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OFFICE of the RAIL REGULATOR

Draft

The Competition Act 1998

Application to Railway Services

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The Competition Act 1998 is applied and enforced by the Director General of Fair Trading, and, in relation to the regulated utility sectors, concurrently with the appropriate sector regulator. In relation to agreements and conduct which relate to the supply of railway services, the Rail Regulator has concurrent jurisdiction. References in this guideline to "the Regulator" should be taken to mean the Director General of Fair Trading or the Rail Regulator. References to the "Director General" refer to the Director General of Fair Trading.

The Competition Act 1998 requires the Director General of Fair Trading to publish general advice and information about the application and enforcement of the Chapter I and Chapter II prohibitions contained in the Act. This guideline is intended to explain the application of the legislation to the railways sector and to explain the general principles the Director General of Fair Trading and Rail Regulator expect to apply when exercising functions under the Competition Act 1998 within that sector.

The guideline is not a substitute for the Competition Act 1998 nor for the regulations and orders which are made under it. It should be read in conjunction with the legislation. It contains a discussion of relevant principles of Community law. It should not be seen as a substitute for or as a definitive interpretation of Community law. Anyone in doubt about how they may be affected by the legislation should seek legal advice.

The guideline should be read in conjunction with the series of general guidelines on the Competition Act 1998 issued by the Office of Fair Trading, which are referred to throughout this text. It does not seek to cover all the areas included in those guidelines.

Outline of the Competition Act

1. On 1 March 2000, two new prohibitions introduced by the Competition Act 1998 ("the Act") come into force: one prohibiting anti-competitive agreements and concerted practices and the other prohibiting abuse of market dominance. These prohibitions may have significant implications for the manner in which undertakings operating within the railways sector â€“ including some not covered by the Rail Regulatorâ€™s existing powers - conduct their business. In order to be prepared for that date, persons operating within the railways sector need to understand the likely implications for their businesses and their business practices.

2. The Chapter I prohibition prohibits agreements, whether written or not, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition and which may affect trade within the United Kingdom (the "Chapter I prohibition"). In this Guideline references to agreements prohibited by Chapter I include references to decisions of undertakings and concerted practices. The Chapter II prohibition prohibits the abuse of a dominant position in the United Kingdom and which may affect trade within the United Kingdom (the "Chapter II prohibition"). These prohibitions are based on Articles 81 and 82 of the EC Treaty. Section 60 of the Act sets out certain principles which provide for the Rail Regulator, Director General and other United Kingdom authorities to handle cases in such a way as to ensure consistency with Community law.

3. Transitional arrangements are in place under which most agreements entered into prior to 1 March 2000 which comply with existing laws will benefit from certain concessionary periods of transition during which the Chapter I prohibition will not apply. In particular, terms contained in railway agreements which were required or approved by the Secretary of State or the Rail Regulator will benefit from a transitional period of maximum five years duration ending on 28 February 2005. In respect of agreements entered into during the period beginning on 9 November and ending on 1 March 2000, early guidance may be sought as to whether the agreement is likely to infringe the Chapter I prohibition when it comes into force, and if so, whether exemption is likely.

4. The Chapter II prohibition (which prohibits the abuse of a dominant position within the United Kingdom) will come into force on 1 March 2000. There are no transitional arrangements in respect of the Chapter II prohibition. A list of some of the more likely types of behaviour which might constitute an abuse of a dominant position appears in part 7 of this guideline.

5. There are a number of consequences resulting from a breach of either prohibition. Any agreement which infringes the Chapter I prohibition is void and cannot be enforced. Third parties who consider that they have suffered loss as a result of any unlawful agreement or conduct have a claim for damages in the Courts. The Regulator may issue interim measures directions, as he considers appropriate for the purpose, while an investigation is pending, if he has a reasonable suspicion that either prohibition has been infringed and he considers that it is necessary for him to act urgently either to prevent serious irreparable damage to a particular person or category of person or to protect the public interest. If he has made a decision

that either prohibition has been infringed, he may give such direction as he considers appropriate to bring the infringement to an end. In the event of an infringement of either prohibition committed intentionally or negligently, the Rail Regulator may impose a penalty of up to 10% of the turnover of an undertaking in the United Kingdom.

6. Any party to an agreement in respect of which the Regulator has made a decision and any person in respect of whose conduct the Regulator has made a decision may appeal to the Competition Commission against or with respect to the decision. â€˜Decisionâ€™ includes decisions about whether a prohibition has been infringed, the imposition or level of any penalty imposed and about any direction made, including an interim direction.

7. The Director General has the function of enforcing the Act. However in respect of agreements or conduct relating to the supply of railway services in Great Britain, the Rail Regulator has concurrent powers with the Director General. The Rail Regulator's jurisdiction under the Act is, in some respects, more extensive than under the Railways Act 1993 (the "Railways Act"). The Rail Regulator will be able to exercise functions under the Act in respect of the activities of undertakings currently operating in sectors of the industry which are not regulated by him as well as of those undertakings who benefit from an exemption from the licensing or access regime (such as operators of freight depots). The Regulator may be able to exercise functions under the Act even though the undertaking which is the subject of an investigation is not in breach of a licence condition or the Rail Regulator is otherwise prevented from exercising his functions under the Railways Act. Circumstances may also arise when an undertaking is in breach of a licence condition so that the Rail Regulator could exercise either his functions under the Act or those under the Railways Act. The Rail Regulator has discretion to decide.

8. The Director General or the Rail Regulator will be able to exercise their respective powers under the Act either in response to a complaint or on his own initiative where he has reasonable grounds for suspecting that an infringement has occurred. It will also be possible for either to consider agreements and conduct which are notified for the purpose of seeking guidance as to whether the agreement or conduct is likely to be in breach of either the Chapter I or Chapter II prohibition or of seeking a decision as to whether a prohibition has been infringed.

9. The purpose of this guideline is to explain how the Regulator expects to apply the provisions of the Act to the railways sector. This guideline is not intended to replace the Competition Act guidelines which have already been published or are to be published. Rather it is intended to explain how the Act will apply to the railways sector in particular and should be read in conjunction with other guidelines issued by the Office of Fair Trading and the other sector regulators and the Act itself. This guideline also explains the relationship between the Rail Regulator's functions under the Railways Act, and his functions under the Act.

