

Public Transport Ticketing Schemes Block Exemption Review

**Proposal to recommend that the duration of the
Block Exemption is extended**

July 2010

OFT1255

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Scope of this consultation

Topic of this consultation	This consultation document seeks views on whether the OFT should make a recommendation to the Secretary of State for Business, Innovation and Skills (the Secretary of State) to extend the duration of the Public Transport Ticketing Schemes Block Exemption (the PTTS Block Exemption). It has been published by the OFT pursuant to sections 8(1) and 8(3) of the Competition Act 1998.
Scope of this consultation	This consultation is limited to the OFT's ability to make recommendations to the Secretary of State on the use of his powers to make or vary block exemptions under the Competition Act 1998. It does not extend to the use of any enforcement powers which the OFT and other regulators may exercise in competition law cases.
Geographical scope	The geographical dimension of this consultation is the UK.
Impact assessment	Not applicable.

Basic information

To	This consultation is aimed at businesses, trade associations, local authorities, individuals or any other parties which may have an interest in passenger transport issues.
Duration	The consultation will run from 28 July to 20 October 2010.

<p>Enquiries</p>	<p>If you have any queries regarding the content of the consultation, please contact:</p> <p>Marc Braithwaite or Carlos Martínez Rico</p> <p>PTTS BE Review</p> <p>Office of Fair Trading</p> <p>Fleetbank House</p> <p>2-6 Salisbury Square</p> <p>London EC4Y 8JX</p> <p>Tel: 020 7211 8732 / 5839</p> <p>Fax: 020 7211 8757</p> <p>Email: transport.ticketing@oft.gsi.gov.uk</p>
<p>How to respond</p>	<p>We would welcome your comments on the proposals set out in this document. Please respond to as many questions as you are able, and provide any supporting evidence for views expressed. We encourage you to provide evidence in writing (by email, or alternatively by letter or fax, as indicated above). When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.</p>
<p>Additional ways to become involved</p>	<p>If you wish to meet with the OFT team involved, please contact Marc Braithwaite or Carlos Martínez Rico (details given above).</p>

<p>After the consultation</p>	<p>After the consultation the OFT will publish a summary of responses received. After considering the consultation responses, we will decide whether to recommend that the Secretary of State should vary the PTTS Block Exemption (including by extending it) or allow it to expire. A summary of responses and our recommendation to the Secretary of State will be available on the OFT's website at www.offt.gov.uk. Should the Secretary of State decide to make changes to the PTTS Block Exemption, we will revise the OFT ticketing schemes guidance (<i>Public transport ticketing schemes block exemption</i> (OFT 439, November 2006)) and consult on a revised draft as necessary.</p>
<p>Compliance with the <i>Code of Practice on Consultation</i></p>	<p>This consultation complies with the Better Regulation Executive's <i>Code of Practice on Consultation</i>. A list of the key criteria, along with a link to the full document, can be found at Annexe D.</p>

Background

<p>Getting to this stage</p>	<p>The PTTS Block Exemption expires on 28 February 2011. In March 2010, the OFT commenced a review of the PTTS Block Exemption. Steps taken to date include speaking with a number of key representative organisations connected with the transport industry.</p>
<p>Previous engagement</p>	<p>The OFT reviewed the PTTS Block Exemption between 2003 and 2005 and recommended to the then Secretary of State for Trade and Industry that changes be made to it, including the extension of its duration until the end of February 2011 and changes to the substance of the PTTS Block Exemption. The OFT has also published guidance explaining the application of the PTTS Block Exemption (<i>Public transport ticketing schemes block exemption</i> (OFT 439, November 2006)).</p>

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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A copy of the key criteria from the Better Regulation Executive's *Code of Practice on Consultation* can be found in Annexe D.

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

CONTENTS

<i>Chapter/Annexe</i>	<i>Page</i>
1 Executive summary	1
2 The legal framework	6
3 The current PTTS block exemption	10
4 Assessing whether the PTTS block exemption remains appropriate	22
5 Proposed changes to the PTTS block exemption	38
6 Conclusions	46
Annexe A - Summary of questions	48
Annexe B - Block exemption currently in force	51
Annexe C - List of consultees	62
Annexe D - Consultation criteria	70

1 EXECUTIVE SUMMARY

Background

- 1.1 Section 2 of the Competition Act 1998 (the Act) prohibits agreements 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, unless they are excluded or meet the conditions for exemption contained in section 9(1) of the Act. The Act also provides for the adoption of block exemptions, exempting a category of agreements from the prohibition in section 2.
- 1.2 In 2001, a block exemption was adopted for public transport ticketing schemes that met certain conditions (the PTTS Block Exemption). The PTTS Block Exemption is set out in the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001 No 319), as amended by the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2005 (SI 2005 No 3347) (the Amendment Order). The current version of the PTTS Block Exemption, which came into force in 2006, is due to expire on 28 February 2011.
- 1.3 Between March and July 2010 the Office of Fair Trading (the OFT) carried out a preliminary review of the PTTS Block Exemption and its operation. This review has included meetings with a number of key representative organisations connected to the transport industry,¹ as well as revisiting the review carried out by the OFT between 2003 and 2005.
- 1.4 This consultation document has been published by the OFT pursuant to sections 8(1) and 8(3) of the Act. It seeks views on the OFT's proposed

¹ These include: the Passenger Transport Executive Group (pteg), the Association of Train Operating Companies (ATOC), the Confederation of Passenger Transport UK (CPT), Transport for London (TfL) and Passenger Focus. We have also met with various Government Departments and agencies, including the Department of Transport (DfT), the Department for Business, Innovation and Skills (BIS) and the Competition Commission.

recommendation to the Secretary of State for Business, Innovation and Skills (the Secretary of State) to vary the PTTS Block Exemption by extending its duration for an additional period of five years until 29 February 2016.

Criteria for assessing whether a block exemption is appropriate

1.5 For the purposes of this review, the OFT considers that the following criteria should be met for a sector-specific block exemption to be appropriate:

- there is a clearly identifiable category of beneficial agreements that appear to meet the conditions for an exemption under section 9(1) of the Act
- the category of agreements are 'special' in that, in comparison with other agreements, they require an enhanced need for cooperation for them to be concluded and implemented
- there is a significant and real risk that the category of agreements will not be entered into in the absence of a sector-specific block exemption, and
- alternative, reasonable and practicable arrangements cannot be concluded which would create even greater benefits to consumers or which would otherwise be more appropriate.

Application to the PTTS Block Exemption

1.6 Public transport ticketing schemes involve agreements that may have a harmful impact on competition for the purposes of section 2 of the Act, for example where three or more transport operators agree the price at which a multi-operator travelcard should be sold to consumers and the consequent revenue-sharing arrangements. However, such agreements can also result in benefits which outweigh their negative impact on competition. For this reason, a block exemption was adopted in 2001 as the conditions for exemption in section 9(1) of the Act were met.

- 1.7 In this review, the OFT has considered whether the criteria for a sector-specific block exemption listed in paragraph 1.5 continue to be met in relation to the PTTS Block Exemption.

Ticketing schemes as an identifiable category of beneficial agreements meeting section 9(1) conditions

- 1.8 It appears to the OFT that there continue to be clearly identifiable categories of public transport ticketing schemes that deliver efficiencies and benefits to consumers, without eliminating competition on public transport or allowing restrictions that are not indispensable to obtaining the benefits from the agreement. Consumer benefits are mainly in the form of improvements in the quality and flexibility of public transport ticketing services, for example allowing a consumer to use one ticket for a journey involving travel on more than one operator's services.

Enhanced need for cooperation

- 1.9 Public transport ticketing schemes appear to the OFT to require an enhanced level of cooperation in comparison with other sectors of the economy. Integrated ticketing schemes would simply not be possible without agreements between transport operators. Customers would need to buy separate tickets from different transport operators where their journey involved travelling on routes offered by different transport operators.

Risk that ticketing schemes will not be entered without the PTTS Block Exemption

- 1.10 The OFT considers that there is likely to be a significant and real risk that, without the PTTS Block Exemption, some operators may be reluctant to join public transport ticketing schemes. It appears that the benefits to individual transport operators from developing and operating joint ticketing schemes, some of which are likely to involve clear restrictions of competition, may be relatively limited. Consequently, individual operators are unlikely to have an incentive to join such schemes in the absence of a block exemption, due to concerns that the

agreement could risk infringing competition law with the associated risk of exposure to enforcement action under the Act, including financial penalties.

Alternatives not available

- 1.11 The OFT's emerging view is that there are no alternative, reasonable and practicable arrangements to facilitate joint ticketing schemes that could deliver even greater benefit to passengers, or which would otherwise be more appropriate.

