

TO: THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS
FROM: DIRECTOR OF COMPETITION POLICY, OFFICE OF FAIR TRADING

COMPETITION ACT 1998, SECTION 8(3): RECOMMENDATION TO VARY THE PUBLIC TRANSPORT TICKETING SCHEMES BLOCK EXEMPTION

1 Summary and recommendation

Issue

- 1.1 Pursuant to section 8(3) of the Competition Act 1998 ('the Act'), the OFT recommends that you make an Order under the Act varying the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order (SI 2001 No 319) ('the Block Exemption'), to extend its duration for an additional period of five years until 29 February 2016.
- 1.2 In July 2010, pursuant to sections 8(1) and 8(4) of the Act, the OFT published a consultation paper setting out details of its proposal to recommend that you extend the duration of the Block Exemption ('the consultation'). This recommendation is made taking into account the responses to the consultation.

Timing

- 1.3 Should you decide to extend the Block Exemption in accordance with our recommendation, the amendment Order should be made so as to come into effect by 28 February 2011 at the latest, when the Block Exemption is due to expire.
- 1.4 The Order will be subject to the negative resolution procedure and as a result will need to be laid before Parliament 21 days before it is due to come into effect.

Remarks

- 1.5 In the consultation we asked for views on whether it may be appropriate to recommend that you make changes to the substance of the Block Exemption to cover electronic 'smart' ticketing schemes using new

technologies. We also noted that the Competition Commission (the CC) is currently undertaking an inquiry into the local bus services market.

- 1.6 Having taken into account the responses to the consultation, we do not recommend that changes are made to the Block Exemption at the present time to cover 'smart' ticketing schemes using new technologies. Also, having discussed with the CC potential interactions between the Block Exemption and the CC review, we have concluded that the outcome of the CC review is unlikely to affect our recommendation to extend the Block Exemption, but that it will be appropriate to continue to coordinate with the CC on any issues emerging from the CC inquiry in relation to ticketing schemes.
- 1.7 Notwithstanding the above, we note that we have the ability to make a recommendation to you to vary the Block Exemption at any time before its expiry, if circumstances change.¹

2 **Background**

- 2.1 Section 2 of 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. Section 6 of the Act also provides for the adoption of block exemptions, exempting a category of agreements from the prohibition in section 2.
- 2.2 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 (MTC)² 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. The Block Exemption was adopted in 2001 as the

¹ See section 5 below.

² See Glossary at the end of this Recommendation.

benefits meant that conditions for exemption in section 9(1) of the Act were met.

- 2.3 The 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 Block Exemption, which came into force in 2006, is due to expire on 28 February 2011.
- 2.4 Between March and July 2010 the Office of Fair Trading (the OFT) carried out a preliminary review of the Block Exemption and its operation. In this review, the OFT considered whether it continued to be appropriate to have the Block Exemption. This review included meetings with representative organisations connected to the transport industry to seek their views on the current Block Exemption. The OFT also reviewed the materials from its earlier review of the Block Exemption carried out between 2003 and 2005.
- 2.5 Following that review, we published for consultation on 28 July 2010 our proposed recommendation that you vary the Block Exemption by extending its duration for an additional period of five years until 29 February 2016. The consultation period ended on 20 October 2010. The consultation document is enclosed as Annexe A to this recommendation.
- 2.6 The OFT received a total of 24 responses to the consultation, mostly from bus and train operators, groups representing those operators and local authorities. A summary of the responses received is contained in Annexe B and will be published shortly on the OFT website. The responses provided overwhelming endorsement for the OFT's preliminary assessment that the types of integrated ticketing schemes under consideration continue to satisfy the conditions for exemption and that it remains appropriate to have a block exemption. One respondent suggested some significant changes to the substance of the Block Exemption, which are explained under Section 4 below. This respondent also proposed an alternative duration for the extension of the Block Exemption, which is explained under Section 5 below. For the reasons set

out in this Recommendation, we do not think that it would be appropriate to recommend an extension of the Block Exemption for the shorter duration proposed by this respondent or to make any of the other changes they suggested.