10. The guideline explains how the new legislation may impact upon key areas of the existing railway regulatory regime, including the industry-wide agreements such as the Ticketing and Settlement Agreement (including fares setting), the provision of passenger information, the access regimes, the timetabling and service development process, and other areas where operators co-operate to improve services to passengers and freight customers.

11. Part 1 of this guideline provides an outline of the Act and the Regulatorâ€™s powers. Parts 2 and 3 describe the relationship between the Act and the Railways Act; and the relationship with other authorities in the railways sector. Part 4 deals with market definition and the assessment of market power in the railways sector.

12. Part 5 of this guideline provides some examples of agreements which may infringe the Chapter I prohibition. Part 5 also explains the criteria which must be met if an agreement is to benefit from an exemption. Part 6 provides examples specific to the railways sector to illustrate the main categories of abuse identified in the context of the Chapter II prohibition. Part 7 refers to the codes of practice to be published [soon] by the ROSCOs and Part 8 explains the relationship between the Regulatorâ€™s functions under the Act and the function of the International Rail Regulator. Finally, Part 9 provides general advice to undertakings on what they can do to encourage compliance with the Act within their organisation.

1. Introduction

The prohibitions

1.1 The Competition Act 1998 (the Act) introduces two prohibitions:

- the Chapter I prohibition prohibits agreements between undertakings (whether written or not), decisions by associations of undertakings (eg. trade associations) and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom and which may affect trade within the United Kingdom (Chapter I prohibition); and
- the Chapter II prohibition prohibits conduct by one or more undertakings which amounts to the abuse of a dominant position in a market in the United Kingdom and which may affect trade within the United Kingdom (the "Chapter II prohibition").

Community law

Section 60 of the Act sets out certain principles with a view to ensuring that the United Kingdom authorities handle cases in such a way as to ensure consistency with Community law.

1.3 The Act therefore places a dual obligation on the United Kingdom authorities in considering and dealing with the application of the Chapter I and Chapter II prohibitions. First they must ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Court or any relevant decision of the European Court. Secondly, the United Kingdom authorities must have regard to any relevant decision or statement of the European Commission. In the Director Generalâ€™s view this is limited to decisions or statements which have the authority of the European Commission as a whole, such as, for example, decisions on individual cases under Articles 81 and 82. It would also include clear statements about its policy approach which the European Commission has published in the Annual Report on Competition Policy.

1.4 The obligation to ensure consistency applies only to the extent that this is possible, having regard to any relevant differences between the provisions concerned. This means that there will be certain areas where the Community principles will not be relevant. For example, the Community single market objectives designed to establish a European common market would not be relevant to the domestic prohibition system.

1.5 The provisions of section 60 apply to all United Kingdom authorities which are involved with the administration and enforcement of the Act: the Regulator, the Competition Commission and the domestic courts·

Exemptions and exclusions

1.6 The Chapter I prohibition is subject to certain exemptions. Examples of agreements which may be in breach of the Chapter I prohibition are provided in part 5 of this guideline. Part 5 also contains a description of the types of exemption that may be available and the criteria which will be applied when considering whether an agreement is to have the benefit of an exemption. There is no possibility of an exemption from the Chapter II prohibition.

1.7 The Act sets out a number of exclusions from the application of either or both of the prohibitions. Some of the exclusions are summarised in Competition Act guidelines· . Those likely to be of interest in the railways sector include:

- the Chapter I prohibition will not apply to an agreement to the extent to which it is made in order to comply with a legal requirement;
- the Chapter II prohibition will not apply to conduct to the extent to which it is engaged in order to comply with a legal requirement;
- the Chapter I prohibition will not apply to agreements in respect of which a direction has been made under section 21(2) of the Restrictive Trade Practices Act 1976 (section 21(2) agreements);
- the Chapter I prohibition will not apply to land agreements (as defined);
- the Chapter I prohibition will not apply to vertical agreements (as defined).

1.8 s important to note that in respect of some of the exclusions the Regulator has the power to withdraw the benefit of the exclusion in prescribed circumstances. For example, the Regulator may withdraw the benefit of the land and vertical agreements exclusions. The exclusion applicable in respect of section 21(2) agreements will cease to apply if a material variation is made and additionally, the Regulator may give a direction that the exclusion does not apply in certain circumstances.

1.9 Access agreements entered into under either section 17 or 18 of the Railways Act are excluded from the scope of both prohibitions to the extent that they are entered into or conduct is engaged in order to comply with the Rail Regulator's directions made under section 17 or 18. However, the legal requirement exclusion does not apply to amendments made to any such access agreements, whether using the section 22 Railways Act procedure or amendment provisions contained in access agreements themselves, because they are not the subject of a direction. Such provisions may, however, be excluded from the scope of the Chapter I prohibition by virtue of another type of exclusion, in particular, the vertical agreements exclusion. Additionally, the Regulatorâ€™s enforcement powers are limited in respect of amendments to such access agreements.

1.10 Many of the network benefit agreements to which passenger train operators are party fall within the meaning of section 21(2) agreements.

Transitional arrangements

1.11 The Act contains transitional provisions intended to allow businesses a period of time in which to modify their agreements in order to comply with the new regime. Most agreements made prior to the starting date of 1 March 2000 will benefit from certain concessionary periods of transition during which the Chapter I prohibition will not apply. Generally the transitional period will be one year commencing on 1 March 2000. However, there are specific transitional arrangements in respect of railways sector agreements falling into either of the following categories:

- there will be a five year transitional period beginning on 1 March 2000 for agreements to which, immediately before that date, the Restrictive Trade Practices Act 1976 ("RTPA") does not apply by virtue of section 131 of the Railways Act and directions made under it;
- other railways sector agreements or provisions in such agreements (whether made before or after 1 March 2000) will benefit from a transitional period of up to five years but in any event ending on 28 February 2005, to the extent that the agreement or provisions were or are at any time before 28 February 2005 required or approved by the Rail Regulator or Secretary of State under the Railways Act.

1.12 Amendments to access agreements approved by the Rail Regulator will fall into the second of these categories.

1.13 In some circumstances the Regulator may terminate the transitional period but in general he may not do so in respect of agreements which are excluded from the Chapter I prohibition unless the benefit of that exclusion is also removed. For example, he may not terminate the transitional period in respect of provisions excluded by virtue of the legal requirement exclusion.

