

# REVIEW UNDER S.162 OF THE ENTERPRISE ACT 2002 OF THE UNDERTAKINGS RELATED TO THE SUPPLY OF BUS SERVICES IN MID AND WEST KENT GIVEN BY MAIDSTONE AND DISTRICT MOTOR SERVICES LTD

## ISSUE

1. Under Section 162 of the Enterprise Act 2002 ('EA02') the Office of Fair Trading ('the OFT') has a duty to consider whether, by reason of any change of circumstances, an enforcement undertaking is no longer appropriate and needs to be either varied, superseded, or parties to the undertaking need to be released from it.<sup>1</sup> The OFT shall give such advice to the Competition Commission ('the CC') as it considers appropriate in relation to any possible action by the CC. Pursuant to this duty, we have reviewed the Bus Services in Mid and West Kent undertakings ('the undertakings') given by Maidstone and District Motor Services Ltd ('M&D'), now Arriva Southern Counties Ltd ('Arriva').

## BACKGROUND

2. The Director General of Fair Trading (DGFT) made a reference under sections 9(1), 47(1), 49(1) and 50(1) of the Fair Trading Act 1973 to the Monopolies and Mergers Commission (MMC) on 15 December 1992 regarding the supply of bus services in mid and west Kent. On 14 June 1993 the MMC reported in *The supply of bus services in Mid and West Kent* (MMC - Cmnd 2309)<sup>2</sup> that Maidstone & District Motor Services Ltd (M&D) provided about two-thirds of the bus services within the reference area,<sup>3</sup> and therefore a scale monopoly existed. The MMC found that there were two forms of behaviour carried out by M&D which raised competition concerns:
  - The first concern involved M&D running bus services in such a way as to maintain their monopoly position. Undertakings were given by M&D in relation to this concern, but these time-expired after three years, and are therefore not considered in this review.

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<sup>1</sup> In this instance the OFT's duty arises under sections 88(4) and (5) of the Fair Trading Act 1973 as preserved in Schedule 24 of the Enterprise Act 2002.

<sup>2</sup> [www.competition-commission.org.uk/rep\\_pub/reports/1993/336busservices.htm#full](http://www.competition-commission.org.uk/rep_pub/reports/1993/336busservices.htm#full)

<sup>3</sup> The reference area was described in the DGFT's reference as the districts of Maidstone, Rochester upon Medway, Gillingham, Swale, Tonbridge and Malling, Tunbridge Wells, Sevenoaks and Gravesham in the County of Kent.

- The second concern involved M&D's arrangements for allowing other bus operators to access the Pentagon Bus Station at Chatham which was leased to and operated by M&D. The MMC found that restrictions applied by M&D to access the Pentagon Bus Station at Chatham disadvantaged competitors and operated against the public interest.<sup>4</sup> It was considered by the consultant employed by the MMC that not having access to the bus station was a significant handicap to M&D's competitors.<sup>5</sup> This second concern is the focus of this review.

3. In relation to the second concern regarding access to Pentagon Bus Station the MMC recommended that:

'M&D should give undertakings to the OFT, first to provide all operators with equal opportunity of gaining access for their services on reasonable terms and charges, on the lines of those negotiated with Southern Vectis on access to the bus station at Newport, Isle of Wight (see Appendix 5.1), and secondly to remove from its current terms and conditions of the power summarily to eject an operator if it infringes M&D's operating conditions. We consider that such undertakings should take into account the current arrangements for tendered services and the case for moving them from Bay 4, which is prone to unauthorized parking by M&D staff. We recognize that space at the station for further commercial services is limited; we envisage that the conditions will require that, if demand for space exceeds the limited number of slots at present available, M&D will make available a further bay by rearranging and, if necessary, removing some of its own operations, possibly by surrendering a parking bay. We note in this connection that any difficulties would be considerably eased if Rochester upon Medway City Council was able to offer M&D additional parking spaces near the Pentagon.'<sup>6</sup>

4. Following the publication of the report, the undertakings were accepted by the Secretary of State for Trade and Industry on 7 August 1995.<sup>7</sup> In summary, M&D undertook:

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<sup>4</sup> Paragraph 6.59

<sup>5</sup> Paragraph 6.53

<sup>6</sup> Paragraph 6.82

<sup>7</sup> The undertakings given on the 7 August 1995 were replaced by some slightly amended ones on 4 December 1995. The amendments did not have a material effect on the undertaking considered in this review.