2.7 The following sections discuss in detail the OFT's view on the extent to which the Block Exemption remains appropriate. Section 3 sets out the criteria on the basis of which we consider that an extension of the Block Exemption is appropriate. Section 4 refers to some changes to the Block Exemption proposed by respondents to the consultation and the reasons why we do not consider any changes are appropriate or necessary at this time. Section 5 considers the appropriate duration for which the Block Exemption should be extended and our proposed approach to future developments in transport ticketing. Finally, Section 6 refers to the ways in which the OFT can provide guidance regarding the application of competition law, including through the OFT guidance *Public Transport Ticketing Schemes Block Exemptions* (OFT439). Section 7 summarises our conclusions.

2.8 This recommendation should be read in conjunction with the consultation document (at Annexe A) and OFT's summary of responses (at Annexe B).

3 A continued role for the Block Exemption

3.1 For the purposes of its review of the Block Exemption and this recommendation, the OFT considered 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 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.

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

3.2 Taking into account the responses to the consultation, the OFT considers 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

3.3 In light of its review of the Block Exemption and the responses to the consultation, 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 Block Exemption

3.4 Taking into account the responses to the consultation, the OFT considers that there is likely to be a significant and real risk that, without the 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

- 3.5 In light of its review of the Block Exemption and the responses to the consultation, it appears to the OFT 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.

4 No need to change the substance of the Block Exemption

- 4.1 In the consultation we set out our proposed recommendation that no changes to the substance of the Block Exemption are currently necessary, in terms of the categories of ticketing schemes that it covers or the conditions for each of those categories to benefit from the Block Exemption.³
- 4.2 This position has been supported by all respondents to the consultation, with the exception of one respondent who suggested a number of changes to the Block Exemption and another respondent who suggested a slight widening of the scope of the Block Exemption, as explained below.
- 4.3 One respondent has suggested a number of changes to the substance of the Block Exemption, particularly in relation to:

³ The Block Exemption identifies several categories of ticketing schemes, imposing a number of general conditions that all agreements must satisfy as well as a number of different conditions that different categories must satisfy in order to benefit from the BE. The categories contained in the Block Exemption are set out in a Glossary at the end of this Recommendation.

- the way in which revenues can be shared between participants in a multi-operator individual ticket (MIT) scheme⁴
- the possibility for operators participating in a ticketing scheme to co-ordinate timetables, and
- the definition of the categories of ticketing schemes covered by the block exemption.

4.4 Having considered these suggestions, we remain of the view that the categories and conditions of the Block Exemption remain appropriate and no change is needed. The following paragraphs set out our views regarding the proposals made in relation to the above three points.

Revenue-sharing in MIT schemes

4.5 An MIT is a ticket for the completion of a particular journey (single or return) on whichever service the passenger chooses of those provided by any of two or more operators. Those are by definition services in competition with each other. Consistent with this definition, article 13(1) of the Block Exemption prohibits price fixing for MITs. In addition, Article 15 requires that the revenue collected from MIT tickets must 'lie where it falls' (in other words, the operator who collects the money keeps it). Both provisions aim to ensure that price competition is not eliminated, by removing as far as possible the ability and the incentive of participants in the scheme to agree or coordinate on the price of MITs.

4.6 One respondent expressed the opinion that in the vast majority of cases fixing the end price of an MIT would be indispensable to achieving the benefits of this type of schemes and that, at the very least, the requirement for revenue to lie where it falls is over-restrictive as a general rule. This is based on their view that in some situations MITs may cause revenue taken and passenger journeys to be distributed unevenly. No other respondent has indicated that either price-fixing or revenue-sharing should be regarded as indispensable for MITs to achieve the benefits of

⁴ See Glossary at the end of this Recommendation.

such schemes (see the summary of the responses to consultation question number 3).

- 4.7 We have considered these arguments regarding the indispensability of price fixing and the indispensability of revenue-sharing for MITs. In relation to the former, we consider that – in contrast to the position with MTCs⁵ – a common price is not indispensable to make an MIT scheme workable. In our view, the fact that a significant number of MIT schemes have been in operation since the Block Exemption has been in place, in which the price of the MIT ticket is set independently by each individual operator, is evidence that an agreement on the MIT price is not indispensable for the operation of the scheme. In addition, we note that no transport operator has responded to the consultation suggesting that the ability to agree on the price of an MIT is indispensable to achieving the benefits arising from an MIT scheme. A further reason for retaining the prohibition on MIT schemes fixing the price of the ticket is that this reduces the risk of anti-competitive collusion between parties providing substitute services, by reducing the communication between the parties to the agreement.
- 4.8 As far as revenue-sharing is concerned, based on the responses received to the consultation, we have insufficient evidence that there is a clearly identifiable category of MIT schemes where a specific revenue-sharing agreement is indispensable to achieve the benefits of the scheme, as required by section 9(1) of the Act. We therefore do not recommend that you change the conditions that apply to MITs in the Block Exemption.
- 4.9 That said, we recognise that there may be particular MIT schemes where a revenue-sharing arrangement would meet the conditions for individual exemption under section 9(1) of the Act.
- 4.10 An example used in the OFT guidance on the Block Exemption⁶ and the consultation is an MIT scheme where one operator mainly runs the services on a route on a commercial basis during the day and another