1.14 There are no transitional provisions in respect of the Chapter II prohibition.

Consequences of breach

1.15 Financial penalties of up to a maxim of 10 percent of the turnover of an undertaking in the United Kingdom may be imposed by the Regulator for an infringement of either of the prohibitions. Further guidance on penalties (and other consequences of breach of the prohibitions) is available in the Competition Act guideline Enforcement.

1.16 Any agreement which infringes the Chapter I prohibition is void and cannot be enforced.

1.17 Third parties who consider that they have suffered loss as a result of a breach of either prohibition may have a claim for damages in the courts.

Enforcement

1.18 The Chapter I and Chapter II prohibitions will be enforced by the Regulator using the powers set out in Chapter III of the Act. The Regulator has power to:

- issue interim measures directions, as he considers appropriate for the purpose, while an investigation is pending, if he has a reasonable suspicion that either prohibition has been infringed and he considers that it is necessary for him to act urgently either to prevent serious irreparable damage to a particular person or category of person or to protect the public interest;
- give such direction as he considers appropriate to bring the infringement to an end when the Regulator has made a decision that either prohibition has been infringed;
- impose penalties on undertakings for infringement of the Chapter I or the Chapter II prohibition.

1.19 The Regulatorâ€™s enforcement powers are limited in respect of amendments made to those access agreements which are the subject of a direction made under either section 17 or 18 of the Railways Act. In paragraph 1.3 it was explained that these provisions do not benefit from the legal requirement exclusion because they are not the subject of a direction made by the Rail Regulator under either section 17 or 18. If the Regulator decides that the amending provisions breach either prohibition he may not issue directions requiring the parties to modify or to terminate the agreement. Nor may he issue interim measures directions unless it is in respect of conduct which is connected with an access agreement. He may, however, impose a penalty.

1.20 Any party to an agreement in respect of which the Regulator has made a decision and any person in respect of whose conduct the Regulator has made a decision may appeal to the Competition Commission against or with respect to the decision. â€˜Decisionâ€™ includes decisions about whether a prohibition has been infringed, the imposition or level of any penalty imposed and about any direction made, including an interim direction. Further guidance on the Regulatorâ€™s enforcement powers is available in the Competition Act guideline Enforcement.

Concurrency

1.21 Enforcement of the Act in respect of agreements and conduct relating to the supply of railway services is carried out by the Rail Regulator concurrently with the Director General. The Director General's functions under the Act apply to business generally so that even if an agreement or conduct is not within the jurisdiction of the Rail Regulator, it will be within the jurisdiction of the Director General. If the agreement or conduct is within the Rail Regulator's jurisdiction, both the Director General and Rail Regulator may exercise their respective functions. However, the Director General and the Rail Regulator have given their commitment to avoid a matter being investigated by them both (unless working jointly) and will make it clear in each case whether it is the Rail Regulator or the Director General who will consider a case.

1.22 Whether the Rail Regulator has jurisdiction is determined according to the subject matter of the agreement or conduct (that is, whether it relates to the supply of railway services) and not according to the identity of the parties or undertakings. In particular, his jurisdiction is not determined by whether the undertaking is licensed under the Railways Act. For example, the agreements and conduct of undertakings who are exempt from the licensing regime and others in the railways sector who are not regulated by the Rail Regulator will be within the Rail Regulator's jurisdiction under the Act if they relate to the supply of railway services in Great Britain. The Regulator may be able to exercise functions under the Act even though the undertaking which is the subject of an investigation is not in breach of a licence condition or the Rail Regulator is otherwise prevented from exercising his functions under the Railways Act. Circumstances may also arise when an undertaking is in breach of a licence condition so that the Rail Regulator could exercise either his functions under the Act or those under the Railways Act. The Rail Regulator has discretion to decide.

1.23 The Rail Regulator has, subject to two exceptions, all the powers of the Director General to apply and enforce the Act. The Rail Regulator may:

- give guidance, consider notifications and make decisions on the application of the Act;
- grant exemptions from the Chapter I prohibition (subject, where appropriate, to conditions);
- consider complaints about breaches of the prohibitions;
- issue general advice and information on how the Act applies to his sector;
- carry out investigations both on the Rail Regulatorâ€™s initiative and in response to complaints. The sector regulators have the same powers to require the production of documents and information and to search premises as the Director General of Fair Trading. Further details about these powers are given in the Competition Act guideline Powers of Investigation;
- impose interim measures to prevent serious and irreparable damage;
- give and enforce directions to bring an infringement to an end; and
- impose financial penalties, taking account of the statutory guidance on penalties issued by the Director General of Fair Trading.

1.24 In general, an agreement or conduct which falls within the Rail Regulator's jurisdiction will be dealt with by the Rail Regulator. The Rail Regulator and the Director General will always consult each other where it appears that there is a possibility of concurrent jurisdiction before either acts in respect of a case and will, whichever handles a case, consult the other as and when appropriate. The Act also enables a case to be subsequently transferred from one authority to another, if appropriate. For more information about concurrency and the working arrangements of the Director General, Rail Regulator and other regulators with functions under the Act, see the Competition Act guideline Concurrent Application to Regulated Industries.

1.25 Schemes arising from transport integration initiatives in general, and Quality Partnerships in particular, raise the issue of which of the persons with jurisdiction should deal with a case or whether those with jurisdiction should work jointly. In transport cases in which the agreement or conduct does not relate to the supply of railway services, any competition issues raised will clearly fall to the Director General. When, however, the agreement or conduct relates in part to the supply of railway services, the question of whether it is the Rail Regulator or the Director General who will consider the case will be dealt with on a case by case basis dependent upon experience, whether the competition question raised relates to the supply of railway services and the degree of interface with non-railways sector markets. Of the Quality Partnership proposals considered so far by the Director General and the Rail Regulator, bus services were the predominant or sole transport mode. In these circumstances, the Director General has taken the lead. Similarly, if in the future railway services are not the predominant service in a Quality Partnership, the Director General would exercise his powers, consulting with the Rail Regulator as appropriate.

2. Relationship with the Railways Act and the Rail Regulator's regulatory functions

2.1 When exercising functions under the Railways Act, the Rail Regulator has a number of general duties which are set out in section 4 of the Railways Act and in section 21 of the Channel Tunnel Rail Link Act 1996 ("the general duties") . The Act will not of itself change the way in which the Rail Regulator exercises his regulatory functions, but he will consider the implications of the approvals given as a result of exercising those functions. This will be the case for instance when he is considering an access application under section 17 or 18 of the Railways Act since, as noted in paragraph 1.9, the legal requirement exclusion may apply to access agreements which are the subject of a direction made under either section. Similarly, because of the transitional arrangements in respect of provisions required or approved by him, the Rail Regulator will consider the Act implications before giving his approval to any agreement.