Proposed Recommendation to extend the PTTS Block Exemption

- 1.12 Based on this preliminary review of the PTTS Block Exemption, our proposal is to recommend that the Secretary of State extend the PTTS Block Exemption for an additional period of five years.
- 1.13 We have considered whether it may be appropriate to recommend that the Secretary of State make changes to the substance of the PTTS Block Exemption to cater for smart ticketing schemes such as pay as you go schemes (PAYG). We are currently minded not to recommend such changes to the PTTS Block Exemption in this review, as there does not yet appear to be sufficient evidence that smart ticketing has developed to a stage where it gives rise to a new category of ticketing schemes (that is, a category of multiple agreements of a similar type or structure and having the same objective) meeting the conditions of section 9(1).
- 1.14 When undertaking our preliminary review of the PTTS Block Exemption, we have also taken account of the fact that the Competition Commission (the CC) is currently undertaking an inquiry into the local bus services market. Whilst the aim and scope of the CC inquiry is different from our review of the PTTS Block Exemption, it is possible that matters relating to ticketing schemes covered by the PTTS Block Exemption may be relevant to the CC's inquiry.
- 1.15 Under sections 8(1) and 8(3) of the Act, we have the ability to make a recommendation to the Secretary of State to vary the PTTS Block

Exemption at any time before its expiry. If strong evidence emerged that developments in smart ticketing required changes to an extended PTTS Block Exemption before it expired, we would consider making a recommendation to the Secretary of State. We would also consider making a recommendation to the Secretary of State if it seemed necessary and appropriate to do so as a result of issues raised by the CC's bus market inquiry.

Next Steps

- 1.16 We will consider the responses to this consultation document before deciding whether to recommend that the Secretary of State varies the PTTS Block Exemption by extending the duration and/or by making any other amendments suggested by consultees. We aim to make a decision on this by the end of this year.
- 1.17 Should the Secretary of State decide to make changes to the PTTS Block Exemption, we will revise our guidance on the application of the PTTS Block Exemption (the Ticketing Schemes Guidance).²

² See the OFT's publication *Public transport ticketing schemes block exemption* (OFT 439, November 2006).

2 THE LEGAL FRAMEWORK

The Competition Act 1998

2.1 The Act prohibits:

- agreements between undertakings,³ decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (or a part thereof) and which may affect trade within the United Kingdom (the Chapter I prohibition), and
- conduct by one or more undertakings which amounts to an abuse of a dominant position in a market and which may affect trade within the United Kingdom (the Chapter II prohibition).

2.2 The OFT has additional powers to apply and enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (the TFEU) alongside the European Commission. These two provisions are similar to the Chapter I prohibition and the Chapter II prohibition under the Act. The main difference between the UK and the EU provisions is their geographic scope. Articles 101 and 102 of the TFEU only apply to agreements and conduct which may affect trade between Member States. The Chapter I and Chapter II prohibitions apply only to agreements and conduct which do not have a cross-border element and which may affect trade within the United Kingdom. The case law of the European court has interpreted the phrase 'may affect trade between Member States' broadly. However, to the extent that ticketing scheme arrangements affect trade within the United Kingdom, and do not affect

³ An undertaking means any natural or legal person carrying on commercial or economic activities relating to goods or services, irrespective of legal status. For example, a sole trader, partnership, company or a group of companies can each be an undertaking. Further guidance on the meaning of 'undertaking' can be found in the OFT publication *Agreements and Concerted Practices* (OFT 401, December 2004).

trade between EU Member States, they will be considered under UK competition law only.

The appreciable effect on competition test

2.3 The European Court has held that the prohibition on anti-competitive agreements is not applicable where the impact of the agreement on competition is not appreciable. As a matter of practice the OFT is likely to consider that an agreement will not fall within the Chapter I prohibition when it is covered by the European Commission's *Notice on Agreements of Minor Importance (de minimis)*.⁴ This Notice states that an agreement between competing undertakings is unlikely to have an appreciable effect on competition if the combined market share of the competing undertakings does not exceed 10 per cent.⁵ The fact that the parties' market shares exceed the thresholds set out in this notice does not automatically mean that the effect of an agreement on competition is appreciable. Further details can be found in the OFT competition law guidance *Agreements and concerted practices*.⁶

The legal exemption regime

2.4 A legal exemption regime operates under the Act. This means that an agreement that falls within the Chapter I prohibition but which satisfies all the conditions set out in section 9(1) of the Act is not prohibited, with no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment that the conditions in section 9(1) are satisfied and for as long as that remains the case.

⁴ OJ [2001] C368/13

⁵ The threshold for non-competing undertakings is 15 per cent. This approach does not apply to agreements containing hardcore restrictions including price-fixing and market-sharing – see paragraph 11 of the Notice.

⁶ OFT 401, December 2004.

- 2.5 Section 9(1) of the Act sets out four cumulative conditions which must all be met in order for an agreement which falls within the Chapter I prohibition to be exempt from the prohibition:
- (i) **efficiency gains** – the agreement must contribute to improving production or distribution or promote technical or economic progress
 - (ii) **fair share for consumers** – consumers must receive a fair share of the benefits generated by the restrictive agreement
 - (iii) **indispensability of the restrictions** – the agreement must not impose restrictions which are not indispensable to achieving the benefits, and
 - (iv) **no elimination of competition** – the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 2.6 Section 9(2) of the Act provides that the burden of proving that the conditions are satisfied rests on the undertaking(s) claiming the benefit of section 9(1).

Block exemptions

- 2.7 Under the Act the Secretary of State may, acting on the OFT's recommendation, make domestic block exemptions for particular categories of agreement which the OFT considers are likely to satisfy the conditions in section 9(1). An agreement which falls within a category specified in a block exemption will not be prohibited under the Chapter I prohibition and is enforceable by the parties to the agreement.
- 2.8 A block exemption may include conditions or obligations. Breach of a condition imposed in a block exemption has the immediate effect of cancelling the exemption in relation to a particular agreement. Failure to comply with an obligation specified in a block exemption allows the OFT to cancel the block exemption in relation to a particular agreement.

- 2.9 A domestic block exemption relates only to the Chapter I prohibition. There is no provision for exemption from the Chapter II prohibition. A domestic block exemption does not exempt agreements affecting trade between Member States for the purposes of Article 101. An agreement affecting trade between Member States which falls within Article 101(1) and is block exempt under Section 9(1) will be invalid and unenforceable if it does not benefit also from an EU block exemption or does not otherwise satisfy the conditions in Article 101(3) (this is the equivalent of section 9(1) of the Act for agreements that may affect trade within Member States).
- 2.10 Section 8(4) of the Act requires the OFT to publish details of any proposed variations to a block exemption it proposes to recommend to the Secretary of State and consider any representations about its proposals before it makes a recommendation to the Secretary of State under Section 8(3) of the Act.

3 THE CURRENT PTTS BLOCK EXEMPTION

- 3.1 Agreements between public transport operators are subject to the terms of the Act in the same way as agreements in other sectors of the economy in the United Kingdom. This chapter describes the public transport ticketing schemes that may be covered by the PTTS Block Exemption and discusses why they are likely to have an effect on competition but may nonetheless satisfy the section 9(1) conditions.

Background

- 3.2 For the purposes of the PTTS Block Exemption and this document, public transport ticketing schemes (or ticketing schemes) are broadly speaking written agreements between operators allowing passengers to purchase tickets that can be used on the services of all participating operators. Without ticketing schemes passengers would only be able to buy from each operator individual tickets valid for use on that operator's services. Article 4(2) of the PTTS Block Exemption gives a precise definition of public transport ticketing schemes as follows:

'For the purpose of this Order a public transport ticketing scheme is one or more of the following:

(a) a written agreement between operators to the extent that it provides for members of the public to purchase, in a single transaction, a multi-operator travelcard

(b) a written agreement between operators to the extent that it provides for members of the public to purchase, in a single transaction, a through ticket

(c) a written agreement between operators to the extent that it provides for members of the public to purchase, in a single transaction, a multi-operator individual ticket

(d) a written agreement between operators to the extent that it provides for members of the public to purchase, in a single transaction, a short distance add-on

(e) a written agreement between one or more operators and one or more long distance operators to the extent that it provides for members of the public to purchase, in a single transaction, a long distance add-on'.

3.3 As noted in the OFT's guidance on public ticketing schemes,⁷ the OFT considers that certain public transport ticketing schemes are likely to prevent, restrict or distort competition to an appreciable extent and infringe the Chapter I prohibition unless they satisfy the conditions in section 9(1). Examples of such schemes are those which:

- fix fares for tickets sold under the public transport ticketing schemes
- carve-up routes between participants
- raise barriers to entry and keep out new competitors, for example through exclusivity provisions, thus allowing incumbents to raise prices
- eliminate single and return tickets,⁸ for which fares are set at the discretion of individual operators in order to compete on price, or
- facilitate price-fixing through the exchange of commercially sensitive information between operators.

