

Public transport ticketing schemes block exemption

Responses to consultation on the text of a guideline
under section 52 of the Competition Act 1998

November 2006

OFT439resp

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1 INTRODUCTION

- 1.1 This report is a summary of the responses to the consultation on the text of the draft competition law guideline *Public transport ticketing schemes block exemption* (OFT439con)(the draft guideline)¹ which was published in May 2006.
- 1.2 The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption Order 2001 (SI 2001 no 319) (the block exemption) came into force on 1 March 2001, with retrospective effect from 1 March 2000. The block exemption allows bus operators to agree public transport ticketing schemes, subject to certain conditions. In 2002, the OFT published its Competition Act 1998 guideline *Public transport ticketing schemes block exemption* (OFT439).
- 1.3 In March 2003, the OFT commenced a review of the block exemption which included consulting all bus operators in Great Britain and representative groups such as the Confederation of Passenger Transport. Based upon the responses to the consultation exercise, as well as the OFT's experience of applying the block exemption over the past five years, we recommended to the Secretary of State for Trade and Industry on 1 November 2005 that the block exemption be varied.
- 1.4 These recommendations were accepted by the Secretary of State on 5 December 2005 and are set out in the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2005 (SI2005 No 3347) (the amendment order). The main changes to note include:
- replacement of the condition requiring revenue distribution for multi-operator travelcard schemes (MTCs) to be on the basis of 'passenger miles, as far as reasonably practicable' with a

¹ This consultation document can be viewed and downloaded from the OFT's website at www.of.gov.uk. Hard copies may be ordered free of charge both online and on 0870 60 60 321.

condition allowing any method provided (a) it does not create an incentive for operators to set their own fares higher than they would have been in the absence of the MTC, and (b) it does not significantly reduce the incentive for each of the operators to compete for passengers, and

- in relation to multi-operator individual tickets (MITs), removal of the requirement for operators to offer both their own single and return tickets.

1.5 The draft guideline, which provides information on the application of the block exemption, has been updated to reflect the amendments to the block exemption as a result of the amendment order and changes to the Competition Act 1998 (the Act) to take account of the Modernisation Regulation.² In the remainder of this document, all references to the block exemption are to the block exemption as amended by the amendment order unless otherwise indicated.

1.6 A consultation period began on 8 May 2006 and ran until 31 July 2006, in accordance with the criteria in the Cabinet Office's Code of Practice on Consultation. Copies of the draft guideline were sent to 206 public transport operators and organisations with an interest in public transport. The OFT received a total of eleven responses. These included comment from four major national bus operators, one metropolitan transport authority, one of the main transport industry trade bodies, the representative body for the six English Passenger Transport Executives, a professional institute for transport planners and policy makers, and a consumer body.

1.7 On the basis of responses to the consultation, we have considered suggestions relating to areas in the draft guideline where we may be able to provide clearer guidance to the industry on the application of the block exemption.

² Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

1.8 We would like to thank all those who contributed to the consultation process.

2 MAIN CHANGES TO THE DRAFT GUIDELINE

2.1 The draft guideline was updated primarily to reflect the amendments to the block exemption and, secondly, to provide some further clarification as to how the OFT will apply the block exemption to public transport ticketing schemes.³ The key changes to the draft guideline therefore included:

- updated guidance on how the OFT will apply Article 11 of the block exemption which relates to the distribution of revenue from an MTC scheme. The draft guideline provides examples of the types of revenue distribution methods that will satisfy Article 11.
- amended guidance to reflect the removal of the requirement, in relation to MITs, for operators to offer both their own single and return tickets.
- further guidance on how operators can set the price of MTCs.
- further guidance on the distribution of revenue from MITs.

³ A definition of public transport ticketing schemes is provided at Article 4(2) of the block exemption.

3 SUMMARY OF RESPONSES TO THE CONSULTATION

Overview of responses

- 3.1 The main changes to the draft guideline were generally welcomed by the respondents. A number of helpful suggestions were made by respondents for improving the clarity of the text contained in the draft guideline.

Revenue distribution for MTCs

- 3.2 Respondents appeared to be content with the new guidance on the application of Article 11 of the block exemption which relates to how operators can distribute revenue arising from MTC schemes. One respondent particularly welcomed the paragraphs at 4.27 to 4.29 of the draft guideline which set out the very limited circumstances where it might be acceptable to use “revenue forgone” as a revenue redistribution method, and the additional explanation of other more generally acceptable forms of redistribution for MTCs.