2.2 Situations may arise in which the Rail Regulator could exercise his enforcement functions under the Act or use his enforcement powers under the Railways Act. For example, the Rail Regulator may wish to consider a complaint of discrimination made against a holder of a licence containing a condition prohibiting discrimination. The Rail Regulator is able to decide not to exercise his functions under the Railways Act if he is satisfied, in a particular case, it is more appropriate to proceed under the Act. The parties will be informed of which functions he is exercising.

2.3 When exercising his functions under the Act, the Rail Regulator is not under the obligations imposed by the general duties under the Railways Act. He may, however, have regard to any matter to which he would have regard if the duties applied and if it is a matter to which the Director General could have regard when exercising the competition functions.

3. Relationships with other authorities

3.1 As explained, the Rail Regulator's general duties do not apply when he is exercising his functions under the Act but he can have regard to any matter in respect of which a duty is imposed under the Railways Act if the Director General could also do so. In some cases, although a funding authority (such as the Franchising Director or a Passenger Transport Authority / Executive or Local Authority) may not be immediately involved (because conduct by it is not being investigated nor is it party to an agreement being considered by the Regulator), a funding authority may nevertheless have considerable interest in the conduct or agreement being considered. In such circumstances the Regulator may wish to canvass views from funders, either directly or via the parties to the agreement or who are engaged in the conduct.

3.2 The Government proposes to create a Strategic Rail Authority which is to exercise some of the Rail Regulator's present functions in relation to the regulation of passenger network benefits secured through conditions in operators' licences. Once the Strategic Rail Authority is established, it is expected to have the role of actively promoting agreements designed to secure cross-industry co-operation. It would fall to the Regulator to consider the application of the prohibitions to such agreements.

3.3 In contrast to his position when exercising functions under the Railways Act, the Rail Regulator is not, when exercising functions under the Act, subject to a general duty to promote competition. His functions relate to the enforcement of the two prohibitions. The Act does not impose any specific duty in respect of promoting on-rail competition in terms of developing frameworks to facilitate new service development nor does it give the Rail Regulator any further specific functions in relation to the moderation of competition arrangements which currently form part of franchisees' track access agreements.

4. Market definition and assessment of market power

4.1 Guidance on the approach to market definition and assessment of market power has been published in the Competition Act guidelines Market Definition and Assessment of Market Power. The Regulator intends to use the same conceptual framework when considering agreements or conduct which relate to the supply of railway services, and it is not intended to replicate those guidelines here. The purpose of this part of the guideline is to give an indication of how the general principles may be approached when considering the application of the prohibitions to the supply of railway services. Each individual case will need to be examined on its own merits, on the basis of the facts and analysis relevant to that case.

Market definition

4.2 The concept of a market is key to the application of the Chapter I and Chapter II prohibitions. Market definition is a crucial input in the process of establishing whether the relevant undertakings possess market power, and hence whether a particular agreement or conduct could affect competition in that market. The object or effect of an agreement must have an appreciable effect on competition for the Chapter I prohibition to be breached. To contravene the Chapter II prohibition an undertaking must be dominant and abuse that dominant market position. Both the tests of appreciability and of dominance require a consideration of the appropriate market, and for market power to be assessed in the context of that market. Such markets need to be defined in terms of the products involved, the geographical area in which they are sold, and in many cases the time period in which they are sold.

4.3 The concept of a market is generally familiar, but the extent of any particular market is not immediately obvious. In the railways sector an example is whether sufficient passengers view London Euston to Birmingham New Street and London Marylebone to Birmingham Snow Hill as substitutes such that they are in the same market. Another example is whether a coach service which takes longer but is cheaper is in the same market as all, or part of, a train service between the same points. The essence of the approach adopted for use under the Act is to define as a market a group of products or services which are sufficiently close substitutes for each other in a specific geographic area and, if appropriate, at particular times. Products can be substitutes on the demand side (where *customers* would switch to alternative products) or on the supply side (where *suppliers* would switch resources from producing one product to another). Markets defined for the purpose of competition cases are generally referred to as "relevant markets".

4.4 The Regulator may also need to consider secondary markets or the issue of downstream and upstream markets in particular cases. The former issue arises where purchasing a product locks a buyer into purchasing ancillary products from the same seller in a secondary market for complementary products. An example in the railway industry would be where purchasing the use of a certain asset or facility requires the buyer to purchase other services or maintenance from the same manufacturer or freeholder of a railhead. The approach that will be taken in such cases is set out in the Competition Act guideline on Market Definition. Agreements or conduct investigated under the Act may include situations where an input is being purchased from an "upstream" market so that the buyer can provide a product in a "downstream" market. In such cases the Regulator may consider it necessary to define both the relevant upstream and downstream markets.

Assessment of market power

4.5 Once the relevant market or markets have been defined, the assessment of market power involves several elements, which may include:

- considering the size of market shares, and their movement over time;
- barriers to entry;
- buyer power; and
- the effect of regulation.

4.6 The general approach to the definition of the market and the types of factors indicating market power are the same under the Chapter I prohibition as they are under the Chapter II prohibition. There are no market share thresholds in the Act. An agreement will infringe the Chapter I prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition in the United Kingdom. The Regulator takes the view that, when considering whether the Chapter I prohibition applies, an agreement is not likely to have an appreciable effect on competition if the undertakingsâ€™ combined market share of the relevant market does not exceed 25 per cent, although these will be circumstances in which this is not the case. The Regulator will, in addition, generally regard any agreement between undertakings which directly or indirectly fixes prices or shares markets, imposes minimum resale prices or is one of a network of similar agreements which have a cumulative effect in the market in question, as being capable of having an appreciable effect. This will apply even where the combined market share of the undertakings involved falls below 25%.

4.7 The Chapter II prohibition can be breached only by a firm which is dominant, or firms which are jointly dominant. High market shares are one factor in considering whether an undertaking is dominant, but are not determinative on their own. The European Court of Justice has indicated that dominance can be presumed in the absence of evidence to the contrary if an undertaking has a market share persistently above 50 per cent. The Regulator considers it unlikely that an undertaking will be individually dominant if its market share is below 40 per cent although dominance could be established below that figure if other relevant factors such as the weak position of competitors in that market provided strong evidence of dominance. Further details are given in the Competition Act guidelines Assessment of Market Power and The Chapter II Prohibition.

