement of sustainable development.
15. The ORR will cooperate with the CMA and other sectoral regulators, in the exercise of its concurrent functions, for the purpose of strengthening the competition framework and to ensure consistency of approach. The ORR will

also engage with the CMA broadly in the promotion of competition for the benefit of users of services relating to railways.

## **Aims**

16. The Enterprise and Regulatory Reform Act 2013, as well as establishing the CMA, made provision for the better working of the CMA's and the sectoral regulators' concurrent powers in the regulated sectors; specifically, the act: 'strengthens the role of the CMA and enhances the emphasis on early and proper consideration of the use of anti-trust powers (under Part 1 of the CA 1998 [ie the competition prohibitions]) by the sector regulators.'<sup>5</sup>
17. It is one of the strategic goals of the CMA, announced on its establishment on 1 October 2013, to extend the frontiers of competition into new areas, including by working with sectoral regulators to ensure fuller use of competition law and policy in sectoral markets.<sup>6</sup>
18. The government's strategic steer to the CMA, issued on 1 December 2015, says that the CMA should build 'a strong dialogue with sectoral regulators using the UKCN to ensure that the overall competition regime is coordinated and regulatory practices complement each other.'<sup>7</sup>
19. The sectoral regulators and the CMA, working together in the UKCN established in 2013 (with Monitor having observer status), declared that: 'The mission of the UKCN will be to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate.'<sup>8</sup>
20. The CMA and the ORR seek to use their powers to achieve more competitive outcomes in the rail sector for the benefit of users and the economy in which those services play an essential part. It is the view of the CMA and the ORR that such competitive outcomes can be achieved by various tools, including: their concurrent competition law powers under the competition prohibitions and market provisions; their concurrent powers under specific consumer protection legislation; and the CMA's merger control functions. However, the CMA and ORR recognise that some of these outcomes can also be achieved

---

<sup>5</sup> [Enterprise and Regulatory Reform Act 2013 Explanatory Notes](#), paragraph 370.

<sup>6</sup> Statement by Alex Chisholm, Chief Executive of the CMA, [CMA mission and strategy](#), 1 Oct 2013.

<sup>7</sup> Department for Business, Innovation and Skills, Strategic steer for the Competition and Markets Authority, in Annex A to the [Government's response to the Consultation on the Strategic Steer to the CMA](#), 1 December 2015, page 11.

<sup>8</sup> UKCN (2013), [Statement of Intent](#).

through other tools such as those that are available to regulators through national and European Union legislation.

21. This MoU aims to further the attainment of these objectives, and to make the changes introduced by the Enterprise and Regulatory Reform Act 2013 work effectively, maximising the complementary skills of the CMA and the ORR, including through:
- (a) promoting cooperation and coordination between the CMA and the ORR when dealing with cases of suspected anti-competitive behaviour for which they have concurrent powers;
  - (b) promoting cooperation and coordination between the CMA and the ORR when dealing with market studies and market investigation references for which they have concurrent powers;
  - (c) facilitating the efficient and effective handling of cases of suspected anti-competitive behaviour within the rail sector;
  - (d) avoiding duplication of activity, wherever possible; and
  - (e) ensuring transparency as to the respective roles of the CMA and the ORR for individuals and consumers affected.

### ***General cooperation***

22. In addition to the provisions for cooperation between the CMA and the ORR specific to particular powers of the CMA and the ORR, as set out in this MoU and elsewhere, the CMA and the ORR are committed to the following general principles and practices for cooperation between themselves in respect of the sectors for which the ORR has responsibility.
23. Officials of the CMA and the ORR will meet and communicate, at appropriate levels of seniority, to discuss matters of mutual interest, both through the UKCN and bilaterally. A framework for such meetings will, as far as possible, be determined in advance so as to ensure attendance at the appropriate level and expertise.
24. The CMA and the ORR will, in respect of the rail sector, always consult each other:
- (a) before the initial exercise of concurrent competition law powers in all cases where it appears that they have concurrent jurisdiction and where there are reasonable grounds for suspecting an infringement of the competition prohibitions; and