3.4 However, the OFT notes that certain types of public transport ticketing schemes which may involve restrictions of competition generate benefits for consumers. These benefits include improvements in the efficient use of resources, thus promoting economic progress. Where the benefits accrue to consumers through, for example, cost or time savings, increased flexibility and convenience of travel – and provided that the restrictive provisions are indispensable and do not go so far as to make

⁷ *Public transport ticketing schemes block exemption* (OFT 439, November 2006).

⁸ These tickets provide the 'building blocks' for competition.

possible the elimination of competition – such public transport ticketing schemes are likely to meet the conditions for exemption in section 9(1).

- 3.5 The OFT considers that the public transport ticketing schemes set out below involve agreements on integrated ticketing that may infringe section 2 of the Act. For example, any type of integrated ticketing agreements involving actual or potential competitors may – compared with a situation where individual operators offer tickets for their own services only – restrict competition by potentially lowering incentives for such operators to compete with the same intensity for passengers to use their individual service, whether in terms of price or quality of service. In this context, we note that the types of ticket covered by the PTTS Block Exemption potentially involve agreements between competitors. Multi-operator individual tickets essentially involve agreements in relation to substitute tickets. The other types of ticket covered by the PTTS Block Exemption may involve agreements between operators who, while they do not compete over a substantial part of relevant routes, may nevertheless compete over parts of some routes.
- 3.6 In addition, different types of ticketing arrangements covered by the PTTS Block Exemption may involve other specific restrictions. For example, multi-operator travelcards involve three or more transport operators agreeing the price at which the travelcard should be sold to passengers and the consequent revenue-sharing arrangements. Multi-operator individual tickets involve integrated ticketing agreements for substitute tickets offered by actual competitors. Through tickets may involve the exchange of information on timetables (which may in some circumstances be considered commercially sensitive information) and may also involve a situation where operators do not set their price with complete independence as they take account of the posted price set by other operators involved in the through ticket agreement. Finally, short and long distance add-ons may involve fixing a common price for multi-operator travelcards.
- 3.7 However, for the reasons set out below, the OFT advised the Secretary of State in 2001 that a block exemption should be made in respect of certain public transport ticketing schemes on the grounds that the

conditions for exemption in section 9(1) of the Act were met and in 2005 advised that the PTTS Block Exemption should be extended.

Categories of agreements covered by the PTTS Block Exemption

3.8 Different types of public transport ticketing schemes have different effects on competition and require different arrangements to make them work. Consequently, the PTTS Block Exemption identifies several categories of public transport ticketing schemes⁹ and provides that these different categories of schemes must satisfy different conditions in order to benefit from the PTTS Block Exemption. The PTTS Block Exemption also contains an obligation for any party to a ticketing scheme to provide the OFT with any information it may request, and the power for the OFT to cancel the PTTS Block Exemption in respect of a particular agreement if it considers that the agreement is incompatible with the conditions in section 9(1) of the Act.

3.9 Public transport ticketing schemes covered by the PTTS Block Exemption involve the following ticket types:

- **multi-operator travelcards (MTCs)** which entitle ticket holders to make multiple journeys on a number of different operators' services across a number of different routes, provided those routes and services are not substantially the same¹⁰ – bus zonal tickets and travelcards, for example, are likely to be types of MTC

⁹ A similar approach to defining ticket types has been taken in section 135 of the Transport Act 2000 and section 28 of the Transport (Scotland) Act 2001.

¹⁰ Neither the PTTS Block Exemption nor the OFT ticketing schemes guidance (*Public transport ticketing schemes block exemption* (OFT 439, November 2006)) gives a definitive formula for assessing whether routes are 'substantially the same' for the purposes of MTCs or compete over a 'substantial part of the route' for the purposes of TTs and short-distance add-ons. The guidance does, however, explain that two routes are likely to be 'substantially the same', or services in competition with each other over a 'substantial part of the route', when common stops form a substantial part of a relevant route, for example where they account for all or most of the stops on the route itself or account for all or most of the stops in a particular fare zone.

- **through tickets (TTs)** which entitle ticket holders to make a particular journey using two or more services run by different operators where those operators do not compete with one another over a substantial part of the route covered by the ticket in question
- **multi-operator individual tickets (MITs)** where two or more different operators provide services which can be used to make a particular journey and ticket holders can choose whichever service they like to make part or all of that journey
- **short distance add-ons** which allow passengers to purchase an MTC as an extension to a ticket on an individual **local** route, and
- **long distance add-ons** which allow passengers to purchase a single-operator local service ticket, MTC or TT as an extension to a ticket on an individual **long distance** route.

3.10 The Act provides that a block exemption may include conditions, breach of which would have the effect of cancelling the exemption in respect of the particular agreement. There are a number of conditions in the PTTS Block Exemption. Some apply to all types of scheme. Others apply only to specific types of ticketing schemes. These are summarised in the remainder of this chapter.

Conditions that apply to all public transport ticketing schemes

3.11 There are a number of conditions in the PTTS Block Exemption which apply to all types of scheme. These require that, in order to benefit from the PTTS Block Exemption, schemes shall not:

- Have the object or effect of preventing any operator (existing or potential) from taking part in the scheme, without 'objective, transparent and non-discriminatory' reasons (Article 6). This condition is to ensure that schemes do not exclude operators from the market, or form barriers that restrict the ability of new operators to enter the market.

- Limit the variety or number of routes, or the price or availability of any single-operator tickets offered by individual operators (Article 7). This condition is to preserve the competition existing between operators on the basic 'building blocks' of single and return tickets and to preserve the freedom of operators to provide services that meet passengers' needs.
- Limit the frequency or timing of any public transport services operated by individual operators, except where doing so is indispensable to providing effective onward travel connections for passengers (Article 8). This condition is to preserve the freedom of operators to provide services that meet passengers' needs.
- Facilitate an exchange of information between the parties except where the exchange of information is indispensable to the effective operation of the scheme, and where the provision requiring the exchange of information is 'objective, transparent and non-discriminatory' (Article 9). This condition is to prevent exchanges of commercially confidential information which may dampen the competitive process and may facilitate collusion.

Conditions that apply to multi-operator travelcard schemes

3.12 An MTC is a ticket valid:

- for three or more journeys (including unlimited travel for a particular period of time)
- on any of three or more specified services
- on three or more routes
- provided that those routes and services are not 'substantially' the same, and
- provided that passenger usage and revenue received from the ticket demonstrate that it is not a TT or a MIT.

- 3.13 In addition to the conditions which apply to all schemes, Article 11 provides that the participating operators may distribute revenues from an MTC scheme using any method, provided it does not:
- result in an incentive for operators to set their own fares higher than they would have been set in the absence of the MTC, or
 - significantly reduce the incentive for each of the operators to compete for passengers.
- 3.14 Parties to an MTC can, in principle, agree the price at which they sell that MTC, both to passengers and to other operators on a wholesale basis as an add-on. However, the benefit of the PTTS Block Exemption may be withdrawn in respect of a particular agreement if it is not compatible with the section 9(1) conditions. As explained in the ticketing schemes guidance,¹¹ this may be the case if the agreed MTC price is linked to the fares of the participating operators (especially if it is linked to the fares of only one or a group of the participating operators). For example, it is unlikely that the section 9(1) conditions will be satisfied if the MTC agreement provides that the MTC price shall be at a percentage premium above the price of the travelcard issued by one or a group of the participating operators.
- 3.15 If operators are able to peg the MTC price to their own prices it would make it easier for that group of operators to raise the price of their own travelcard(s) or other fares. Pegging the price of the MTC to the prices of individual operators could make the MTC unattractive to passengers, thereby weakening the ability of rival operators to compete through participation in the MTC scheme.

Conditions that apply to through ticket schemes

- 3.16 A TT is a ticket valid:

¹¹ See *Public transport ticketing schemes block exemption* (OFT 439, November 2006), at paragraphs 4.22 to 4.24.

- on more than one operator's services
- for completion of a particular journey (whether single or return) on two or more services, and
- provided that the journey is made on 'complementary services' (meaning services where the operators do not compete with each other over a 'substantial part of the route' covered by the ticket in question).