4.8 The process of market definition and consideration of market shares provides an indication of one set of competitive constraints on a firm, namely those provided by substitute products. These aspects need to be considered along with other possible constraints on the market power of an undertaking, such as the threat of new entry, buyer power and the effect of regulation. The competitive constraints imposed by potential new entrants into the market will be considered in the light of the barriers to entry into that market. The effect of regulation on the ability of a firm to exercise market power will also be taken into account as appropriate. Factors other than market shares which may be relevant to an assessment of dominance are discussed in the Competition Act guideline Assessment of Market Power [parts 5 and 6].

4.9 The rest of this part of the guideline highlights some of the topics which may be relevant when assessing market power in the railways sector. The discussion is illustrative rather than exhaustive of the issues that may arise. The appropriate legal and economic analysis will depend on the actual facts of any particular case.

Application to passenger markets

4.10 Passenger markets will need to be defined across more than one dimension. The geographic extent of the market will need to be assessed in terms of the point to point flow or flows which are within the market. An important consideration may be whether significant numbers of passengers can choose between starting or destination stations, or between different operators. The extent of the markets in terms of other transport modes should also be established. Again, the proportion of passengers which have alternative modes of transport is likely to be important. If a particular railway route is not found to be a separate relevant market, a significant proportion of travellers will need to have an alternative, but this does not necessarily mean that all passengers must have an alternative.

4.11 Another dimension which may be important is that of desired time of travel. Separate peak and off-peak markets may be defined. The Regulator will also need to consider whether separate markets exist for travel on different days of the week or seasons. These issues are discussed in the Competition Act guideline Market Definition paragraphs [5.1 to 5.3]. The ability of operators to price discriminate between different passenger groups may also lead to separate markets being defined. Where operators are able to charge different prices to specific groups of customers, for example passengers travelling before and after 9.00am, this could lead to separate markets being defined. Evidence that operators are actually able to segment markets by charging higher prices to specific passenger groups would suggest that those groups represent separate relevant markets.

4.12 The competitive pressure which other modes exert on railway operators will determine whether or not they are considered to be within the same relevant market for specific geographical routes, time bands and passenger groups. On certain routes, leisure markets may exist, for example, consisting of travellers who do not have access to a private car. Car travel may also not be an effective substitute for city centre commuters. Coach and air travel will also need to be considered on many routes. Whether other modes of transport are or are not in the relevant markets will depend on the facts of each case, and may be different between time bands or geographical routes. Other factors which may be important in assessing the options available to different passenger groups will include relative journey times and connection possibilities.

4.13 In part 1 of this guideline (see paragraphs 1.2 to 1.5) it was explained that section 60 of the Act sets out certain principles with a view to ensuring consistency with Community law. This includes ensuring there is no inconsistency with a relevant decision of the European Court. The European Court of Justice has considered transport markets in *European Night Services*, and referred to possible substitution from other transport modes and markets in terms of leisure and business travellers.

4.14 In assessing market shares in passenger railway markets, the Regulator will use the volume and revenue shares which appear best to represent the competitive situation in any particular case. For example, a judgement may need to be made as to whether numbers of passengers or passenger miles is the most appropriate volume measure. Value (based on revenues or sales) market shares may need to be considered in terms of revenue passenger miles or as a proportion of the total farebox raised in a market.

Application to freight markets

4.15 As with passenger markets, market definition in respect of railway freight must be done in geographic and product terms. The extent of the relevant market is likely to depend on the characteristics of the distribution markets. For example, the extent to which deep sea container, domestic intermodal or bulk commodity flows are in the same market will be assessed in terms of the degree of substitutability between them.

4.16 There may be circumstances where other factors such as planning constraints have a significant impact on the carriage of certain commodities within and between certain geographic areas. There may be no suitable substitutes for transportation by railway along a certain route for a type of commodity, leading to a narrowly defined geographic and product market. For example, the transportation of coal in a "merry go round" movement between pit and power station might be considered by the Regulator to lead to a narrow market definition.

4.17 The carriage of deep sea containers out of ports to inland destinations may, alternatively, need to take into account the substitutability of other transport modes and in defining the geographic market may need to assess the case with which customers could switch to alternative UK entry ports.

4.18 In determining the relevant market, the Regulator may also find that railway supply side substitution will be constrained by the lead time needed by undertakings to enter the market as licensed railway freight hauliers. A factor which may be taken into account is the availability of essential inputs such as the lead time required on the placement of orders for suitable new locomotives or rolling stock. Such issues are likely to be particularly relevant in cases where the market is defined narrowly, due to an element of captivity such that customers are unable to use other transport modes instead of railway services, on account of cost or other differences.

4.19 Other issues which are likely to be considered in defining freight relevant markets include:

- the extent to which haulage services at different times of day or season can be considered as substitutable;
- the extent of the bundle of services being sold, and whether they are necessarily an integral product (for example, whether unloading services which are part of the overall transport services being supplied are purchasable elsewhere as a separate product); and
- the extent to which the product carried requires the provision of unique rolling stock or other facilities, such as the ability to access road/railway connected terminals.

4.20 In assessing the market shares within railway freight markets, the Regulator will use a measure appropriate to the case. For example, a suitable measure for railway freight traffic into and out of ports may be TEUs (twenty foot equivalent units), and for bulk commodity market tonnes lifted or tonnes moved may be used. It may also be appropriate to consider value market shares (based on sales or revenues) either in conjunction with volume shares or where they are the only available measure.

Application to track, rolling stock and other input markets

4.21 The previous sections discussed the markets from which final customers of the railways sector purchase services. There also exist many markets within the railways sector, where undertakings provide inputs to the various types of operator. Agreements and conduct in these markets are also subject to the Act unless they are excluded as discussed in part 2 of this guideline.

4.22 Inputs include (but are not necessarily restricted to) access to track and stations, the provision of rolling stock, the provision of maintenance services and plant required to carry out maintenance services. The Regulator will use the same approach to defining markets and assessing dominance in these sectors. For example, the provision of access to a specific station will need to be considered in terms of whether there are any suitable substitutes for the train operators concerned.

4.23 Where a train operator provides services or goods to another train operator that will also be in the context of a relevant market (for example a

TOC providing driver services to another TOC). Issues might arise in such a context as to whether services which operators supply to themselves should be included in the market where they supply to others.