⁵ See Glossary at the end of this Recommendation.

⁶ *Public Transport Ticketing Schemes Block Exemptions* (OFT439)

operator mainly runs services during the evening. It may be that more journeys are made in the evening than the day so that the revenue falls unequally between the operators' services. In such a case, the evening operator might 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. As noted in the OFT's published guidance on the Block Exemption, we consider that such arrangements are likely to satisfy the conditions in section 9(1) of the Act for individual exemption, provided that the revenue distribution method is limited to what is indispensable to achieve the benefits of the MIT scheme and does not result in the operators agreeing the price of the MIT.⁷

- 4.11 As a more general point, where an agreement falls outside the scope of the Block Exemption, there is no automatic presumption that it falls foul of competition law. The undertakings involved in the scheme would need to self-assess the agreement to decide whether the conditions for exemption were met in the circumstances of the case. Where agreements meet the criteria of section 9(1) of the Act because they generate efficiencies which are shared with consumers and do not contain unnecessary restrictions or eliminate substantially competition for the services in question, they will benefit from individual exemption under the Act without the need for a decision from the OFT. In such circumstances, they may proceed with a scheme including a revenue-sharing arrangement without any need to obtain prior clearance from the OFT.

Coordination of timetables

- 4.12 For a ticketing scheme to benefit from the Block Exemption, it must not have the object or effect of limiting the frequency or timing of the services provided by participant operators, unless such restriction is indispensable to the effective operation of the scheme, pursuant to an

⁷ We also note in this context that it is important to carry out a careful assessment of whether in an example like this one services are in fact substitute services and therefore whether the scheme actually falls within the definition of an MIT contained in the Block Exemption. Factors to be taken into account when assessing the substitutability of services may include, but are not limited to, the direction of travel and the extent to which services of different operators overlap in time. Even if it is not an MIT for the purposes of the Block Exemption, the scheme may fall within other categories of the Block Exemption.

agreement which provides for onward travel connections for passengers. This requirement is contained in Article 8 of the Block Exemption.

- 4.13 In the consultation, we summarised our view that the co-ordination of timetables between the operators participating in a ticketing scheme was likely to be indispensable only for through tickets (TTs)⁸ and short and long-distance add-ons⁹ insofar as the coordination facilitates onward connections. In these cases, we consider that there is unlikely to be a significant distortion of competition because the two parts of the journey will not be competing. However, on routes that do compete, co-ordination of timetables, particularly in the form of agreements leading to equal headways, is likely to be damaging to passengers, as it can restrict the entry of new operators and discourage (or even eliminate) competition between existing operators.
- 4.14 In its response to the consultation, one respondent disagreed that the above should be considered automatically the case. They have also indicated that, from a passenger perspective, the benefits of more equal headways would in most cases outweigh the negative implications for competition and passengers. As an alternative to the prohibition of timetable coordination contained in Article 8 of the Block Exemption, this respondent suggested the introduction of a condition in the Block Exemption to require the amendment of a scheme to account for a new market entrant in these situations. This view of equal headways on competing routes was echoed by two other respondents, both of whom considered that the benefits of equal headways to passengers would outweigh the negative implications and was therefore desirable.
- 4.15 Having considered this argument, we remain of the view that the prohibition of timetable coordination (except to allow onward travel connections) should be retained in the Block Exemption. A significant number of schemes have been in operation since the Block Exemption has been in place, in which timetables were not coordinated between operators. This is evidence that an agreement on timetables is not indispensable for the operation of the scheme. In addition, we note that

⁸ See Glossary at the end of this Recommendation.