(b) before launching a market study under the Enterprise Act 2002.<sup>9</sup>

25. Where either the CMA or the ORR exercises its concurrent powers, the CMA and the ORR will, to the extent permitted by law, engage with each other in open dialogue and by sharing relevant information as appropriate. This engagement may include attendance at internal meetings held by the investigating authority (ie the authority to which a case is allocated) by the supporting authority (ie the other authority which would be competent to exercise concurrent powers in relation to the case), in order to discuss the case as envisaged at paragraph 3.31 of the concurrency guidance. The supporting authority will not generally attend the investigating authority's constitutional decision-making meetings, meetings of governance bodies or meetings with external parties such as those under investigation or complainants. Attendance by the supporting authority at any meeting is at the discretion of the investigating authority, but requests to attend should be considered by the investigating authority in the spirit of cooperation underpinning the new concurrency regime.
26. The CMA and the ORR will consult each other at an early stage on any issues that might have significant implications for the other. For example, where the CMA undertakes a market study which relates to a sector other than the rail sector but which may have a significant impact on that sector, the CMA will inform the ORR and share appropriate information relating to that market study with the ORR to the extent permitted by law.
27. Within the spirit of broader collaboration for the purposes of the promotion of competitive outcomes, the CMA and the ORR will commit to discuss and share other information about a broader range of competition complaints and concerns, where legally permissible to do so, but subject to the need not to impair the impartiality and fairness of the CMA in carrying out the functions referred to in paragraph 5 of this MoU.

---

<sup>9</sup> Instigation of a market study occurs on the publication of a market study notice, as defined in section 130A of the [Enterprise Act 2002](#).

## **Part A – Cooperation in relation to the competition prohibitions (Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union)**

### ***Case allocation***

#### *Basis of allocation*

28. The CMA and the ORR will endeavour to reach agreement on which authority will exercise its concurrent competition powers in respect of any particular case, under regulation 4(2) of the concurrency regulations. They will do so in a spirit of constructiveness and cooperation, while acknowledging the CMA's ultimate powers under regulations 5 and 8 of the concurrency regulations.
29. Their determination of which authority will exercise its powers will be based on assessing which of them is better placed to exercise those powers, having regard to the factors set out in paragraph 3.22 of the concurrency guidance. The CMA and the ORR envisage that other factors may appear relevant in the light of practical experience and that, if so, such factors may be chosen to supplement or supplant the factors set out in paragraph 3.22 of the concurrency guidance.

#### *Procedure for allocation*

30. Where either the CMA or the ORR has decided, on the basis of information in its possession, that there are reasonable grounds for suspecting that one of the competition prohibitions has been infringed (the reasonable suspicion test)<sup>10</sup> in relation to the rail sector, it will disclose to the other (ie the receiving authority) sufficient information:
  - (a) to enable the receiving authority to understand the basis on which the disclosing authority has decided that the reasonable suspicion test is met; and
  - (b) for there to be an informed discussion on which authority (if either) is best placed to proceed in respect of the case.
31. In practice, it may be helpful for the CMA and the ORR to have discussed the case prior to such a decision having been reached, subject to paragraph 44 below. The disclosing authority will provide the information described under paragraph 30 within ten working days after it has decided that the reasonable

---

<sup>10</sup> As provided in section 25 of the [Competition Act 1998](#).

suspicion test is met, whether or not it proposes to exercise concurrent powers.<sup>11</sup>

32. With seven working days from receipt of this information, the receiving authority will respond in writing, setting out its initial view on the case and how it should be allocated and identifying any further information which it requires.
33. The CMA and the ORR will endeavour to agree which authority will exercise its concurrent competition powers in relation to the case, as provided for in regulation 4(2) of the concurrency regulations, as soon as possible and in any event no later than one month from disclosure of the information described under paragraph 30. Other than in exceptional circumstances (which shall be set out in writing), the CMA will initiate the procedure set out in regulation 5 of the concurrency regulations if agreement is not reached within two months of the disclosing authority first receiving sufficient information in connection with a complaint to enable it to decide that the reasonable suspicion test is met.
34. The procedure for agreeing the transfer of a case that is already in progress from the CMA to the ORR, or from the ORR to the CMA, is as set out in regulation 7 of the concurrency regulations and in paragraph 3.32 of the concurrency guidance.
35. The procedure for the CMA to direct the transfer to itself from the ORR of a case that is already in progress is as set out in regulation 8 of the concurrency regulations.

#### *Implications of allocation*

36. Any agreement or determination as to case allocation, under regulations 4, 5, 7 or 8 of the concurrency regulations, shall be notified to the person who has provided the information resulting in the case (for example, the person making a complaint), and so far as appropriate and lawful to any other affected person, by the authority which is exercising its concurrent competition powers in relation to the case, as soon as reasonably practicable.
37. Case allocation determines which of the CMA and the ORR is to exercise concurrent functions and make any decisions under the competition prohibitions. The CMA or ORR will be publicly identified as having such responsibility if and when any such investigation is announced. The CMA and the ORR envisage that, whichever authority has responsibility for a particular case, they and their officials will work cooperatively with each other on the case as appropriate, pooling their expertise including in the ways described in

---

<sup>11</sup> As provided in regulation 9 of the concurrency regulations.

paragraphs 52 to 60 of this MoU and in paragraphs 3.33 to 3.35 of the concurrency guidance.

## ***Sharing information***

### *Principles of information sharing*

38. The effective sharing of information between the CMA and the ORR is fundamental to the successful exercise of their concurrent competition powers. It is needed both for the appropriate allocation of cases, as described in paragraphs 30 to 35 of this MoU, and for the successful handling of cases once allocated to make optimal use of the complementary experience and expertise of the two authorities.
39. The CMA and the ORR are committed, in addition to their legal obligations to share information (set out in regulation 9 of the concurrency regulations), to open dialogue and continuing liaison, both bilaterally and through the UKCN, with a view not only to handling specific cases but to promoting competition, for the benefit of users of railway services.

### *Information sharing mechanism – general liaison*

40. The CMA and the ORR recognise the importance of meeting regularly to share information on matters relevant to competition in the rail sector in Great Britain, and to keep each other abreast of relevant work which they are considering or currently undertaking.
41. The CMA and the ORR will meet regularly at multiple levels, bilaterally and through the UKCN.
42. The CMA and the 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 will 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 (whether bilaterally or in the context of the UKCN) to identify potential new issues, with a view to circulating information to appropriate individuals within each organisation.

43. The existence of relationship managers does not in any way preclude direct communication between other staff at the CMA and the ORR.
44. For the purposes of sharing information pursuant to paragraph 30, ie in circumstances where the reasonable suspicion test is met, such information will be shared by the disclosing authority to the extent permitted by law and whether or not it proposes to exercise its concurrent powers in the case.<sup>12</sup> Where disclosure would be appropriate and permitted by law, the CMA and ORR may also share information regarding potential infringements of the competition prohibitions in advance of having reached a view as to whether the reasonable suspicion test is met. In circumstances where either the CMA or FCA has taken the view that a matter is not an administrative priority, irrespective of whether a view has been reached on whether the reasonable suspicion test is reached, each may share the details of the matter with the other, or with any other authority which would be able to exercise concurrent competition powers in relation to that matter, to the extent permitted by law. Where leniency information is being shared under this paragraph, special considerations apply, as set out in paragraphs 50 and 51.

*Information sharing mechanism – handling specific cases*

45. The procedures for information sharing for the purpose of case allocation shall be as set out in paragraphs 30 to 32 and 38 to 51 of this MoU.
46. When either the CMA or the ORR is exercising its powers in respect of the competition prohibitions in a particular case in the rail sector, each of them will share with the other any of the following information in its possession (to the extent permitted by law and subject to the confidentiality obligations in paragraphs 49 to 51 of this MoU):
  - (a) as a minimum, the matters referred to in regulation 9(1)(b) – (j) of the concurrency regulations, and in paragraph 3.49 of the concurrency guidance, complying with the time limits specified in paragraph 3.49;
  - (b) other information which it reasonably believes to be relevant or helpful to the other in the conduct of the case; and
  - (c) in the case of the authority which is exercising the powers, reports to the other on the progress of the case, of sufficient frequency and detail to enable the other to be appropriately informed; the means and frequency of such reporting will be decided on a case-by-case basis and in the light

---

<sup>12</sup> For the avoidance of doubt, this does not entail an obligation to inform the other party if the regulator is carrying out general monitoring activity, where there is no active consideration of exercising its concurrent powers.

of experience as this enhanced framework of collaboration and its supporting arrangements develop over time.

*Information sharing mechanism – for know-how purposes*

47. The CMA will maintain on its webpages a central database of decisions taken in cases under the competition prohibitions, with a view to having an accessible body of know-how that will help ensure the effective and consistent application of competition law. The CMA and the ORR will, to the extent permitted by law, contribute information to that in the way best calculated to achieve that objective.
48. In any event, the CMA will report on cases in the regulated sectors under the competition prohibitions in the annual concurrency report which it is required under statute to issue. Further provisions on the annual concurrency report are in paragraphs 61 to 63 of this MoU.