4.24 When defining input markets there may be issues of whether second hand products, e.g. locomotives, are suitable substitutes for new. An important factor which may need to be taken into account in this context is whether a single operator has control of the stock of, for example, locomotives suitable for particular tasks. In such a case the Regulator may find an operator to have market power in the disposal of specific types of locomotives.

4.25 In the context of input markets it should also be noted that an undertaking can be found to be a dominant buyer, as well as a dominant seller, and abusive conduct by a dominant buyer will be found to contravene the Chapter II prohibition. For example, the illustrative list of abuses contained in section 18 of the Act includes directly or indirectly imposing unfair purchase prices.

5. The Chapter I Prohibition

Introduction

5.1 The Competition Act guideline The Major Provisions explains that the underlying rationale behind the Act is that competition is central to enhancing economic growth and living standards, the creation of products offering greater benefits to customers and in ensuring the efficient working of the allocative processes essential to the effective working of a market economy.

5.2 Examples of anti-competitive agreements are set out in the Act and given in the Competition Act guideline The Chapter I Prohibition. This part of the guideline provides other examples specific to the railways sector. The examples provided are by no means comprehensive but are intended to be illustrative.

5.3 Examples which may arise in the railways sector include:

- agreements between train operators to restrict increases in service frequency or to miss out individual station stops (such activity is likely to constitute a form of market sharing);
- agreements between train operators on fares, for example which restrict the introduction of cheaper fares or inhibit the development or introduction of quality initiatives;
- agreements between train operators not to introduce new services into each otherâ€™s franchise areas;
- agreements not to bid for particular contracts or franchises; and
- agreements to restrict the access of third parties to facilities.

5.4 Nonetheless, the Act recognises that some agreements which breach the Chapter I prohibition should be permitted because of the beneficial effects they produce. Such agreements may benefit from an exemption. An agreement may be exempted from the Chapter I prohibition (either by an individual or block exemption) if it satisfies all the following criteria. These are:

- **it contributes to:**
  - improving production or distribution, or
  - promoting technical or economic progress,

  while allowing consumers a fair share of the resulting benefit;
- **but it does not:**
  - impose on the undertakings concerned restrictions which are not
  - indispensable to the attainment of those objectives; or
  - afford the undertakings concerned the possibility of eliminating competition
  - in respect of a substantial part of the products in question.

5.5 There are three types of exemption: individual, block and parallel. An individual exemption must be applied for by way of notification. Under the Act, the Regulator may also make block exemptions exempting particular categories of agreement. The criteria referred to in paragraph 5.4 above must be satisfied in respect of individual and block exemptions. An agreement which falls within a category specified in the block exemption will be automatically exempt from the Chapter I prohibition. [At the date of publication of this guideline, no block exemption had been made].

5.6 The third type of exemption, the parallel exemption, applies to an agreement which is exempted under Article 81(3) of the EC Treaty either by an individual or block exemption or would be covered by a European Commission block exemption if the agreement had an effect on trade between EC Member States. Relevant to the railways sector will be Regulation 1017/68 which applies rules of competition to transport by rail, road and inland waterway.

5.7 Regulation 1017/68 contains a prohibition similar to the Chapter I prohibition and which may be declared inapplicable in respect of agreements which contribute towards:

- improving the quality of transport services; or
- promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuations; or
- increasing the productivity of undertakings; or

- furthering technical or economic progress;

and takes fair account of the interests of transport users;
and neither

- imposes on the transport undertakings concerned any restriction not essential to the attainment of the above objectives; or
- makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

The prohibition set out in Article 2 of Regulation 1017/68 is a Community prohibition as defined in section 10 of the Act. Article 8 which prohibits abuse of a dominant position is also a Community prohibition for the purpose of the Act.

5.8 In the circumstances when an agreement benefits from the non-application of the prohibition contained in Regulation 1017/68 (because the Commission has made a decision disapplying the prohibition or an agreement has been notified and is deemed to be exempt), the agreement may benefit from a parallel exemption. The Regulator may, in the circumstances and manner specified in the Director Generalâ€™s Rules, impose conditions or obligations subject to which a parallel exemption is to have effect, vary or remove any such condition or obligation, impose one or more conditions or obligations or cancel the exemption.

5.9 The following paragraphs of this part of the guideline contain an explanation of how the Chapter I prohibition may apply to agreements and arrangements which feature quite often in the railways sector.

Integrated transport and quality partnerships

5.10 The Government's White Paper 'A New Deal for Transport' emphasised that passenger benefits and incentives to reduce car use could result from greater integration in the provision of public transport services. The Government is also promoting quality partnerships as a potentially effective way of increasing the relative attractiveness of public transport for local journeys compared to the car alternative.

5.11 When considering a request for exemption of an agreement designed to implement transport integration schemes, the elements the Regulator will want to see in order to be satisfied that the exemption criteria are met include:

- demonstration that the scheme brings real material improvements for passengers (and existing non-users likely to transfer mode from the car) in the provision of transport services;
- that there are no restrictions which are not indispensable to achieving those benefits; and
- that there is no unnecessary elimination of competition or the potential for competition through the creation of new barriers to entry.

Industry-wide arrangements and agreements

5.12 A feature of the railways sector is that it is generally accepted that there are significant benefits from a co-ordinated national network at the retail level which are in the public interest. The licences of passenger train operators require them to belong to industry-wide agreements which provide network benefits such as through-ticketing, co-ordinated timetabling, accurate and impartial information.

5.13 Many of these agreements have been notified to the Office of Fair Trading under section 24 of the Restrictive Trade Practices Act 1976 and are the subject of a direction issued by the Director General under section 21(2) of that Act. As explained in paragraph 1.8, agreements which are the subject of a section 21(2) direction benefit from an exclusion from the application of the Chapter I prohibition unless the agreement is varied materially.

5.14 Industry-wide agreements made in accordance with a licence obligation may benefit from exclusion from the application of the Chapter I and Chapter II prohibitions to the extent that the agreement is made or conduct is engaged in order to comply with a legal requirement. In respect of any provisions that do not benefit from the legal requirement exclusion, the Regulator will, if he concludes that the Chapter I prohibition is breached, consider whether the exemption criteria described above apply. For example, when considering whether the exemption criteria are satisfied he will take into account the benefit to the end user of the co-ordination or co-operation.