⁹ See Glossary at the end of this Recommendation.

no transport operator has responded to the consultation suggesting that timetable coordination is indispensable to operate a ticketing scheme. We also note that agreements leading to such coordination would be unlikely to meet the fourth condition of section 9(1) of the Act, requiring that the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. This is because the coordination of timetables could remove the commercial freedom of the parties to a ticketing scheme to set the services and timetables of the services they provide individually, which is essential for transport operators to compete for passengers.

- 4.16 We have concluded that the alternative condition proposed by one respondent is unlikely to ensure effective competition in relation to the services provided individually by the operators which are part to the scheme. Moreover, a requirement to amend a scheme (and in particular the coordinated timetables) is likely to create a significant barrier to new entrants, which will in practice be subject to the agreement of incumbent operators as to the level of service that the new entrant can provide.
- 4.17 In reaching this conclusion, we note that the Transport Act 2000 as amended (TA 2000) may allow local authorities and operators to create schemes and conclude agreements allowing equal headways for buses. Such schemes and agreements are lawful only if the relevant competition test is met in relation to them.¹⁰
- 4.18 In all the circumstances, therefore, we do not recommend that you amend the requirement contained in Article 8 of the Block Exemption.
- 4.19 As mentioned above, we recognise that where an agreement falls outside the scope of the Block Exemption, there is no automatic presumption that it falls foul of competition law. The undertakings involved in the scheme

¹⁰ In broad terms, the TA2000 – as amended by the Local Transport Act 2008 – permits Local Authorities to make certain schemes to improve local bus services, subject to a competition test ('the Part 1 test'). It also inserts a new competition test (the 'Part 2' test), applying to voluntary partnership agreements and certain other agreements, and makes specific provision for investigation and enforcement action to be taken by the Office of Fair Trading in relation to such agreements. The two competition tests are to some extent similar (although not identical) to the exemption test in section 9 of the CA98.

would need to self-assess the agreement to decide whether the conditions for exemption were met in the circumstances of the case. Where agreements meet the criteria of section 9(1) of the Act because they generate efficiencies which are shared with consumers and do not contain unnecessary restrictions or eliminate substantially competition for the services in question, they will benefit from individual exemption under the Act without the need for a decision from the OFT. In such circumstances, they may proceed with a scheme including timetable coordination without any need to obtain prior clearance from the OFT.

Definition of categories

- 4.20 In its response to the consultation, the same respondent suggested that it would be preferable to clarify the definitions of tickets that qualify for the Block Exemption, and in particular the definition of MTCs, in order to increase participation further. In relation to this suggestion, the respondent pointed to the divergence between the definition of the categories of ticketing schemes covered by the Block Exemption and the ticketing schemes defined by the TA 2000. For the reasons set out below, we do not recommend that you change the definition of MTCs in the Block Exemption.
- 4.21 As already noted,¹¹ Local Transport Authorities (LTAs) have the ability to make certain types of ticketing schemes, which require transport operators to offer tickets to passengers that cover more than one journey or service. When making such schemes, LTAs need to satisfy themselves that they meet the applicable competition test, contained in Part 1 of Schedule 10 of the Transport Act (the Part 1 test). Where the OFT decides, as a result of an investigation initiated under the powers conferred to it by the Transport Act, that the ticketing scheme does not meet the Part 1 test, it may give to the LTA or LTAs making the scheme directions prohibiting the scheme, or requiring that it should be revoked or varied.
- 4.22 The types of ticketing schemes that LTAs can make are defined in section 135 of the Transport Act. Generally, such definitions are wider than those in the Block Exemption, in the sense that they can encompass a wider

¹¹ See note 10 above.

range of schemes. In particular, section 135(4)(a) of the Transport Act refers to 'tickets entitling the holder to make more than one journey on particular local services or on local services of a class specified in the scheme (whether or not operated by the same person)'. As the Department for Transport and the OFT have jointly explained in public guidance,¹² this definition includes MTCs as defined in the Block Exemption. However, there might be other types of tickets in the first definition of section 135(4) which would not necessarily be considered an MTC under the Block Exemption, such as tickets entitling the holder to fewer than three journeys or to use the services of less than three operators.