1. to grant licenses to other operators of bus services to use stands at the Pentagon Bus Station in Chatham, on the following terms and conditions:
  - The bus stand made available by M&D shall be that from which M&D's own bus services to the same destination operate.
  - Where the bus stand is already fully utilised by bus services to that destination the other operators shall be permitted to use the nearest bus stand not already fully utilised at which space can reasonably be made available.
  - M&D shall place a sign at the bus stand from which its own services to a destination operate indicating the stand used by another operator who provides services to that destination.
5. A version of the undertakings which are currently in force can be found on the OFT's website.<sup>8</sup>
6. The original signatory to the undertakings was M&D, along with its holding company Einkorn Ltd, and British Bus PLC, which had purchased Einkorn Ltd just before the undertakings were given. In July 1996 the British Bus Group was taken over by the Cowie Group, which was renamed Arriva on 1 January 1998. Einkorn, which had already been renamed Invictaway, was renamed Arriva Southern Counties on 2 April 1998. In August 2010, Arriva was acquired by Deutsche Bahn.<sup>9</sup>
7. The non-time expired parts of the undertakings were reviewed in 2005.<sup>10</sup> The OFT found that there was no evidence of a breach of the undertakings, and had not received complaints about Arriva as part of the review. However, during the OFT's review it became apparent that some bus operators in the area were unaware of the undertakings.
8. As a result of this, and Arriva's continued strong position in the supply of bus services in the area, the OFT decided:
  - not to advise that the company be released from the undertakings or to vary or supersede the undertaking, and

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<sup>8</sup> [www.of.gov.uk/shared\\_of/monopolies/busservices.pdf](http://www.of.gov.uk/shared_of/monopolies/busservices.pdf)

<sup>9</sup> [www.arriva.co.uk/arriva/en/about\\_arriva/history\\_growth/overview/](http://www.arriva.co.uk/arriva/en/about_arriva/history_growth/overview/)

<sup>10</sup> The review can be found here: [www.of.gov.uk/shared\\_of/monopolies/advice/busreview.pdf](http://www.of.gov.uk/shared_of/monopolies/advice/busreview.pdf)

- to address the lack of awareness by writing to all the local bus operators reminding them of the undertaking.

9. Therefore the remaining undertaking is still in place.

## **CHANGE OF CIRCUMSTANCES**

10. The Pentagon Bus Station was replaced as the bus station serving Chatham on 10 October 2011 by the Chatham Waterfront Bus Station, and is now no longer used as a bus station. Unlike the Pentagon Bus Station, the Chatham Waterfront Bus Station is not operated by one of the bus companies active in the area. The Chatham Waterfront Bus Station is owned and managed by Medway Council, and Arriva does not have any responsibility for operating the new bus station other than through its membership of the Chatham Waterfront Bus Station Steering Group Organisation. Decisions over access to the new bus station and allocation of bus stands are taken by Medway Council. This is made clear in the agreement between Medway Council and any bus operator wishing to access the Chatham Waterfront Bus Station, which includes these clauses:

3.1 The Council agrees with the Operator that it shall

3.1.1 provide access to the stands at Chatham Waterfront for the boarding or alighting of passengers during times as may be agreed by the Council

3.1.2 provide and allocate stands at which the Operator's passengers may board and alight

3.1.3 allocate a stand for each registered departure in a way which does not unreasonably discriminate between operators.

11. Medway Council has informed the OFT that, in addition to Arriva, four different bus operators have signed a contract to use the Chatham Waterfront Bus Station. Arriva is therefore not in a position where it can control access to bus station facilities in Chatham.

## **CONCLUSION AND RECOMMENDATION**

12. There has been a change of circumstances which mean that the undertakings are no longer appropriate and either they need to be amended or Arriva can be released from them. This is because Arriva no longer has any responsibility for

managing access to the bus station which serves Chatham (the Chatham Waterfront Bus Station), or for the allocation of bus stands.

13. This advice has been published on the OFT website, consistent with paragraph 22 of the Memorandum of Understanding between the OFT and the CC on the variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the EA02.<sup>11</sup>

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<sup>11</sup> [www.offt.gov.uk/shared\\_offt/595316/595319/oft1060.pdf](http://www.offt.gov.uk/shared_offt/595316/595319/oft1060.pdf)