3.17 In addition to the conditions which apply to all schemes, the following additional conditions apply to TTs:

- Article 13(1) prohibits price fixing for TTs. While our current view is that it appears still to be the case that an MTC cannot operate without agreed common prices, it is not indispensable for operators to agree the prices of TTs. The risks of anti-competitive collusion between parties to TT schemes will also be reduced if communication between parties to the agreement is kept to the minimum necessary. Therefore, in order to retain the benefits of the PTTS Block Exemption, operators must not agree the price of a TT, and
- Article 13(2)(a) allows each party in a TT scheme to set the 'posted' prices that it can charge another operator for accepting a ticket the other participant has issued. The 'posted' price is the reimbursement that an operator independently decides it requires for any passenger that it carries who uses a ticket purchased from another operator. It is important to note that the condition is satisfied only if the relevant operators do not charge **discriminatory** posted prices. This means that an operator must have a single posted price for carrying passengers between any two points which it charges **any** other operator who has sold a TT valid for travel between those two points.

Conditions that apply to multi-operator individual ticket schemes

3.18 A MIT is a ticket:

- which is valid on more than one operator's services
- for the completion of a particular journey (single or return) on whichever service the passenger chooses, involving a journey which could be made on services provided by any of two or more operators where those operators' services are in competition with each other.

3.19 In addition to the conditions which apply to all schemes (set out in paragraph 3.11 above), the following additional conditions apply to MITs:

- Article 13(1) prohibits price fixing for MITs. As with TTs, it is generally not indispensable for operators to agree the prices of MITs and the risks of anti-competitive collusion between parties to MIT schemes will also be reduced if communication between parties to the agreement is kept to the minimum necessary. In order to retain the benefits of the PTTs Block Exemption, operators must not, therefore, agree the price of a MIT
- Article 15 requires that the revenue must 'lie where it falls' for schemes under which MITs are issued – in other words, the operator who collects the money keeps it, and, over time, the revenues should balance themselves out.

Conditions that apply to short and long distance add-on ticket schemes

3.20 A short distance add-on is a ticket where an MTC (for example, a bus zonal ticket) is provided as an add-on to another **local** public transport service (for example, a local train journey), providing onward travel connections for passengers on complementary services.¹² Short distance add-ons stem from agreements which enable an operator who is supplying a **local** public transport service between two towns to offer passengers an MTC as an 'add-on' to a single or return ticket for travel

¹² See paragraph 3.13 above for the definition of complementary services.

between those two towns. This 'add-on' would be for travel within the destination town, for example.

- 3.21 A long distance add-on is a ticket under which a long distance operator offers a single-operator ticket, an MTC or a TT as an add-on, for example, to a single or return ticket for travel on a **long distance** service between two cities (where every passenger on that service is set down only after 15 miles or more – that is, **not** a local service). For services where passengers are set down more frequently than every 15 miles, the ticket will be a short distance add-on or a TT.
- 3.22 In addition to the conditions which apply to all schemes, the following additional conditions apply to add-ons:
- Article 13(1) prohibits price-fixing for, among other things, short and long distance add-on tickets. As for TTs and MITs, it is not considered 'indispensable' for operators to agree the prices of add-ons, and the risks of anti-competitive collusion between parties to add-on schemes will also be reduced if communication between parties to the agreement is kept to the minimum necessary. In order to retain the benefits of the PTTS Block Exemption, operators must not, therefore, agree the total price of an add-on.
 - Article 13(2)(a), however, allows parties in an add-on scheme to set the 'posted' prices that they can charge one another for accepting a ticket issued by another participant. Article 13(2)(b) allows operators in a town to fix the price of an MTC which may be purchased as a long or short distance add-on provided that they do this in accordance with the conditions explained above.

Obligation to provide information to the OFT

- 3.23 Article 17 requires any person (including an undertaking) to provide the OFT with any information it may request concerning a public transport ticketing scheme to which that person is a party. This is to allow the monitoring of schemes and to require operators and others to provide information in the event that a complaint is made about the scheme. If

the request is not complied with, the OFT may cancel the PTTS Block Exemption for any public transport ticketing scheme to which the request relates.¹³

Withdrawal of the PTTS Block Exemption

3.24 Under Article 19, the OFT may cancel the PTTS Block Exemption in respect of a particular agreement if it considers that the agreement is not compatible with the conditions in section 9(1) of the Act. This might happen where, for example, the introduction of a scheme resulted in an unreasonable increase in fares by any or all of the operators who were party to the agreement. In this example, the agreement would not confer a fair share of the benefits on consumers, and so would not satisfy the conditions of section 9(1).

Agreements that do not benefit from the PTTS Block Exemption

3.25 Agreements which do not benefit from the PTTS Block Exemption are subject to the normal application of the Act (and where there is an effect on trade between Member States, they are also subject to Articles 101 and 102 of the TFEU). Such agreements are not, however, necessarily prohibited by the Chapter I prohibition. Agreements may fall within the Chapter I prohibition only where they have an appreciable effect on competition within the United Kingdom.¹⁴ In addition, agreements which do not benefit from the PTTS Block Exemption are not prohibited by the Chapter I prohibition if they are otherwise exempted or excluded (see the OFT Competition law guidance *Agreements and concerted practices*.¹⁵) Thus, as stated above, if an agreement does not fall within the PTTS Block Exemption but the conditions in section 9(1) of the Act are met,

¹³ Article 18.

¹⁴ In accordance with section 60 of the Act, the OFT will consider any public transport ticketing scheme which does not fall within the terms of the block exemption in accordance with relevant European provisions.

¹⁵ OFT 401, December 2004.

then the agreement will not be prohibited. No prior decision to that effect is required.

4 ASSESSING WHETHER THE PTTS BLOCK EXEMPTION REMAINS APPROPRIATE

- 4.1 This chapter considers whether it remains appropriate to have a block exemption for public transport ticketing schemes. In order to recommend that the Secretary of State make a new block exemption or cancel or extend the duration of an existing one, the OFT must consider that the category of agreements concerned are likely to satisfy the conditions in section 9(1) of the Act. Providing these conditions are met, the OFT has discretion as to whether or not to recommend that a block exemption is made or extended.
- 4.2 When exercising its discretion to recommend an extension of the PTTS Block Exemption, the OFT will take into account the applicable legal framework, market conditions and the extent to which a block exemption will contribute to more effective application of competition law. It is important to note that a legal exception regime operates under the Act. As explained above, this means that an agreement that falls within the Chapter I prohibition but which satisfies all the conditions set out in section 9(1) of the Act shall not be prohibited, with no prior decision (or indeed a block exemption) to that effect being required.
- 4.3 However, in certain circumstances a block exemption may be justified. Where a restrictive agreement falls within the terms of the block exemption, the parties to the agreement are relieved of the burden of showing that their agreement satisfies the conditions in section 9(1) of the Act. They have only to prove that the restrictive agreement falls within the block exemption. This also enhances legal certainty for anyone who is party to an agreement falling within the scope of the block exemption.
- 4.4 For the purposes of this review, we consider that the Public Transport Ticketing Schemes PTTS Block Exemption should be extended if it meets

four cumulative criteria,¹⁶ which are broadly consistent with the approach taken in recent EU block exemption reviews in the insurance and motor vehicle sectors.¹⁷

- there is a clearly identifiable category of beneficial agreements that appear to meet the conditions for an exemption under section 9(1) of the Act
- the agreements in this category are 'special' in that, in comparison with other agreements, they require an enhanced need for cooperation to be concluded and implemented
- there is a significant and real risk that this category of agreements will not be entered into in the absence of a sector-specific block exemption, and
- alternative, reasonable and practicable arrangements cannot be concluded which would create even greater benefits to consumers or which would otherwise be more appropriate.

4.5 Our emerging view, based on our preliminary review carried out between March and July 2010, and having regard to the OFT's previous review of the PTTS Block Exemption in 2005, is that the PTTS Block Exemption continues to meet these four criteria. We therefore propose to recommend that it should be extended for an additional period of five years until 29 February 2016. In the remainder of this chapter we set out our current views regarding each of the criteria.

¹⁶ The test applied here is a slightly expanded version of the test applied in the OFT's previous review in 2005.

¹⁷ http://ec.europa.eu/competition/sectors/motor_vehicles/legislation/legislation.html

http://ec.europa.eu/competition/sectors/financial_services/insurance.html

Ticketing schemes as an identifiable category of agreements meeting section 9(1) conditions

4.6 As set out at paragraph 2.5 above, the section 9(1) conditions, which the OFT must consider are likely to be met before it can recommend that a block exemption be made, are as follows:

- (i) **efficiency gains** – the agreement must contribute to improving production or distribution or promote technical or economic progress
- (ii) **fair share for consumers** – consumers must receive a fair share of the benefits generated by the restrictive agreement
- (iii) **indispensability of the restrictions** – the agreement must not impose restrictions which are not indispensable to achieving the benefits, and
- (iv) **no elimination of competition** – the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

4.7 These conditions must be met for a **category** of agreements. We consider that ticketing agreements, being of a similar type and structure and having the same objective, are such a category.