Passenger information, timetabling and code of practice

5.15 Agreements concerning the publication of passenger information, timetable preparation and the ATOC codes of practice agreed by train operators may contain matters of the type prohibited by the Chapter I prohibition. The Regulator will take into account the benefits deriving from them. For example, it is recognised that the widespread provision of reliable, high quality passenger service information is an essential aspect of an efficient railway. Among the factors the Regulator will consider when assessing whether the exemption criteria are satisfied are whether the restrictions on competition within such agreements are the minimum necessary to achieve the benefits to passengers.

6. The Chapter II Prohibition

6.1 Chapter II of the Act prohibits the abuse of a dominant position in a market. For conduct to breach this prohibition the relevant undertaking or undertakings must first, as described in part 4, be found to be dominant or jointly dominant. There are certain exclusions from the Chapter II prohibition (as described in part 2 of this guideline). Unlike the Chapter I prohibition, there are no exemption provisions in respect of the Chapter II prohibition.

6.2 The approach of the Regulator when considering what constitutes an abuse of a dominant position has been laid out in the Competition Act guideline **Assessment of Individual Agreements and Conduct**. Each case will need to be considered in terms of the evidence and factors specific to the issue involved. The rest of this part of the guideline provides examples specific to the railways sector to illustrate the main categories of abuse identified in that guideline, and assumes that the conduct described is that of a dominant undertaking. The examples are not exhaustive.

Rather they are intended to be illustrative. Conduct not covered by this guideline, or the Competition Act guideline **Assessment of Individual Agreements and Conduct**, should not be assumed to be beyond the scope of the Chapter II prohibition.

6.3 Examples of potential abuses within the railways sector include (but are not restricted to) limiting service frequency, limiting improvements in vehicle quality, unfairly raising prices for captive markets and placing other companies at a disadvantage through discrimination, for example by excluding them from integration schemes. It should also be noted that an undertaking can contravene the Act by abusing dominance in one market through abuse in another market.

6.4 **Charging excessive prices.** The Regulator may consider that a dominant position has been abused by the introduction or maintenance of prices that lead to profits being sustained at a higher level than in a competitive market. The Regulator will usually apply this general rule to all activities across the railways sector, including for example passenger fares, freight charges, access charges and rolling stock lease charges. The Regulator will consider the relationship between prices and costs when deciding whether prices are excessive, for example when assessing passenger fares or freight haulage charges. Excessive prices, where charged by a dominant undertaking, are an abuse.

6.5 **Charging discriminatory prices or applying discriminatory terms or conditions.** It is recognised that price discrimination may produce economic benefits. The charging of discriminatory prices will be considered to be an abuse where there is evidence that it is a device to charge excessive prices, or where it is used to reduce competition significantly (for example, through predation). A vertically integrated firm which is dominant in an upstream market and competes in a downstream market might discriminate. This could lead to an abusive exclusion of competitors through the dominant firm offering more favourable terms to its own downstream associate. For example, the owner of a maintenance facility offering different terms to its own operations to those of a competitor might be abusive if the company in question were dominant. The same is true of the offering by an undertaking which is a dominant purchaser of different terms to a company in which it has a stake to those it offers to a third party.

6.6 **Engaging in predatory behaviour.** Setting prices at a level designed to force equally efficient competitors to withdraw from a relevant market often will be considered to be an abuse of a dominant position. If prices are below costs there is the possibility that they may be predatory, but in some cases evidence of the intention to drive competitors out of the relevant market may also be required. The economic principles to be applied in such cases have been set out in more detail in the Competition Act guideline **Assessment of Individual Agreements and Conduct** at part 4. Considering these principles in relation to the supply of railway services, targeted fares reductions (as opposed to a general reduction across most fares) might provide evidence of predatory intent. It might also be the case that a railway undertaking uses predatory behaviour to exclude competition from other modes (e.g. coaches) and vice versa.

6.7 In general the appropriate cost measures which will be considered in the context of whether prices are predatory will be the average variable cost and the average total cost of a good or service, as set out in the Competition Act guideline **Assessment of Individual Agreements and Conduct**. For certain railway services there may be a large difference between these two cost measures. In such cases the Regulator may decide it is appropriate to consider alternative cost measures between these two extremes. For example, the long run incremental cost of providing a service may be considered·

6.8 **Enforcing vertical restraints.** The conduct of a dominant undertaking may be in the form of explicit or implicit agreements into which it enters. This will include a dominant purchaser or supplier enforcing a vertical restraint, though (as with discrimination) there may be economic benefits to these. In the context of the Chapter II prohibition these are agreements between suppliers and purchasers restricting the commercial freedom of one or more parties. The Competition Act guideline **Assessment of Individual Agreements and Conduct** lays out the approach which the Regulator will use in balancing the reduction in competition against any economic benefits. Vertical restraints will be relevant to railway services input markets, where activities such as the enforced bundling together of the supply of scarce spares and the provision of maintenance, or the provision of rolling stock with no option to obtain maintenance from a different supplier, may be considered an abuse under certain circumstances.

6.9 There could also be issues related to the freight and passenger markets if an operator tries to bundle together various products where the customer would otherwise have the option of not purchasing one of the products or alternatively of obtaining one of the products from a different supplier. Examples may include the bundling together of a railway ticket and on-board refreshments, or of railway haulage with warehousing and distribution. Denying the customer the opportunity to purchase the refreshments or the warehousing and distribution from an alternative source, or even perhaps the option not to purchase them at all, might be an abuse of a dominant position. An important factor to be considered in such cases is whether the action leads to a significant reduction in actual or potential competition in the relevant market.

6.10 **Refusing to supply existing or potential customers.** Refusal to supply where that refusal has the effect of restricting competition in a related market in the supply chain is likely to be considered an abuse of a dominant position. One example might be a refusal by an operator of a maintenance depot to provide overnight stabling to one train operator who wishes to introduce a new service for which no other stabling options are available. Where the depot owner is providing a similar service to another train operator (which may be the depot operator itself) and the stabling of the additional trains would not create any undue difficulties for the facility owner, this might be construed as an abuse if the depot operator was found to be dominant.

6.11 One particular type of refusal to supply is where the owner of a facility, which is an essential input (by virtue of particular legal, geographic or economic factors) for another firm, refuses to supply a competitor in the downstream market or sets an excessive price. In assessing alleged instances of such cases the Regulator will follow the analysis set out in the Competition Act guideline **Assessment of Individual Agreements and Conduct**. In applying the concept of essential facilities under the Act, the Regulator will need to be satisfied that, *inter alia*, access to the facility in question is indispensable through technical, legal or even economic obstacles, such that the creation of a substitute facility is impossible or unreasonably difficult for any actual or potential competitor (rather than any particular company). Therefore, without such access, a downstream competitor would be *unable* to compete.

7. The rolling stock leasing market

The Code of Practice

7.1 In 1998 the then Rail Regulator conducted a review of the rolling stock leasing market. He concluded that there were instances in which the ROSCOs could be expected to enjoy significant market power. This applied particularly at the time of franchise re-let. The Government accepted his conclusion that the potential detriments could be remedied by means of a voluntary code of practice. The codes of practice were published by the ROSCOs on the 10th February 2000.

7.2 The codes primarily address conduct. Compliance with the codes will be monitored by the Rail Regulator and, in the event of an infringement, an investigation could be instigated using powers under the Act. This may lead to a decision that there has been an abuse of a dominant position and, therefore, an infringement of the Chapter II prohibition. The codes do not provide an exhaustive list of conduct which is likely to be an abuse, nor is conduct which complies with a code excluded from the application of either prohibition.

7.3 The issues covered by the codes of practice include:

- the lease periods;
- the lease terms;
- early termination provisions;
- vehicle modifications;
- maintenance arrangements (including performance regimes);
- price calculation and residual value assumptions;
- restrictions on the mixing of vehicles within train sets;
- behaviour at the time of re-franchising; and
- confidentiality.

Abuse of a dominant position

The Chapter II prohibition only applies to undertakings having a dominant position on a relevant market and when analysing whether a ROSCO is in a dominant position the Regulator will use the analytical framework discussed in part 4 above. When considering the market definition to be used, the Regulator will consider the options available to individual train operators. This analysis will begin by considering:

- whether an alternative supplier has appropriate rolling stock available at a suitable price in a relevant timeframe; and
- the availability of new rolling stock for a suitable cost in the relevant timeframe.

7.5 Other factors which may tend to a narrow market definition (which will likely mean the ROSCO in question has a higher market share) include:

- the ROSCO possesses the only type(s) of rolling stock suitable for operating on a particular route; or
- the ROSCO possesses part of the only fleet of rolling stock suitable for operation on a particular route and the remainder not owned by that ROSCO is already on lease to other operators and will not become available during the relevant timeframe; or
- the case involves rolling stock which is already on lease to the operator and where that lease does not contain provisions for early termination within the relevant timeframe.

8. European Community reform of the railways

8.1 The European Union has taken steps towards the reform of European railways. The relevant Directives (91/440, 95/18 and 95/19) are reflected in the Railways Regulations 1998 (the "International Regulations"). They relate to the accounting separation of infrastructure management from the provision of transport services; the permitting of access to member states' national networks by railway undertakings for certain international services (i.e. passenger or goods services operated by international groupings of railway undertakings, and combined transport services operated by individual railway undertakings); an appeal process for disputes relating to the allocation of capacity or charges for such international services; and the licensing of railway undertakings operating them. The International Rail Regulator (IRR) is the licensing authority and the appeal body for international access matters under the International Regulations in Great Britain.

8.2 The IRR is a legally separate body from the Rail Regulator and he has no functions under the Competition Act. The International Regulations impose obligations on infrastructure managers to avoid discrimination in charging, capacity allocation and in the terms and conditions of access agreements. Breaches of these obligations may be enforceable by the Rail Regulator by the exercise of functions under the Act.

8.3 International access agreements made pursuant to the International Regulations do not require the approval of either the IRR or the Rail Regulator. In particular, the provisions of sections 17 and 18 of the Railways Act under which the Rail Regulator issues directions do not apply and, accordingly, such international access agreements cannot benefit from the legal requirement exclusion by virtue of being entered into pursuant to a direction (see paragraph 1.7 above). However, to the extent that conduct or provisions of an agreement are determined and required by the IRR when exercising his appeal functions under the International Regulations, the legal requirement exclusion may apply.

9. Compliance

9.1 The Director General has already recommended that compliance programmes should form an integral part of businesses preparation for the new regime. The degree to which companies can demonstrate commitment will be a determinant of the severity of any penalties applied by the competition authorities. This applies equally to all sectors of the railway industry.

9.2 The Rail Regulator will expect companies within the railways sector to implement corporate compliance programmes if they do not already have them. He expects that such programmes will minimise the risk of infringing the prohibitions by systematically ensuring that all relevant employees are sufficiently knowledgeable about the provisions of the law, and that they will put that knowledge to good effect.

9.3 There is no single recipe for what makes a good compliance programme and details are likely to vary from company to company. However, a minimum programme can be expected to comprise at least four elements:

- Support and personal commitment from senior management, both visible and continuous, will be essential to ensure that compliance is treated with the importance it deserves and to ensure acceptance by other employees who will be more receptive to an initiative which is seen to be applied equally to senior managers and employees;
- Appropriate Compliance Policy and Procedures will include a clear policy commitment to comply with the legislation by not engaging in anti-competitive behaviour or condoning such behaviour in other parties. This policy could feed through into personal development performance objectives, contracts and disciplinary arrangements. Procedures could include a framework within which employees can check whether or not a particular contract or deal is in breach of the law. This might involve a nominated expert or compliance officer. An effective mechanism to communicate the policy and procedures supported by a review process is a necessity, part of which is likely to be a manual or handbook provided to all relevant staff.
- Training will form an essential aspect of any compliance programme. It should be designed to ensure that all relevant staff are given proper training on both the law and the company policy and procedures. It will not be sufficient to limit training to the implementation phase. It must be offered on a regular basis to reinforce and update the message. Such training is likely to be an essential element of any induction programme for new staff.
- Evaluation of the effectiveness of the overall compliance programme is the final essential ingredient. This might include informal feedback at an individual level and perhaps as part of individual performance appraisal. At a broader level formal audits, both with and without warning, could be undertaken. A transparent approach to the correction of any revealed infringements would serve as a constant reminder to employees that their business dealings are subject to review and will thereby deter complacency.

The Regulator does not intend to endorse individual compliance procedures. This is because any such endorsement could easily become inappropriate as businesses and markets develop. On the other hand, he will be happy to offer further guidance on an individual basis and may publish further guidelines on compliance within the railways sector in due course.

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