*Information sharing – confidentiality constraints*

49. Any disclosure of information under paragraphs 30 to 32 and 38 to 48 of this MoU, and any use by the recipient of such information, shall only be to the extent permitted by law, including by reference to the provisions of Part 9 of the Enterprise Act 2002, relevant sector-specific legislative provisions and any other provisions relating to the disclosure, handling and use of information (such as the Data Protection Act 1998 and section 118 of the Financial Services and Markets Act 2000, to the extent relevant).
50. Prior to disclosing information to each other, the CMA and the ORR will not generally give the person to whom the information relates prior notice of its intention to make the disclosure. However, if the CMA or the ORR consider it necessary or appropriate to pass leniency information to each other (or to another UK authority with concurrent powers), the transmitting authority will inform the applicant or its legal adviser first. Leniency information for the purposes of this MoU is any information which came into the possession of any of the CMA, its predecessors, the ORR or any other public authority as a direct or indirect result of having been provided in the context of an application for leniency. It includes information obtained by the transferring authority as a result of investigative measures resulting directly or indirectly from an application for leniency.
51. In addition to the general provisions referred to in paragraph 49, where the ORR or the CMA receives leniency information from the other (or from another UK authority with concurrent powers) for the purpose of applying the competition prohibitions or, in the case of the CMA, the cartel offence under

section 188 of the Enterprise Act 2002, that information will not be used for any other purpose. This restriction on use also applies to any information obtained by the receiving authority as a result of investigative measures relating to the competition prohibitions or the cartel offence following the receipt of leniency information from the other authority. This does not affect the use that may be made by the CMA or the ORR of information received from other sources, or if the leniency applicant's consent is obtained.<sup>13</sup> Where the provision of leniency information to either the CMA or the ORR affords or might, under certain conditions, afford the leniency applicant, its subsidiaries or its employees protection from sanctions (including a reduction in penalties) under the leniency programme operated by that authority and that information has been passed to another authority, the receiving authority shall afford the leniency applicant, its subsidiaries or its employees no lesser protection.

### ***Pooling resources***

52. Paragraph 25, above, and the concurrency guidance provide for support to be provided by the supporting authority to the investigating authority when it is exercising its concurrent powers in a case. The CMA and the ORR will endeavour, so far as is reasonably practicable and permitted by law, and in the light of their respective ongoing priorities and resource availability at the time, to share their resources with each other in the interests of the effective enforcement of competition law in the rail sector in Great Britain, and more generally the promotion of competition for the benefit of consumers in that sector, and to ensure that their resources and expertise are used most efficiently for that purpose. This is subject to the proviso that, as stated in paragraph 5, this does not apply in relation to the functions of the CMA in its role of considering references related to proposed action by the ORR under the sectoral statutes.
53. As a consequence, where it has been agreed or determined that one of the authorities is to exercise its concurrent competition powers in relation to a case, that authority will, to the extent that there are resources available, receive appropriate practical assistance and support from the other in the handling of the case, as agreed on a case-by-case basis.

---

<sup>13</sup> The use restriction in this paragraph is intended to govern the use of leniency information in the context of the concurrency arrangements. It is not intended to prevent the disclosure of such leniency information by either one of the CMA or the ORR to the other (to the extent permitted by [Part 9](#) of the Enterprise Act 2002 and in accordance with [Leniency and no-action applications in cartel cases](#): OFT1495) for purposes other than the application of the competition prohibitions or the cartel offence. However, any such disclosure of leniency information would only be likely to be justified in exceptional circumstances, given the strong public interest in maintaining the incentives for undertakings and, in the case of the cartel offence, individuals to apply for leniency.