4.8 The following paragraphs discuss our preliminary view that the agreements covered by the PTTS Block Exemption continue to meet the conditions outlined above. For the purposes of this discussion, we consider that it is appropriate to invert the order of the second and the third conditions and deal with the issue of indispensability before the issue of consumers receiving a fair share of the efficiencies. This is because analysis of efficiencies being passed on to consumers requires a balancing of the negative and positive impact of an agreement on consumers. This analysis should not include the impact of any

restrictions that have already failed the indispensability test and which for that reason are prohibited by Article 101.¹⁸

- 4.9 In its review of the previous PTTS Block Exemption in 2005, the OFT concluded that the ticketing arrangements covered by the PTTS Block Exemption were likely to meet the conditions for exemption in section 9(1) of the Act. In our current review, we have considered whether there is evidence that any of the conditions are no longer met.
- 4.10 As discussed below, based on our preliminary review, including discussions with key representative organisations, we consider it likely that the exemption criteria continue to be met.

Condition (i) – Efficiency gains

- 4.11 In our 2005 review, we concluded that public transport ticketing schemes **contribute to improving production or distribution, or promoting technical or economic progress**. We have seen no evidence that the position has changed. Specifically, all ticketing schemes covered by the PTTS Block Exemption potentially deliver the following benefits for passengers, operators and other consumers:

- benefits for passengers – better quality bus services and improved transport networks, for example, by offering the ability to travel on the services of several operators on a single ticket. The effective creation of an integrated network can save the time and money passengers spend purchasing separate tickets on different legs of a journey, thereby improving the quality of the service, the accessibility of transport services for passengers and the overall value for money they receive. In addition, different ticketing schemes can deliver specific benefits for passengers, including:

¹⁸ This is consistent with the European Commission's approach in its 'Guidelines on the application of Article 81(3) of the EC Treaty' (now Article 101(3) of the TFEU).

- MTCs reduce the effective cost of additional journeys to zero
- MITs allow passengers flexibility of choice on specific routes, allowing them to catch the first service that arrives
- through tickets can link several towns by several different operators, each of whom on their own might not find it financially viable to serve all the towns in an area. This is particularly beneficial to passengers in small communities who may easily become isolated from larger centres
- short and long distance add-on tickets increase flexibility by allowing passengers to travel widely within their destination area at a price lower than having to buy several individual tickets within the destination town
- benefits for operators – ticketing schemes can lead to increased patronage on public transport, increasing the profitability of operators and the viability of public transport networks. Prepaid tickets provide operators with greater certainty as to revenue, reduce costs (especially banking costs) and increase staff security by reducing the amount of cash-handling involved.

4.12 Moreover, the OFT considers that the wording of section 9(1) is wide enough to allow the OFT to take account of benefits for other road users and consumers. Although the OFT believes that the main thrust of the analysis under section 9(1) relates to the economic efficiencies that are directly or indirectly passed on to consumers (those described in the previous paragraph) and that wider benefits to society would not normally be sufficient on their own for section 9(1) to apply, we note that in addition to the economic efficiencies discussed above, ticketing schemes can lead to indirect benefits for other consumers, such as road users.

- Congestion and noise and air pollution are reduced by increasing the efficiency of services, for example, 'off-bus' ticket purchases speed up boarding thus reducing the time that vehicles are stationary.

- Ticketing schemes can also encourage modal shift from cars to buses, and thus further contribute to reducing congestion and pollution. For example, add-on tickets give passengers greater flexibility of travel options in their destination town and reduce the need to drive into towns, thereby reducing congestion and improving the efficiency of on-road public transport.

Question 1

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that the integrated ticketing schemes indicated above provide economic benefits? Are there any other economic benefits that such schemes provide? Please note if your answers vary according to the different types of ticket covered by the PTTS Block Exemption and explain how they vary.

Condition (iii) – Indispensability

4.13 In order to ensure that the ticketing schemes covered by the PTTS Block Exemption do not impose restrictions that are not indispensable to the benefits flowing from the agreement, the PTTS Block Exemption sets different conditions for different types of tickets that must be met. The most important differences between conditions relate to the ability to set prices, share revenues and coordinate timetables, and these are discussed below. These conditions were considered necessary to ensure that the agreements met the third condition for exemption in 2005 and the OFT has seen no evidence to suggest that the position has changed.

MTCs

4.14 The OFT considers that for MTCs some kind of cooperation between operators on the pricing of MTCs may be necessary to operate the MTC scheme more efficiently than would likely have been the case in the absence of the restriction. This is for three key reasons.

- 4.15 Firstly, when individual operators are monopolists over their own routes and the services within the MTC are complementary, it may be the case that prices are lower where there is some form of coordination than they would otherwise be.¹⁹
- 4.16 Secondly, in the absence of a common price, and assuming revenue lies where it falls, there may be an incentive for operators to price as low as they can to attract greater sales and potentially maximise their revenue at the expense of others. As the price is bid down by iterations of such price competition, the price could reach a point where some operators exit the scheme as they are not covering their costs and the scheme will potentially unravel.
- 4.17 Thirdly, alternative pricing systems, for example, a form of revenue sharing agreement or a posted price, may be difficult for MTCs absent a common end price. Unlike the situation with other types of tickets, MTC operators do not know in advance what journeys will be made using an MTC. It may therefore be difficult for them to calculate the total amount they will need to reimburse other operators, and the amount they will need to be reimbursed themselves, at the time they are setting the price at which they will sell the MTC.
- 4.18 Given the above, there are good reasons to believe that a common agreed price for MTCs, combined with the requirement that revenue be distributed through a method that does not result in an incentive for operators to set their own fares higher than they would have been set in the absence of the MTC, or significantly reduce the incentive for each of the operators to compete for passengers, is indispensable to obtaining the efficiencies from the agreement and provides the best overall incentives to compete.²⁰ Any risk that the agreed price will restrict

¹⁹ In Cournot's model of complements where the producers of A and B are both monopolists, the joint maximisation price can be lower than the two prices that A and B would set individually.

²⁰ Where the condition is not met in respect of an individual agreement, the OFT has the ability to cancel the PTTS Block Exemption in respect of that agreement.

competition should be mitigated by the fact the MTC will have to compete with individual operators' own travelcards and individual operators' single and return tickets.

- 4.19 However, whilst alternative pricing mechanisms may be difficult, they may still be possible, such that fixing the end price of the MTC is not indispensable to achieving the benefits to consumers that MTCs bring. An example might be where operators share revenue on the basis of the total number of passengers or some proxy thereof. This could be calculated ex-post. For example, if one operator carried 80 per cent of passengers over a year, it would receive 80 per cent of the revenue from the total number of MTCs sold.
- 4.20 Another example might be if operators could each independently stipulate a minimum access price per MTC sold in order to participate in the scheme. This would effectively set a minimum cost for each operator in selling the MTC but allow competition at any price above this.
- 4.21 The participation of a large number of operators is likely to make alternative approaches cumbersome. Furthermore, some of these mechanisms (for example minimum access prices) might create incentives to increase fares by increasing their minimum access prices. Finally, in certain circumstances such revenue sharing agreements or posted prices may not provide operators with the right incentives to compete over MTC prices and could even provide perverse incentives to over or under invest in capacity. It is thus not certain that these alternatives will in practice always lead to a better outcome for the consumer than fixing prices.

MITs

- 4.22 As regards MITs, revenue sharing is not permitted as these schemes can function with prices that are set independently and with revenue allowed to 'lie where it falls'. That said, this method may not always work, for example schemes where one operator runs the services on a route on a commercial basis during the day and another operator runs them on a subsidised basis during the evening. More revenue in such a case would

be taken during the day while return portions of tickets are used during the evening. In such a case, the evening operator would be unwilling to agree to a 'revenue lies where it falls' scheme and a mechanism for apportioning revenue on a fairer basis would need to be included in the ticketing scheme. However, while an alternative revenue sharing arrangement will not meet the conditions for the PTTS Block Exemption, it may still meet the conditions for individual exemption.

TTs

- 4.23 Co-ordination of timetables is likely to be indispensable for TTs and short and long-distance add-ons only insofar as it facilitates onward connections. In these cases, we consider that there is unlikely to be a significant distortion to competition because the two parts of the journey will not be competing. However, co-ordination, in the form of agreements leading to equal headways,²¹ on routes that do compete is likely to be damaging to passengers as it can restrict the entry of new operators and discourage competition between existing operators.