4.23 It must be noted that the difference in the definitions of ticketing schemes between section 135 of the Transport Act and the Block Exemption is consistent with the purpose of each of these instruments. Section 135 of the Transport Act, on the one hand, enables LTAs to make a wide range of ticketing schemes. These will be subject to a competition test (set out in Schedule 10 of the Transport Act), which involves a case-by case assessment of each individual scheme, to be made by the relevant LTA (and the OFT when enforcing the provisions of the Transport Act).¹³ The Block Exemption, on the other hand, defines particular categories of agreements which are likely to satisfy the conditions for exemption in section 9(1) of the Competition Act. An agreement which falls within a category specified in the Block Exemption and meets the conditions or obligations set there in will not be prohibited under the Chapter I prohibition, without any further assessment needed regarding the specific agreement.¹⁴

¹² *Guidance on the application of competition law to certain aspects of the bus market following the Local Transport Act 2008* (OFT452).

¹³ The provision which previously enabled LTAs and operators to apply the OFT for a decision as to whether the exercise or proposed exercise of a function under Part 1 of Schedule 10 meets the competition test has been repealed [by the LTA 2008].

¹⁴ Agreements that do not fall within the Block Exemption categories or do not meet the conditions for each category, may nonetheless satisfy the conditions of section 9(1) of the Competition Act and not be prohibited under the Chapter I prohibition. Businesses are required in those cases to self assess whether their agreements comply with competition law and whether they meet the conditions for an exemption under section 9(1).

- 4.24 The stricter definition of MTCs in the Block Exemption is aimed at ensuring that agreements are only exempted where the restrictions on competition included in the MTC scheme (including the ability of the participating operators to fix a common price for the MTC) are indispensable to achieve the benefits flowing from the agreement. Price fixing is generally seen as a serious restriction of competition.¹⁵ However, as explained in paragraphs 2.13 to 2.28 of the summary of responses document we remain of the view that the ability to set a common price is indispensable for MTC schemes, as defined by the Block Exemption.
- 4.25 For the reasons set out above, we do not recommend that you amend the definitions of tickets that qualify for the Block Exemption, and in particular the definition of MTCs.¹⁶
- 4.26 We note that another respondent considered that the Block Exemption is defined mainly by reference to bus services and that its scope should be widened to promote inter-modal services. We do not consider that changes are necessary in this respect as we consider that the scope of the Block Exemption already covers inter-modal travel to a sufficient extent, so that an inter-modal scheme may fall within the scope of the Block Exemption if it meets the relevant conditions. Specifically, we note that the Block Exemption covers tickets giving entitlement to make journeys on a 'local public transport service', the definition of which covers not just bus services but also other services for the carriage of passengers by road, railway, tramway or inland waterway.

Other issues

- 4.27 One respondent suggested that the criterion in the Block Exemption that usage must demonstrate that an MTC is not an MIT or TT be removed because it could create revenue allocation problems if a passenger

¹⁵ The Transport Act does not give LTAs the power to set prices in a ticketing scheme.

¹⁶ In their response to the consultation, one respondent also pointed at some aspects where the interpretation of the Block Exemption could be clarified, including the place of 'carnets' in the Block Exemption and whether actual utilisation is a criterion in determining if a particular ticket falls within the categories of the Block Exemption. The OFT guidance *Public Transport Ticketing Schemes Block Exemptions* (OFT439) currently explains those aspects. .

purchased an MTC but in fact used it as an MIT (that is, users are not obliged to use the full capability that a purchased ticket entitles them to). However, we consider that the requirement is actually to create a framework for – where this is necessary – investigating whether the tickets sold under the scheme as a whole are MTCs rather than requiring a demonstration that each and every ticket sold is used as an MTC. In these circumstances, we recommend that the usage requirement is not removed.

4.28 The same respondent also suggested that the treatment of carnets under the Block Exemption be clarified as the Block Exemption does not mention carnets specifically (although the OFT's ticketing guidance notes that a carnet is likely to be either an MTC or an MIT). The respondent expressed the view that a carnet might also be a TT. We consider that a carnet is simply a book of a particular type of tickets and that the classification of a carnet under the Block Exemption will therefore depend on the type of ticket that operators are selling. It will be a question of fact for a given carnet what type of ticket it is. Given this, we do not consider that it is necessary or appropriate to change the Block Exemption to address this issue and we recommend that you do not change the Block Exemption to address this point.

5 Duration of the exemption and approach to future developments in transport ticketing

5.1 The OFT recommends that you extend the duration of the Block Exemption for an additional period of five years until 29 February 2016. We consider that this period is sufficient to provide the legal certainty needed to continue to encourage investment in the existing types of ticketing schemes, while allowing for a subsequent review to consider changing circumstances if necessary.

5.2 Since we last reviewed the Block Exemption, important developments have begun to take place with regard to the technologies used in public transport ticketing, in particular 'smart ticketing'.¹⁷ The likely roll out of

¹⁷ 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.

smart technologies has been a key factor we have taken into account when considering the appropriate duration of an extension of the Block Exemption or any appropriate changes to its substance.

- 5.3 In the consultation we considered the likely implications of new technologies for ticketing arrangements and what that would mean for the future of the Block Exemption. Whilst we acknowledged the likely possibility that the development of smart ticketing technologies may lead to changes in the types of tickets sold jointly by transport operators, we did 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).¹⁸
- 5.4 In the consultation we proposed to recommend the extension of the 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 Block Exemption regime is appropriate, including whether smart ticketing schemes give rise to a new category of ticketing schemes meeting the conditions of section 9(1) and whether some of the categories of the Block Exemption have by then become obsolete. This was based on the assumption that smart ticketing could be in use in a significant number of urban areas of the UK by 2013.
- 5.5 We also noted 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 Block Exemption. For example, smart cards can support MTCs, MITs, TTs or add-ons.
- 5.6 The majority of respondents to the consultation agreed with our proposal regarding the duration of the Block Exemption and did not challenge our assumptions on the time when smart ticketing could be in use in a significant number of urban areas of the UK by 2013. The vast majority of respondents agreed in principle with the OFT's assessment that it

¹⁸ We also noted that an early categorisation of smart ticketing schemes may have disadvantages if it promotes a certain form of agreement over a more desirable or efficient alternative for consumers.

would be premature substantially to change the Block Exemption to accommodate new modalities of ticketing based on smart technologies.

- 5.7 One respondent has expressed the view that, if the existing Block Exemption is extended without specific provisions for new ticketing schemes based on smart technologies, it should be re-evaluated sooner than in the proposed five years. The respondent considers that smart ticketing is developing at a faster pace than the OFT proposal takes into account, and the extension period should reflect this. They consider that it would be appropriate to reconsider whether the Block Exemption should be extended for a shorter duration to facilitate reconsideration of the issue in 2012, which would also allow the Competition Commission's recommendations following its investigation into the bus industry to be taken into account.
- 5.8 Based on the overall response to the consultation with regard to the appropriate duration of the Block Exemption and the need to change it to reflect the development of smart ticketing, we remain of the view that the Block Exemption should be extended for an additional period of five years until 29 February 2016. We also remain of the view that it would be premature substantially to change the Block Exemption to accommodate new modalities of ticketing based on smart technologies whilst the way in which the commercial application of smart technologies operates is still relatively undeveloped and smart ticketing technologies are not widespread.
- 5.9 In the consultation we also noted that the CC is currently undertaking an inquiry into the local bus services market. We noted that, whilst the aim and scope of the CC inquiry is different from the OFT's review of the Block Exemption, it is possible that matters relating to ticketing schemes covered by the Block Exemption may be relevant to the CC's inquiry.
- 5.10 We have discussed these potential interactions with the CC and are continuing to coordinate with them on any issues emerging from the CC inquiry in relation to ticketing.
- 5.11 Our recommendation is to extend the duration of the Block Exemption for an additional period of five years until 29 February 2016, which would

provide continued legal certainty to businesses and would continue to facilitate the types of ticketing schemes in the Block Exemption. Importantly, however, it would be without prejudice to our ability to make a further recommendation to vary the Block Exemption at any time before its expiry if strong evidence emerged that developments in smart ticketing required changes to an extended Block Exemption before it expired, or if it seemed necessary and appropriate as a result of issues raised by the CC's bus market inquiry.

- 5.12 Having taken in to account the responses to the consultation, we remain of the view that the Block Exemption should be extended for a five year period until 29 February 2016.

6 Informal guidance/ issuing Revised Guidance

- 6.1 A number of respondents also considered that the OFT should be prepared to provide guidance or informal advice to companies where ticketing agreements involving new technology do not clearly fall within the Block Exemption. It is crucial to recall that where an agreement falls outside the Block Exemption, there is no automatic presumption that it falls foul of competition law. Where agreements meet the criteria of section 9(1) of the Act because they generate efficiencies which are shared with consumers and do not contain unnecessary restrictions or eliminate substantially competition for the services in question, they will benefit from individual exemption under the Act without the need for a decision from the OFT.
- 6.2 Since the end of the notification system in 2004, businesses have been required to self-assess whether their agreements comply with competition law, including whether they would meet the section 9(1) criteria. The OFT's ticketing guidance¹⁹ should provide transport operators with significant assistance in making this assessment where agreements potentially fall outside the Block Exemption. Moreover, the OFT is currently trialling a new Short-form Opinion process under which it can provide guidance on prospective horizontal agreements between

¹⁹ OFT 439, '*Public transport ticketing schemes block exemption*' (November 2006), at paragraph 4.43.

competitors that raise novel or unresolved questions of competition law clarification of which would benefit a wider audience.²⁰ We consider it likely that questions about the competition law assessment of proposed arrangements involving new types of multi-operator ticketing schemes falling outside the Block Exemption would in principle be capable of meeting the criteria for the OFT to provide guidance under a Short-form Opinion, although a resourcing decision would need to be taken as to whether such a request met the OFT's Prioritisation Principles at the time.²¹ Such an opinion would be published for the benefit of other operators.

- 6.3 As an additional point, we note that the OFT guidance *Public Transport Ticketing Schemes Block Exemptions* (OFT439) explains how the Block Exemption works in practice and provides greater clarity as to whether ticketing schemes benefit from an exemption. If you agree with our recommendation that it is not necessary or appropriate to make changes to the Block Exemption, we do not consider that a revision of the guidance is necessary.

7 Conclusions

- 7.1 The OFT recommend that you make an Order varying the Block Exemption to extend its duration for an additional period of five years until 29 February 2016.
- 7.2 Notwithstanding the above, we note that we have the ability to make a recommendation to you to vary the Block Exemption at any time before its expiry, if circumstances change.

Jackie Holland

Director of Competition Policy

²⁰ Further details of the process are available on the OFT website at: www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions/.

²¹ OFT 953, '*OFT Prioritisation Principles*' (October 2008), available on the OFT website at: www.of.gov.uk/shared_of/about_of/oft953.pdf.

GLOSSARY OF TICKET TYPES

Ticket types

Public transport ticketing schemes covered by the PTTTS 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 same – bus zonal tickets and travelcards, for example, are likely to be types of MTC
- **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.

Definitions

The definitions of these ticket types are set out in Article 3 of the Block Exemption, in the following terms:

'**Multi-operator travel card**' means a ticket (or tickets) entitling the holder to make three or more journeys on three or more specified local public transport services operating on three or more routes provided that:

- a) these routes are not substantially the same

- b) these local public transport services are not substantially the same, and
- c) for each of these routes and local public transport services, the passenger usage and revenue received from the ticket and other such tickets purchased as a result of the relevant agreement, demonstrate that the ticket is not, in practice, a multi-operator individual ticket or a through ticket.

'Through ticket' means a ticket (or tickets) entitling the holder to make a particular journey on two or more local public transport services provided that such a journey is made on complementary services.

'Multi-operator individual ticket' means a ticket (or tickets) entitling the holder, where a particular journey could be made on local public transport services provided by any of two or more operators, to make that journey or any part of it on whichever service the holder chooses.

'Short distance add-on' means a multi-operator travelcard purchased as an add-on to a ticket (or tickets) entitling the holder to make a particular journey on a local public transport service pursuant to an agreement which provides for onward travel connections for passengers on complementary services.

'Long distance add-on' means:

- a) a ticket (or tickets) entitling the holder to make a journey solely on the local public transport services of any one operator
- b) a multi-operator travelcard or
- c) a through ticket

each being purchased as an add-on to a ticket (or tickets) entitling the holder to make a particular journey on one or more connecting services.

ANNEXE LIST

ANNEXE A – Consultation document

Public Transport Ticketing Schemes Block Exemption Review. Proposal to recommend that the duration of the Block Exemption is extended (OFT1255).

ANNEXE B – Summary of responses document

Public Transport Ticketing Schemes Block Exemption Review. Summary of responses to the OFT's consultation, and OFT's conclusions and decision document (OFT1255res).