### *Secondments of staff*

54. One means of the practical assistance and support that might be given, as referred to in paragraphs 52 and 53 of this MoU, is the secondment of staff, in accordance with regulation 10 of the concurrency regulations and paragraphs 3.33 and 3.34 of the concurrency guidance.
55. The CMA and the ORR are fully committed to the idea of secondments for this purpose, and will endeavour to meet each other's requests for secondments to the extent that they are appropriate and resources permit; this may include making provision for any secondee to be available to work for part of his or her time at his or her existing employer during the course of the secondment, for example on such cases that are in progress.
56. Requests for secondments should be made by the relationship manager of one authority to the relationship manager of the other, setting out the following information:
  - (a) The number of secondees required.
  - (b) The period for which each one is required.
  - (c) The level of seniority of each one.
  - (d) The nature of the expertise or experience of each one.
  - (e) The proposed payment arrangements.
  - (f) A brief explanation of why the requirement or requirements cannot adequately be met by deployment of staff from within the requesting authority.
57. To the extent that the recipient of a request for a secondment made under paragraph 56 of this MoU refuses that request or accedes to it on terms that are materially different from those requested, the recipient shall give reasons.
58. The CMA and the ORR will develop appropriate arrangements for the pooling and secondment of staff. Such arrangements will have regard to the resource constraints of both parties and such calls for staff, therefore, will be made in reasonable time and with sufficient warning to enable appropriate resource planning, management of other work commitments and appropriate sign-off procedures within each authority.



### *Other mutual support*

59. In addition to the sharing of information, expertise, experience and the secondment of staff, the CMA and the ORR are fully committed to providing each other with more informal forms of support to enable them to carry out their competition law functions in relation to the rail sector – in each case to the extent that it is appropriate and permitted by law, and that resources permit – including (but not limited to):
- (a) answering specific queries from time to time;
  - (b) providing information or views on a specific sector or market, or an area of competition law or policy; and
  - (c) providing training on a specific sector or market, or an area of competition law or policy.
60. Such support may be requested and provided in connection with a specific case or with the promotion of competition more generally. In this regard, both the CMA and the ORR will act reasonably, including by providing sufficient time and information for requests for support to be responded to fully and effectively and for the relevant staff to be engaged.

### ***Annual concurrency report***

61. The CMA is required by statute to publish a report every year, starting after its first year of operation in 2014/15,<sup>14</sup> containing an assessment of how the concurrency arrangements between the CMA and the sectoral regulators, as regards both the competition prohibitions and the market provisions, have operated during the year. This MoU refers to that report as the annual concurrency report. There is further provision on the annual concurrency report in paragraphs 3.55 to 3.62 of the concurrency guidance.
62. The CMA will consult, and cooperate with, the ORR and with other sectoral regulators in preparing the annual concurrency report. In connection with this, the CMA will:
- (a) prepare a draft of the annual concurrency report that it will send to the ORR and other sectoral regulators seeking comments or suggestions on the content or conclusions of the annual concurrency report and giving them adequate time to comment or make suggestions;

---

<sup>14</sup> Enterprise and Regulatory Reform Act 2013 [Schedule 4](#) paragraph 16.

- (b) take account of any comments or suggestions it receives from the ORR and other sectoral regulators, and the CMA may seek further clarification on those comments or suggestions as appropriate;
  - (c) prepare a final version of the annual concurrency report for publication that takes account of its consultation of the ORR and other sectoral regulators as appropriate; and
  - (d) make the annual concurrency report available on the CMA webpages.
63. The ORR will cooperate with the CMA in the preparation of the annual concurrency report including (but not limited to) by way of:
- (a) providing information and data on general market conditions and on the application of the competition prohibitions and the market provisions in the railways services sector in Great Britain;
  - (b) responding to reasonable requests for information and data; and
  - (c) providing to the CMA any comments and suggestions it may have in connection with the process described in paragraph 62 of this MoU;
- in each case promptly so as to facilitate the timely production and publication of the annual concurrency report.

### ***Voluntary redress schemes***

64. In cases relating to investigations under the competition prohibitions in the rail sector, both the CMA and the ORR have the power to approve voluntary redress schemes. When either authority proposes to exercise these powers, it shall liaise with the other authority as appropriate and will have regard to its own guidance.<sup>15</sup>

### ***Short form opinions***

65. The CMA shall inform the ORR following an initial enquiry for a short form opinion relating to the rail sector. Where the CMA is considering providing such an opinion, it will discuss with the ORR before deciding to do so. If the CMA then decides to produce an opinion, it will engage with the ORR, the nature and degree of that engagement to be considered on a case-by-case basis, having regard, in particular, to the extent to which the opinion has a

---

<sup>15</sup> The CMA's guidance on the [approval of voluntary redress schemes](#) (CMA40) states at footnote 7: 'The CMA expects that regulators will take this CMA guidance into account when producing their own guidance on the approval power.'

multi-sector rather than a single-sector dimension. In all cases, the CMA will give the ORR the opportunity to provide comments on such a draft opinion.