Question 2

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that the ticketing schemes indicated above, if they satisfy the conditions in the PTTS Block Exemption, do not impose on the undertakings concerned restrictions unnecessary for the attainment of the benefits described above? In particular, do you agree that fixing the end price for MTCs meets the indispensability condition, or are there other practical alternatives that would lead to equivalent benefits? For example, would alternative revenue sharing agreements that did not involve fixing a common end price for MTCs achieve this end? If you can envisage other practical alternatives, please describe these in detail.

²¹ A situation where services run at equally spaced intervals.

Question 3

Are there additional features of these ticketing schemes that should be regarded as indispensable and without which the schemes could not deliver the benefits described above? Please note if your answers vary according to the different types of ticket covered by the PTTS Block Exemption and explain how they vary.

Condition (ii) – Fair share for consumers

4.24 In our 2005 review, we concluded that ticketing schemes **allow consumers a fair share of resulting benefit**. We have seen no evidence to suggest the position has changed. Consumers will continue to benefit directly from the improved quality, flexibility and convenience and potentially lower prices of transport services that flow from integrated ticketing, as discussed above. We draw attention in particular to the fact that the effective creation of an integrated network of transport can save time and money for passengers and improve the accessibility of transport services overall. The PTTS Block Exemption also preserves competition between operators so any cost improvements arising from schemes are more likely to be passed on to consumers in the form of lower fares. Moreover, the conditions set out in the PTTS Block Exemption are designed to ensure that single and return tickets and travelcards issued by individual operators continue to provide the competitive discipline to control the price of tickets issued through multi-operator ticketing schemes.

Question 4

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that a fair share of the economic benefits provided by the integrated ticketing schemes indicated above are passed on to consumers? If you have identified any additional economic benefits in your answer to question 1 above, do you consider that they are passed on to consumers? Please note if your answers vary according to the different types of ticket covered by the PTTS Block Exemption and explain how they vary.

Condition (iv) - No elimination of competition

- 4.25 The conditions described in paragraph 3.11 above, which apply to all schemes, are designed to ensure that the ticketing agreements within the scope of the PTTS Block Exemption do not eliminate competition in respect of a substantial part of the services in question. These conditions should ensure that new entrants are entitled to join any schemes benefiting from the PTTS Block Exemption, and that they have the commercial freedom to set fares, services and timetables on the services they provide individually.
- 4.26 In order to minimise the risk of collusive behaviour that might be encouraged by ticketing agreements – which could result in higher prices or reduced services – but allow and encourage cooperation that benefits consumers, the PTTS Block Exemption provides that information sharing is permitted only where it is indispensable to the scheme.
- 4.27 Moreover, we consider that competition between operators will be diminished if operators only make available integrated tickets and not their own single and return tickets. Single and return tickets are the basic building blocks of competition that provide the competitive

discipline to control the price of tickets issued through public transport ticketing schemes.

Question 5

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that the ticketing schemes indicated above, if they satisfy the conditions in the PTTS Block Exemption, are unlikely to allow the undertakings concerned to eliminate competition in respect of a substantial part of the services in question? Please note if your answer varies according to the different types of ticket covered by the PTTS Block Exemption and explain how it varies.

Enhanced need for cooperation

- 4.28 Our preliminary view is that the need for cooperation in relation to public transport ticketing schemes is greater than the need for cooperation in relation to agreements in other sectors.
- 4.29 Cooperation is necessary with regard to both the core elements of these agreements (for example, price-fixing and revenue distribution for MTCs) and other elements necessary for ticketing schemes to be operational. For example, cooperation is crucial to ensure that the physical tickets issued to passengers are issued in a suitable format and that these are readable by all the participant operators.
- 4.30 More fundamentally, ticketing schemes would not work without cooperation between different types of transport operators (for example, between train and bus operators).

Risk that ticketing schemes will not be entered without the PTTS Block Exemption

- 4.31 According to the information available to the OFT and after considering discussions with industry representative groups in the context of our

recent preliminary review, we consider that if the PTTS Block Exemption is not to extended, there is a significant and real risk that agreements which are beneficial to consumers may not be entered into and that existing agreements may be terminated.

- 4.32 There is evidence to suggest that the PTTS Block Exemption continues to be an important factor for transport companies to be involved in ticketing schemes with other companies. In particular, while the benefits to consumers from ticketing agreements are typically substantial, the benefits to public transport operators may vary depending on the specific circumstances of each particular company. Companies may need to devote considerable time, effort and investment to facilitate integrated ticketing, but the additional revenues they receive from the schemes may be relatively small for some of them.²²
- 4.33 Given that the commercial benefits of a ticketing scheme are usually weighed against the risks of infringing competition law, which in relation to some arrangements are perceived to be particularly great, incentives to operate the relevant schemes may be limited. For example, MTCs involve an element of price-fixing, which is a 'hard core' restriction of competition and thus could be taken particularly seriously by OFT. In the absence of the PTTS Block Exemption, therefore, many companies may choose not to enter into discussions on ticketing schemes. The PTTS Block Exemption therefore provides public transport operators with legal certainty that, providing their schemes comply with the conditions set out in the PTTS Block Exemption, they will not infringe competition law, thereby reducing the disincentives to be involved in integrated ticketing schemes.
- 4.34 Moreover, as we noted in our previous review of the PTTS Block Exemption, many operators, in particular large operators, also develop their own travelcards. Any uncertainty about the position of integrated ticketing schemes under competition law may provide an incentive for

²² In 2005 the OFT's evidence suggested that, on average, less than 10 per cent of bus operators' revenues derive from integrated tickets.

operators to concentrate on developing single-operator travelcards instead. If large operators choose to develop their own tickets rather than participate in multi-operator schemes, competition is likely to be weakened as smaller operators, who often rely on multi-operator schemes to provide a network that allows them to compete with large operators, may no longer be able to compete.

More appropriate alternatives not available

- 4.35 The OFT is of the view that there are no alternative, reasonable and practicable arrangements to facilitate joint ticketing schemes that could deliver even greater benefits to consumers or which would otherwise be more appropriate.
- 4.36 One possible alternative to transport companies entering into a ticketing agreements covered by the PTTs Block Exemption would be a legal requirement for them to do so, or specific legal provisions allowing the conclusion of such agreements. There are currently various instruments that provide local authorities and operators with the tools necessary to enter into ticketing schemes. For example:
- The Transport Act 2000 provided local authorities with the power to introduce ticketing schemes.
 - The Transport Act 2000 also introduced Quality Partnerships and Quality Contracts, which have since been made simpler by the Local Transport Act 2008, which also allows for multi-lateral Voluntary Partnership Agreements.
 - Franchise Agreements include requirements that operators of trains or buses (as the case may be) must offer integrated tickets or remain part of any local schemes.
 - In London the Greater London Authority Act 1999 provides the Mayor with the power to direct Transport for London to enter into certain ticketing agreements.

- 4.37 However, these instruments generally rely on the discretion of the relevant authority to use them as a way to promote integrated schemes. Whilst the involvement of Government and local authorities might in many situations be central to achieving the benefits of integrated ticketing, it is also crucial that businesses can pursue the same objectives without having to rely on legal requirements or directions from any authority. Moreover, there would appear to be areas where such requirements and directions may not be available for all parties to a ticketing agreement in the same way. One case might be ticketing schemes between operators of different means of transport subject to different frameworks in providing passenger services (for example, a ticketing scheme agreed between a rail company operating under a long distance rail franchise and a bus company operating a local bus franchise).
- 4.38 Another alternative to the PTTS Block Exemption would be to introduce sector-specific guidance to assist companies self-assess their arrangements against the competition law framework. However, the strong view expressed by the organisations we have spoken to in our recent preliminary review is that the risk is likely to be considered too great in the context of the ticketing schemes covered by the PTTS Block Exemption, given the elements of some of the schemes. For example, as discussed above, multi-operator travelcards involve an element of price-fixing, a serious restriction of competition. They consider that such ticketing schemes might not go ahead without a block exemption and on the basis of guidance alone, owing to the fear of breaching competition law and the potential significant penalties that could follow.
- 4.39 Our emerging view is therefore that the BE is still likely to be a necessary instrument in relation to a significant number of ticketing schemes.

Question 6

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that there is a risk that without the PTTS Block Exemption operators would not choose to participate in the above ticketing schemes, and especially in the establishment of new schemes? If so, do you have any

evidence to support this view? Please note if your answers vary according to the different types of ticket covered by the PTTS Block Exemption and explain how they vary.

Question 7

Since the PTTS Block Exemption was extended in 2006, have any alternatives to the ticketing schemes covered by the PTTS Block Exemption developed that you think would provide greater benefits to consumers (leaving aside the issue of so-called 'smart cards', which are discussed in chapter 5 below)? If so, please describe these schemes and explain why they would provide additional benefits.