The removal of the requirement, in relation to MITs, for operators to offer both their own single and return tickets

- 3.3 The draft guideline reflects the removal of the requirement for operators to offer their own single and return tickets when they offer a MIT. None of the respondents to the consultation offered any comment on this issue.

Fixing the price of MTCs

- 3.4 The draft guideline provides guidance on how operators may set the price of an MTC. Overall, the respondents to the consultation did not raise any objections to this new guidance. One respondent particularly welcomed the warning in paragraph 4.23 that the direct price linking of an MTC to an individual operator’s services is not acceptable. The draft guideline has been further amended to provide additional clarification on how operators may set the price of an MTC.

Revenue distribution for MITs

3.5 The respondents acknowledged the usefulness of the new guidance given at paragraphs 4.41 and 4.42 of the draft guideline on schemes where revenue cannot fairly lie where it falls. This can happen where an imbalance arises in the revenue being received by operators participating in a MIT scheme – where, for example, a daytime operator is paid for tickets which are then used for return journeys with an operator of evening services, who may be receiving less revenue. The draft guideline explains that schemes which do not use 'revenue lies where it falls' as a method for distributing the revenue arising from MIT schemes will not meet the condition of Article 15 and cannot therefore benefit from the block exemption. However, the OFT considers that such schemes can satisfy the conditions in section 9(1) of the Act, provided that the revenue distribution method is limited to what is necessary to enable the MIT scheme to work, and does not result in operators agreeing the price of the MIT.

Schemes which do not fall within the block exemption

3.6 It was pointed out that the ending of the procedure whereby operators could apply for an individual exemption had necessitated changes to the description of how to address schemes which may not fall within the scope of the block exemption. One respondent suggested that, in relation to the reference to 'appreciable effect'⁴ at paragraph 3.17 of the draft guideline, some guidance as to the thresholds which might be applied could usefully be added. Having considered this point further, the OFT takes the view that sufficient guidance is already provided in the OFT guideline '*Agreements and concerted practices*' (OFT 401).

3.7 One respondent suggested that the OFT should include examples of where the block exemption does not apply. The guideline cannot provide an exhaustive set of examples covering circumstances both where the

⁴ The concept of appreciability is not defined in UK competition law but is imported from EC competition law.

block exemption may and may not apply, nor is that the purpose of the guideline. The purpose of the guideline is to provide some general guidance on how the block exemption should be applied; it should not be regarded as a substitute for bus operators seeking their own independent legal advice. The OFT took the view that it was not appropriate to include additional examples in the draft guideline. The examples provided appear to be sufficient, based on the other responses to the consultation and our own view, to enable bus operators to understand the general principles underpinning the application of the block exemption.

EC Competition Law, the Enterprise Act 2002, the Transport Act 2000/Transport (Scotland) Act 2001, and the competition test

- 3.8 It was noted by one respondent that while the paragraphs relating to EC Competition Law, the Enterprise Act 2002 and the Transport Acts in section 5 of the draft guideline were useful, they could be interpreted by some prospective participants in ticketing schemes as additional barriers or risks. Therefore, one respondent suggested that a note to the effect that these paragraphs are only included for the sake of completeness should be inserted into the draft guideline. The reason the OFT considers that the legislation set out at Section 5 of the draft guideline is required is because it may, in some limited circumstances, be applicable to an operator who participates in a ticketing scheme. Therefore, it would not be correct to say that the reference to this legislation is provided for completeness only. However, an introduction to this section has been added.

Schemes entered into in order to comply with legal requirements

- 3.9 One respondent suggested that the draft guideline should include a clarification that there are circumstances where inter-operator ticketing schemes can benefit from the exclusion in paragraph 5 of Schedule 3 to the Competition Act 1998, which relates to agreements entered into pursuant to legal requirements. The draft guideline has been amended to reflect this point.

4 NEXT STEPS

- 4.1 The OFT will publish a final version of the Public Transport Ticketing Schemes block exemption guideline. It is envisaged that the OFT will review the operation of the block exemption again before its expiry in 2011.

ANNEXE(S)

ANNEXE A

Consultation Respondents

Arriva plc

Chartered Institute of Logistics and Transport

Confederation of Passenger Transport

FirstGroup plc

Go-Ahead Group

Hertfordshire County Council Passenger Transport Unit

London TravelWatch

PTEG (representing the six English Passenger Transport Executives)

Transport for London

Stagecoach UK Bus

Strathclyde Passenger Transport