***Choice of instrument – competition prohibition or direct regulation by licence enforcement***

66. As a result of legislative changes introduced by Schedule 14 to the Enterprise and Regulatory Reform Act 2013,<sup>16</sup> the ORR is required by sections 55(5A) and 57A(6) of the Railways Act 1993, to ‘consider whether it would be more appropriate to proceed under the Competition Act 1998’ before exercising its direct regulatory powers of licence enforcement.
67. The Explanatory Notes to the legislation explain that this provision ‘enhances the emphasis on early and proper consideration of the use of anti-trust powers (under Part 1 of the CA98)<sup>17</sup> by the sector regulators’.<sup>18</sup>
68. The government had previously indicated that the policy intention is to: ‘strengthen the primacy of general competition law, so that the Sector Regulators are required to consider whether the use of their CA98 powers is more appropriate before using their sectoral powers to promote competition’.<sup>19</sup>
69. Under this provision, it is for the ORR to determine, in any particular case, whether using its powers under the competition prohibitions would be more appropriate than exercising its licence enforcement powers.
70. Paragraph 4.4 of the concurrency guidance says that this determination will be made by the sectoral regulators ‘on a case-by-case basis.’ It may be that, in the light of experience accumulated over the coming months or years in applying this provision, it will be possible to develop more general principles that could serve as useful guidance in future cases, perhaps through the forum of the UKCN, while respecting the right of the sector regulator to make the determination.

---

<sup>16</sup> Having effect from April 2014.

<sup>17</sup> That is, the competition prohibitions.

<sup>18</sup> [Enterprise and Regulatory Reform Act 2013 Explanatory Notes](#), paragraph 370.

<sup>19</sup> BIS, *Growth, competition and the competition regime – Government response to consultation*, March 2012, paragraph 8.16.

## **Part B – Cooperation in relation to the market provisions: market studies and market investigations (Enterprise Act 2002)**

### ***How concurrency works under the market provisions***

71. The ORR has the power, concurrently with the CMA, to carry out market studies, to make market investigation references, agree undertakings in lieu of a reference and make recommendations to the government in relation to the rail sector under Part 4 of the Enterprise Act 2002 (as do other sectoral regulators in relation to the sectors for which they are responsible).
72. Under the Enterprise Act 2002, the CMA and the ORR may, in relation to the rail sector, undertake market studies, and may make market investigation references to the Chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the UK. The purpose of these investigations is to examine the market(s) and (where required) implement appropriate remedies where the CMA determines that the structure of the market(s) or the conduct of the suppliers or customers is harming competition.
73. When making a reference, the CMA or the ORR, as applicable, must have reasonable grounds for suspecting that any feature or combination of features of a market or markets in the UK prevents, restricts or distorts competition in relation to the supply or acquisition of any goods or services in the UK (or in a part of the UK).
74. The cooperation between the CMA and the ORR provided for in this Part B shall not extend to conduct that could reasonably be expected to impair the impartiality or the fairness of the CMA panel in conducting market investigations.

### ***Super-complaints***

75. Section 11 of the Enterprise Act 2002 provides for a super-complaint to be made by a designated consumer body that any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers.
76. The ORR has a duty to respond to super-complaints made to it under the Enterprise Act 2002 if the complaint concerns the rail sector in Great Britain.
77. The coordination of the CMA's and the sectoral regulators' super-complaint duties will be based on policies agreed and applied through the UKCN.

### ***Mutual consultation***

78. The ORR and the CMA have a duty to consult each other before exercising concurrent functions under the market provisions.

### ***Sharing information***

79. The provisions of paragraphs 40 to 44, 46 (excluding 4646(a)) and 48 of this MoU apply to information sharing under the market provisions as they do under the competition prohibitions.

### ***Pooling resources***

80. The provisions of paragraphs 52 to 60 of this MoU apply to pooling resources under the market provisions as they do under the competition prohibitions.
81. Where the CMA and the ORR intend to pool resources in order to exercise powers under the market provisions of the Enterprise Act 2002, they shall, at the outset of any such project, discuss the arrangements for how they will pool resources and work jointly.

### ***Annual concurrency report***

82. The provisions of paragraphs 61 to 63 of this MoU apply under the market provisions as they do under the competition prohibitions.