5 PROPOSED CHANGES TO THE PTTS BLOCK EXEMPTION

5.1 A key consideration that we have taken into account as part of our review of the PTTS Block Exemption is the changing landscape of public transport ticketing. Should the PTTS Block Exemption be retained after February 2011, it is important that it continues to facilitate the conclusion of new as well as established types of arrangements which deliver clear benefits for consumers without allowing unnecessary restrictions on competition. In this chapter we look at whether the categories and conditions in the PTTS Block Exemption will be appropriate to encompass ongoing and future developments in transport ticketing. For the reasons explained below, however, the only change we propose to recommend to the Secretary of State is that the PTTS Block Exemption be extended for an additional period of five years until 29 February 2016.

Ticketing developments

5.2 Our preliminary review suggests that the categories of the PTTS Block Exemption continue to be broadly used by public transport operators. It also appears that the conditions for each category of ticketing scheme to benefit from the PTTS Block Exemption continue to be appropriate to ensure that consumers benefit from ticketing schemes and these do not impose unnecessary restrictions on competition, as required by section 9(1) of the Act. The changes introduced by the Amendment Order were instrumental in achieving this balance.

5.3 Since we last reviewed the PTTS Block Exemption, however, important developments have begun to take place with regard to the technologies used in public transport ticketing. These are expected to develop further and become more widespread over the coming years. Often these developments are encapsulated in the concept of 'smart ticketing'.

5.4 Smart ticketing is the name given to the systems where an entitlement to travel (or ticket) is stored electronically rather than being printed on a paper ticket. Smart tickets are validated by electronic readers that record

specific ticket information and send it to computer systems that can process it for multiple purposes.

- 5.5 Smart ticketing technologies can deliver a range of benefits, including reductions in boarding times (because of the faster electronic reading) and benefits in speed, convenience and flexibility for passengers, who can 'charge' or 'top up' smart tickets and avoid carrying cash as they travel. Further, benefits can be derived from better data handling, allowing transport operators a better understanding of customer demand as well as new commercial opportunities.
- 5.6 There is a Government sponsored national specification for smart ticketing called ITSO,²³ which is designed to make different ticketing schemes technically compatible with each other from a technical perspective. There are other technologies that are likely to affect the future of ticketing, such as contactless bankcards or innovations allowing mobile phones to be used as smart tickets.
- 5.7 In practice, however, the rollout of smart ticketing depends on various factors. Responses to a consultation that the Department for Transport (DfT) carried out, 'Developing a strategy for smart and integrated ticketing', suggested that chief amongst these is investment in the necessary infrastructure to support the use of smart ticketing. This includes the cards (or other media supports) that passengers carry with them, smart readers, sales terminals and back office systems. Ongoing questions are whether such investment will take place in all parts of the UK and at what pace. According to the indications of the DfT in its 'Smart and Integrated Ticketing Strategy' for England, smart ticketing is currently not widespread outside London. The expectation is that smart

²³ ITSO Ltd is a non-profit organisation owned by bus operators, train companies, regional and local authorities and suppliers to the transport industry in the UK, and supported by the Department of Transport. It was set up to create and maintain a common specification to enable the use of interoperable smart cards in public transport. This specification is also named ITSO.

ticketing will be first established in the urban areas where the overall business case is stronger before spreading to smaller cities and towns. It is perhaps too early to predict with certainty either how smart ticketing will develop or the precise timescale for this.

5.8 It is also important to note that, to date, the innovations brought about by smart ticketing relate primarily to the physical support or format of the tickets rather than the transport entitlement as such. The smart format does not relate to a specific type of transport ticket in particular. In fact, smart cards may carry different types of tickets, including the ticket types currently envisaged by the PTTS Block Exemption. Therefore, for the purposes of the review of the PTTS Block Exemption, we regard smart cards merely as electronic instruments that allow for the advanced handling and use of information. To the extent that smart cards allow passengers to carry credit that can be used to purchase the right to use public transport, they may also be considered as payment methods.

5.9 In the remainder of this chapter we set out our preliminary thinking on:

- the likely implications of new technologies for ticketing arrangements between different transport operators, and
- whether any changes to the PTTS Block Exemption are currently appropriate.

Impact on ticketing schemes

5.10 After considering discussions with various representative organisations in our preliminary review and our own analysis, we think that the development of new ticketing technologies may have at least the following consequences on the contractual aspects of ticketing schemes entered into by different transport operators.

5.11 Firstly, smart ticketing will allow more targeted pricing and revenue allocation within existing ticketing schemes. This would be based on the information held by the smart systems, which will facilitate the identification of the precise services used by specific passengers. For

example, transport companies who are party to MTC schemes could more easily re-allocate revenues on the basis of passenger miles, or could charge different MTC prices to users depending on the zones or areas where they wish to use the travelcard.

- 5.12 Secondly, smart ticketing could lead to the development of new types of tickets, which were not possible with former technologies. There is already one type of scheme – the PAYG scheme, which may be considered as a new product. With PAYG passengers can hold credit on their smart card that will only be consumed as they make additional journeys. PAYG schemes may adopt different forms and each of these would have different implications for competition. One particular example is PAYG with a cap (PAYGC). With PAYGC, passengers purchase tickets as they use them, but they will not have to pay more than a pre-defined maximum amount of money over a specified period of time (for example, a day or a week).
- 5.13 Thirdly, if new products and targeted pricing are available, the use of some types of tickets may decrease over time. For example, if two bus operators offering an MIT on a certain route decide to offer individual PAYG tickets using a common smartcard system, passengers could stop purchasing MITs and move to PAYG, which would offer the same degree of convenience (the possibility to get on any bus on the route).
- 5.14 We note that these are merely our developing views of the opportunities that smart ticketing might in time present for transport operators and passengers. As indicated above, it would seem too early to determine what the commercial implications will be of the widespread introduction of smart ticketing technologies.

Our view on whether the content of the PTTS Block Exemption should be changed

- 5.15 Our preliminary view is that no changes are necessary to the current PTTS Block Exemption, either in terms of the categories of ticketing schemes that it covers or the conditions for each of those categories to benefit from the PTTS Block Exemption. However, we note that ticketing

arrangements between different transport operators may significantly change as smart technologies become more widespread in the coming years.

- 5.16 As stated above, the OFT considers that four criteria should be met for a sector-specific block exemption to be appropriate: a clearly identifiable category of agreements that meet the conditions of section 9(1) of the Act, an enhanced need for cooperation in comparison with other agreements, a significant risk that they would not be entered in the absence of a block exemption and absence of more appropriate alternatives. Whilst the development of smart ticketing technologies is likely to lead to changes in the types of tickets sold jointly or by individual transport operators, we do not think that there is currently sufficient evidence that smart ticketing has developed to a stage where it gives rise to a new category of ticketing schemes (that is, agreements of a similar type or structure and having the same objective) meeting the conditions of section 9(1).
- 5.17 Introducing a new category of schemes into the PTTs Block Exemption would seem premature until the commercial application of smart technologies has developed further and is more broadly understood. While an early categorisation of smart ticketing schemes may help ensure that some smart ticketing agreements are entered into (for example, by giving legal certainty for anyone who is party to an agreement falling within the scope of the block exemption), it may also have disadvantages if it promotes a certain form of agreement over a more desirable or efficient alternative. In particular, the OFT would not wish to block exempt a category of agreements if it could be shown that there were alternative means of concluding agreements that would bring about greater benefits to consumers.
- 5.18 The likely roll out of smart technologies has nevertheless been a key factor we have taken into account when considering the appropriate duration of an extension of the PTTs Block Exemption. Whilst there is some uncertainty about future ticketing developments, it seems likely that smart ticketing will be in use in a significant number of urban areas of the UK by 2013. As explained above, the increased use of smart

ticketing could lead to a number of consequences, including the possibility that smart ticketing schemes give rise to a new category of ticketing schemes meeting the conditions of section 9(1) in the future, or that some of the categories of the PTTS Block Exemption become obsolete. Therefore, in our view it would be appropriate to recommend the extension of the PTTS Block Exemption for an additional period of five years until 29 February 2016. By that time, sufficient evidence should be available to assess whether a more fundamental change of the PTTS Block Exemption regime is appropriate and necessary.

- 5.19 We note that even if new ticketing agreements based on smart technologies do not fall within the PTTS Block Exemption categories or do not meet the conditions for each category, they may nonetheless satisfy the conditions of section 9(1) of the Act. Businesses are required to self assess whether their agreements comply with competition law and equally if they meet the conditions for an exemption under section 9(1).
- 5.20 We also note that we have the ability to make a recommendation to the Secretary of State to vary the PTTS Block Exemption at any time. If strong evidence emerged that developments in smart ticketing made it appropriate to revise any extended PTTS Block Exemption before it expired, we would consider making such a recommendation to the Secretary of State.
- 5.21 Finally, we believe that some of the new commercial schemes that may develop on the basis of new technologies would still fit within the categories contained in the current PTTS Block Exemption. For example, smart cards can support MTCs, MITs, TTs or add-ons. For example, PAYG tickets sold for use on more than one operator's services may qualify as TTs, provided that the services of each operator are not substitutes.
- 5.22 Therefore, we are currently minded not to recommend changes to the PTTS Block Exemption at this stage, as there does not yet appear to be sufficient evidence that smart ticketing has developed to a stage where it gives rise to a new category of ticketing schemes (that is, a category

of multiple agreements of a similar type or structure and having the same objective) meeting the conditions of section 9(1).. We would welcome feedback from respondents to this consultation as to whether any such category exists, what the specific structure of agreements within that category may be and its expected use by transport operators in the near future.

Question 8

Do you agree with our assessment that it would be premature substantially to change the PTTS Block Exemption to accommodate new modalities of ticketing based on smart technologies while the way in which the commercial application of smart technologies operates is still relatively undeveloped and smart ticketing technologies are not widespread? If you disagree, please: (i) explain why you disagree; and (ii) describe the specific changes you consider should be made to the PTTS Block Exemption.

Question 9

Do you agree with our proposed recommendation to extend the duration of the PTTS Block Exemption for five more years, which takes into account the likely timescale for the developments in smart ticketing? If you disagree, what would in your view be the appropriate duration and why?

Other developments

5.23 The CC is currently undertaking an inquiry into the local bus services market. Whilst the aim and scope of the CC inquiry is different from our review of the PTTS Block Exemption,²⁴ it is possible that matters relating

²⁴ In particular, whereas the scope of the CC inquiry is confined to local bus services and is focusing on the features of bus markets, the OFT's review covers ticketing arrangements relating to any type of public transport (not just local buses) to which the PTTS Block Exemption applies.

to ticketing schemes covered by the PTTS Block Exemption may be relevant to the CC's inquiry.

- 5.24 We have discussed these potential interactions with the CC and we will continue to coordinate with them on any issues emerging from the CC inquiry in relation to ticketing.
- 5.25 In terms of timing, the OFT is due to make recommendations on the PTTS Block Exemption to the Secretary of State at the end of 2010 and the CC is due to report in summer 2011. In this context, we note that our proposed recommendation to extend the duration of the PTTS Block Exemption for an additional period of five years until 29 February 2016 would be without prejudice to our ability to make a further recommendation to vary the PTTS Block Exemption at any time before its expiry if, as a result of issues raised by the CC's bus market inquiry, it seems necessary and appropriate to do so.

6 CONCLUSIONS

- 6.1 Based on our preliminary review of the PTTS Block Exemption and on the matters discussed in chapters 1 to 5 above, we propose to recommend that the Secretary of State extend the PTTS Block Exemption for an additional period of five years until 29 February 2016.
- 6.2 As set out in chapter 5 above, although there appear to be a number of potential issues in relation to smart ticketing, we consider that it is inappropriate to change the PTTS Block Exemption now, given that smart ticketing across the UK is still in the relatively early stages of development. To make changes to the PTTS Block Exemption too early may risk promoting or encouraging a certain form of agreement, when a different type of agreement may be more desirable or efficient. It may also prevent innovation in the types of agreements that develop.
- 6.3 The OFT will, however, keep the development of smart technology under review and, if prior to the next review it appears that the technology is developing in a way that is unlikely to be covered by the PTTS Block Exemption, the OFT will consider whether changes to the PTTS Block Exemption are necessary and appropriate in relation to smart ticketing and make another recommendation if so required.
- 6.4 The OFT will consider these specific points further in light of responses to this consultation document.

ANNEXES

ANNEXE A - SUMMARY OF QUESTIONS

Question 1

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that the integrated ticketing schemes indicated above provide economic benefits? Are there any other economic benefits that such schemes provide? Please note if your answers vary according to the different types of ticket covered by the PTTS Block Exemption and explain how they vary.

Question 2

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that the ticketing schemes indicated above, if they satisfy the conditions in the PTTS Block Exemption, do not impose on the undertakings concerned restrictions unnecessary for the attainment of the benefits described above? In particular, do you agree that fixing the end price for MTCs meets the indispensability condition, or are there other practical alternatives that would lead to equivalent benefits? For example, would alternative revenue sharing agreements that did not involve fixing a common end price for MTCs achieve this end? If you can envisage other practical alternatives, please describe these in detail.

Question 3

Are there additional features of these ticketing schemes that should be regarded as indispensable and without which the schemes could not deliver the benefits described above? Please note if your answers vary according to the different types of ticket covered by the PTTS Block Exemption and explain how they vary.

Question 4

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that a fair share of the economic benefits provided by the integrated ticketing schemes indicated above are passed on to consumers? If

you have identified any additional economic benefits in your answer to question 1 above, do you consider that they are passed on to consumers? Please note if your answers vary according to the different types of ticket covered by the PTTS Block Exemption and explain how they vary.

Question 5

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that the ticketing schemes indicated above, if they satisfy the conditions in the PTTS Block Exemption, are unlikely to allow the undertakings concerned to eliminate competition in respect of a substantial part of the services in question? Please note if your answer varies according to the different types of ticket covered by the PTTS Block Exemption and explain how it varies.

Question 6

In light of a further period of working with the PTTS Block Exemption since 2006, do you agree that there is a risk that without the PTTS Block Exemption operators would not choose to participate in the above ticketing schemes, and especially in the establishment of new schemes? If so, do you have any evidence to support this view? Please note if your answers vary according to the different types of ticket covered by the PTTS Block Exemption and explain how they vary.

Question 7

Since the PTTS Block Exemption was extended in 2006, have any alternatives to the ticketing schemes covered by the PTTS Block Exemption developed that you think would provide greater benefits to consumers (leaving aside the issue of so-called 'smart cards', which are discussed in chapter 5 below)? If so, please describe these schemes and explain why they would provide additional benefits.

Question 8

Do you agree with our assessment that it would be premature substantially to change the PTTS Block Exemption to accommodate new modalities of ticketing

based on smart technologies while the way in which the commercial application of smart technologies operates is still relatively undeveloped and smart ticketing technologies are not widespread? If you disagree, please: (i) explain why you disagree; and (ii) describe the specific changes you consider should be made to the PTTS Block Exemption.

Question 9

Do you agree with our proposed recommendation to extend the duration of the PTTS Block Exemption for five more years, which takes into account the likely timescale for the developments in smart ticketing? If you disagree, what would in your view be the appropriate duration and why?

ANNEXE B - BLOCK EXEMPTION CURRENTLY IN FORCE

Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (as amended)

Citation, Commencement, Duration and Interpretation

Article 1

This Order may be cited as the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 and shall come into force on 1st March 2001.

Article 2

This Order shall have effect from the beginning of 1st March 2001 and shall cease to have effect at the end of the period of ten years commencing on 1st March 2001.

Article 3

In this Order—

'the Act' means the Competition Act 1998;

'block exemption' means the exemption from the Chapter I prohibition arising by virtue of this Order for the category of agreements specified in this Order;

'bus service' has the meaning given in section 159(1) of the Transport Act 1968 but excludes a bus service which is a tourist service;

'chartered service' means a public transport service:

- (a) for which the whole capacity of the vehicle, vessel or craft supplying that service has been purchased by one or more charterers for his or their own use or for resale;

(b) which is a journey or trip organised privately by any person acting independently of the person operating the vehicle, vessel or craft supplying that service; or

(c) on which the passengers travel together on a journey, with or without breaks, from one or more places to one or more places and back;

'complementary services' means local public transport services which are not in competition with each other over a substantial part of the route covered by the ticket in question;

'connecting service' means a service (other than a bus service, a chartered service or a tourist service) for the carriage of passengers by road, tramway, railway, inland waterway or air which is a long distance service and which runs between—

(a) a station or stopping place at or in the vicinity of which the relevant local public transport service stops; and

(b) any other place;

'inland waterway' includes both natural and artificial waterways, and waterways within parts of the sea that are in the United Kingdom;

'journey' means any journey made by an individual passenger and includes a return journey;

'local public transport service' means:

(a) a bus service; or

(b) a scheduled public transport service (other than a bus service) using one or more vehicles or vessels for the carriage of passengers by road, railway, tramway or inland waterway at separate fares other than a long distance service, a chartered service or a tourist service;

'long distance add-on' means:

