

# Public transport ticketing schemes block exemption

Understanding competition law

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Articles 81 and 82 of the EC Treaty and the Competition Act 1998 are applied and enforced in the United Kingdom by the Office of Fair Trading (the OFT). In relation to the regulated sectors these provisions are applied and enforced, concurrently with the OFT, by the regulators for communications matters, gas, electricity, water and sewerage, railway and air traffic services (under section 54 and schedule 10 of the Competition Act 1998) (the Regulators).

The following are Regulators:

- the Office of Communications (OFCOM)
- the Gas and Electricity Markets Authority (OFGEM)
- the Northern Ireland Authority for Energy Regulation (OFREG NI)
- the Director General of Water Services (OFWAT)
- the Office of Rail Regulation (ORR), and
- the Civil Aviation Authority (CAA).

This guideline is issued by the OFT under section 52 of the Competition Act 1998 and provides general advice and information about the application and enforcement by the OFT of Articles 81 and 82 of the EC Treaty and the Chapter I and Chapter II prohibitions contained in the Competition Act 1998. It is intended to explain the OFT's practice on consulting with complainants and other third parties during its investigations to those likely to be affected by it. The OFT has consulted the Regulators on this guideline in accordance with section 52(7) of the Competition Act 1998. However, references in this guideline to the OFT do not include the Regulators, unless otherwise stated.

**This guideline is not a substitute for the EC Treaty nor for regulations made and notices provided under it. Neither is this guideline a substitute for the Competition Act 1998 and the regulations and orders made under it. It should be read in conjunction with these legal instruments, Community case law and United Kingdom case law. Anyone in doubt about how they may be affected by the EC Treaty and the Competition Act 1998 should seek legal advice.**

In addition to its obligations under Community law, when dealing with questions in relation to competition within the United Kingdom arising under Part I of the Competition Act 1998, the OFT will act in accordance with section 60 of that Act.

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# 1 Introduction

<sup>1</sup> The original order (SI 2001 No 319) was amended by the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2005 (SI 2005 No 3347).

- 1.1** This guideline explains the application of the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001 No 319) as amended<sup>1</sup> (the block exemption).
- 1.2** Part 2 of this guideline briefly sets out the legal framework within which the block exemption operates.
- 1.3** Part 3 provides an overview of the block exemption. It discusses why certain public transport ticketing schemes are likely to have an effect on competition but provide benefits to consumers. It then sets out an outline of the block exemption and explains how to assess public transport ticketing scheme agreements within this framework.
- 1.4** Part 4 explains in detail how the block exemption is applied. It explains the distinctions between the different types of public transport ticketing schemes and discusses the requirements which must be satisfied for these agreements to benefit from the block exemption.
- 1.5** Part 5 covers the interaction of the block exemption with other UK and EC competition law regimes.
- 1.6** To assist the reader a copy of the block exemption, as amended, has been included in Annex A.<sup>2</sup>

<sup>2</sup> The amended version of the block exemption has been prepared by the OFT incorporating the changes made by SI 2005 No 3347 into SI 2001 No 319.

## 2 The Legal Framework

**2.1** This Part describes the Competition Act 1998 (the Act) in broad terms. The OFT has published a series of general guidelines and booklets which explain the application and enforcement of the Act in more detail. A list of all the guidelines in the series and how they may be obtained is on the inside back cover of this guideline.

### UK and EC competition law

**2.2** The Act prohibits:

- agreements between undertakings, 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 or any part of it (the Chapter II prohibition).<sup>3</sup>

**2.3** The OFT has additional powers under EC Competition law to apply and enforce Articles 81 and 82 of the EC Treaty.<sup>4</sup> 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 EC provisions is the geographic scope: Articles 81 and 82 only apply to agreements and conduct which may affect trade between Member States whereas the Chapter I prohibition and the Chapter II prohibition only apply to agreements and conduct that may affect trade within the United Kingdom.

**2.4** The case law of the European courts has interpreted the phrase 'may affect trade between Member States' broadly. However, public transport ticketing schemes generally relate to services within a limited geographical area, such as a town or city, and are therefore unlikely to result in an effect on trade between Member States.

<sup>3</sup> There is no provision for exemption from the Chapter II prohibition and so this guideline primarily concerns the application of the Chapter I prohibition.

<sup>4</sup> The Treaty establishing the European Community.

**2.5** For the rest of this guideline, public transport ticketing scheme agreements are considered in relation to the Chapter I prohibition, against which the block exemption is available. The interactions between the Chapter I prohibition and Article 81, and between the Chapter II prohibition and the block exemption, are considered in Part 5 of this guideline.

### Terms used in the Chapter I prohibition

**2.6** Some of the terms used in the Chapter I prohibition and the concepts relevant to their application are explained below briefly. These are terms and concepts used throughout this guideline. Further information about these terms can be found in the OFT guideline *Agreements and concerted practices* (OFT401).

#### Undertaking

**2.7** The term undertaking is not defined in the EC Treaty or the Act but its meaning has been set out in Community law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed.<sup>5</sup> It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (for example, trade associations), non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. The key consideration in assessing whether an entity is an undertaking for the application of the Chapter I prohibition is whether it is engaged in economic activity. An entity may engage in economic activity in relation to some of its functions but not others.

**2.8** The Chapter I prohibition does not apply to agreements where there is only one undertaking: that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence.<sup>6</sup> Whether or not the entities form a single economic unit will depend on the facts of each case.

<sup>5</sup> See Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306 and Case T-319/99 *Fenin v Commission*, judgment of [2003] 4.3.2003.

<sup>6</sup> See Case 22/71 *Beguelin Import v GL Import Export* [1971] ECR 949; [1972] CMLR 81.

**2.9** The Chapter I prohibition applies to local authorities insofar as they act as undertakings. In assessing whether a local authority is acting as an undertaking in a particular set of circumstances, the key question is whether or not it is engaged in an economic activity. A bus company co-owned by a local authority is an undertaking. If the local authority merely owns shares in the bus company, the authority is not necessarily an undertaking. However, if the local authority is involved in the day to day running of the bus business it may be regarded as an undertaking.

### **Agreement**

**2.10** Agreement has a wide meaning and covers agreements whether legally enforceable or not, written or oral; it includes so called gentlemen's agreements. There does not have to be a physical meeting of the parties for an agreement to be reached: an exchange of letters or telephone calls may suffice.

**2.11** The block exemption, however, specifies that only **written** agreements may benefit from it. This is to encourage transparency between parties and potential parties on the terms of their particular public transport ticketing scheme.

### **The prevention, restriction or distortion of competition**

**2.12** The Chapter I prohibition applies where the object or effect of the agreement is to prevent, restrict or distort competition within the United Kingdom. Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessarily mean that the agreement is prohibited. The OFT does not adopt such a narrow approach. The OFT will assess an agreement in its economic context.

### **The appreciable effect on competition test**

**2.13** An agreement will fall within the Chapter I prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition within the United Kingdom. The European Commission's *Notice on Agreements of Minor Importance*<sup>7</sup> sets out,

<sup>7</sup> OJ C368, 22.12.01, p13.

using market share thresholds, what is **not** an appreciable restriction of competition under Article 81 of the EC Treaty. In determining whether an agreement has an appreciable effect on competition for the purposes of the Chapter I prohibition, the OFT will have regard to the European Commission's approach as set out in this Notice, information about which can be found in the OFT guideline *Agreements and concerted practices* (OFT401).

- 2.14** The market share thresholds do not apply to certain hard-core restrictions including for example price fixing, market sharing and resale price maintenance (see paragraph 11 of the Notice for the full list of these hard-core restrictions). Agreements containing any of the restrictions set out in paragraph 11 of the Notice are regarded as being capable of having an appreciable effect even where the market shares fall below the thresholds explained in the Notice.

### The legal exception regime

- 2.15** Although the Chapter I prohibition applies to agreements which prevent, restrict or distort competition, the Act recognises that some such agreements should, nevertheless, not be prohibited provided that they satisfy the conditions set out in section 9(1). A legal exception regime now operates under the Act. This means that an agreement that falls within the Chapter I prohibition but which satisfies the conditions set out in section 9(1) shall not be prohibited, 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. Under the Act, the burden of proving that the conditions are satisfied rests on the undertaking(s) claiming the benefit of section 9(1).

### The conditions in section 9(1)

**2.16** Section 9(1) sets out four conditions which must all be met for an agreement to have the benefit of the legal exception rule. Section 9(1) provides that an agreement is exempt from the Chapter I prohibition if it:

'(a) contributes to

- (i) improving production or distribution, or
- (ii) promoting technical or economic progress

while allowing consumers a fair share of the resulting benefit; and

(b) does not

- (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
- (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.'

**2.17** The European Commission has issued a Notice entitled *Guidelines on the Application of Article 81(3) of the Treaty*.<sup>8</sup> This Notice is intended to assist companies and their advisers in determining whether an agreement satisfies the conditions in Article 81(3). As the wording in section 9(1) is similar to the wording of Article 81(3) the OFT will have regard to this Notice in considering the application of section 9(1) of the Act.

<sup>8</sup> OJ C101 27.04.2004, p.97.

### Block Exemptions

**2.18** Under the Act the Secretary of State may, acting on the OFT's recommendation, make a domestic block exemption that exempts from the Chapter I prohibition particular categories of agreement which the OFT considers are likely to satisfy the conditions in section 9(1).

**2.19** A block exemption may include conditions or obligations. Breach of a **condition** imposed in a block exemption has the immediate effect of cancelling the block 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. The Act also allows the OFT to cancel the block exemption in relation to a particular agreement if it considers that the conditions set out in section 9(1) of the Act are not satisfied. This might be for example if the OFT considered that a particular agreement allowed the parties to eliminate existing competition or prevent new entry to the market.

**2.20** An agreement which falls within a category specified in the block exemption (and which does not breach any of the conditions specified in the block exemption) will not be prohibited under the Chapter I prohibition<sup>9</sup> and is enforceable by the parties to the agreement.

**2.21** A block exemption does not exempt an agreement from the Chapter II prohibition (see paragraph 5.1) or from Articles 81 and 82 (see paragraphs 5.2 to 5.4).

### Exclusions

**2.22** Schedules 1-3 of the Act specifically exclude certain categories of agreement from the Chapter I prohibition. Further information on the exclusions available in relation to Article 81 and the Chapter I prohibition can be found in Part 6 of the OFT guideline *Agreements and concerted practices* (OFT401). The following examples of excluded agreements are non-exhaustive and may be of particular relevance to certain public transport ticketing schemes.

<sup>9</sup> A domestic block exemption does not exempt agreements affecting trade between Member States for the purposes of Article 81. An agreement affecting trade between Member States which falls within Article 81(1) and is block exempted under section 9(1) will be invalid and unenforceable if it does not also benefit from an EC block exemption or does not otherwise satisfy the conditions in Article 81(3).

**2.23** An agreement is excluded from the Chapter I prohibition<sup>10</sup> if it is covered by a direction under section 21(2) of the Restrictive Trade Practices Act 1976<sup>11</sup> which was in force immediately before the Act came into effect on 1 March 2000. The exclusion applies only to agreements made prior to 9 November 1998 (the enactment date of the Act) and continues in force unless the agreement is 'materially'<sup>12</sup> varied. However, this exclusion has been repealed with effect from 1 May 2007. The exclusion, its repeal and the circumstances where its benefit may be lost during the period prior to its repeal are explained further in the OFT guideline *Modernisation* (OFT442).

**2.24** In addition, an agreement is specifically excluded from the Chapter I (and Chapter II) prohibition to the extent to which it is made to comply with a legal requirement.<sup>13</sup>

<sup>10</sup> By virtue of paragraph 2 of Schedule 3 to the Act.

<sup>11</sup> A direction that the restrictions or information provisions contained in the agreement were not of such significance as to call for investigation by the Restrictive Practices Court.

<sup>12</sup> In this context 'material' is likely to mean that the change to the agreement would cause the agreement then to have an appreciable effect on competition. Minor adjustments to, for example, the parties' trading relationship – such as a change in delivery dates, mode of transportation, credit terms, or method of payment – would not normally be considered to be 'material'. Variations to an agreement involving, for example, the change of a joint marketing area to segregated markets, or the addition of a significant competitor as a party to the agreement, are likely to be considered to be 'material'.

<sup>13</sup> By virtue of paragraph 5 of Schedule 3 to the Act.

# 3 Overview of the Block Exemption

**3.1** This Part describes the public transport ticketing schemes that may be covered by the block exemption and discusses why they are likely to have an effect on competition but may nonetheless satisfy the section 9(1) conditions. It then provides an outline of the block exemption, briefly describing each of its articles. Finally it sets out how to assess public transport ticketing scheme agreements within this framework.

## Public transport ticketing schemes

**3.2** Broadly speaking, ticketing schemes are written agreements between operators allowing for passengers to purchase tickets that can be used on the services of the participating operators. Without ticketing schemes passengers would only be able to buy from each operator individual tickets valid for use only on that operator's services. A precise definition of public transport ticketing scheme can be found in Article 4(2) of the block exemption.

**3.3** 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,<sup>14</sup> 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.

<sup>14</sup> These tickets provide the 'building blocks' for competition.

These examples are not exhaustive: they include types of agreements that would **generally** fall within the Chapter I prohibition, but the circumstances of a particular agreement may mean that it does not do so. Equally, there will be instances of agreements not listed above which are prohibited because of their particular terms.

- 3.4** However, certain types of public transport ticketing schemes 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, or reductions in external costs such as atmospheric or noise pollution,<sup>15</sup> and provided that the restrictive provisions are indispensable and do not go so far as to make possible the elimination of competition, such public transport ticketing schemes should satisfy the conditions in section 9(1) so as not to be prohibited.
- 3.5** Some public transport ticketing schemes meet these conditions more clearly than others. Particular care needs to be taken over public transport ticketing schemes which risk eliminating competition on particular routes, to ensure that the basic building blocks of competition on price and quality remain intact. On the other hand, some public transport ticketing schemes such as those providing only onward travel on complementary routes may not infringe the Chapter I prohibition at all.
- 3.6** Different types of public transport ticketing schemes have different effects on competition and require different arrangements to make them work. Consequently, the block exemption identifies several categories of public transport ticketing schemes and requires that these different categories of schemes<sup>16</sup> satisfy different conditions in order to benefit from the block exemption.

<sup>15</sup> The OFT takes the view that the wording of section 9(1) is wide enough to allow the OFT to take account of benefits such as a reduction in congestion and pollution. However, the OFT considers that the main thrust of the analysis under section 9(1) relates to economic efficiencies that are directly or indirectly passed on to consumers and that wider benefits to society would not normally be sufficient on their own for section 9(1) to apply.

<sup>16</sup> 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.

## Categories of agreements covered by the block exemption

- 3.7** Public transport ticketing schemes covered by the 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 (see paragraph 4.20 below) - 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 each other over a substantial part of the route covered by the ticket in question (see paragraph 4.31 below)
- **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 use to make part or all of that journey (see paragraph 4.38 below)
- **short distance add-ons** which allow passengers to purchase an MTC as an extension to a ticket on an individual local route (see paragraph 4.45 below), 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 (see paragraph 4.46 below).<sup>17</sup>

**3.8** The block exemption does not cover agreements relating to, for example, joint marketing of tickets or routes. Such agreements will need careful consideration by the parties as to whether the agreements have an appreciable effect on competition, and any subsequent action to be taken.

### Duration

**3.9** The block exemption applies from 1 March 2001 until 28 February 2011.<sup>18</sup> It is envisaged that the operation of the block exemption will be reviewed before its expiry.

<sup>17</sup> Unlike short distance add-ons, agreements that include long distance operators cannot be potentially exempted as other ticket types. This is why long distance add-ons can include single-operator tickets or TTs on local public transport services and MTCs.

<sup>18</sup> Article 2.

## The Articles of the block exemption

**3.10** Article 1 gives the full title of the Order, Article 2 states the length of time for which the Order shall be in place, and Article 3 defines terms used in the Order. The remaining Articles are as follows:

- Article 4: specifies the categories of agreements for the sale of tickets covered by the block exemption and provides that there must be a written agreement
- Article 5: provides that the block exemption has effect subject to the conditions and the obligations specified in Articles 6 to 17
- Article 6: prevents any operator or potential operator from being excluded from the public transport ticketing scheme without 'objective, transparent and non-discriminatory' reasons
- Article 7: prevents any restriction of any operator's ability to decide which routes to serve or to fix the price, availability, fare structure or geographic validity of its own single, return or individual operator season tickets
- Article 8: prevents any restriction of the ability of operators to take independent commercial decisions on the number of vehicles operated, timetables or headways (except where an agreement on schedules is indispensable to the operation of a scheme which involves the provision of onward connecting services)
- Article 9: prevents the exchange of commercially sensitive information, but allows the exchange of information that is 'directly related and indispensable' to the effective operation of the public transport ticketing scheme
- Article 10: provides that any breach of Articles 6, 7, 8 or 9 results in the cancellation of the block exemption in respect of the public transport ticketing scheme to which the breach relates

<sup>19</sup> This Article was amended by the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2005 (SI 2005 No 3347).

Article 11: allows revenue under a public transport ticketing scheme for an MTC to be distributed using any method, provided that the distribution method does not provide operators with an incentive to set their own fares higher than they would have been in the absence of the MTC, or significantly reduce the incentive for each operator to compete for passengers<sup>19</sup>

Article 12: provides for cancellation of the block exemption in respect of the MTC in question if Article 11 is not met

<sup>20</sup> See paragraph 4.33 for an explanation of posted prices.

Article 13: prohibits price-fixing for MITs, TTs and add-ons, but allows an agreed price for MTCs purchased as an add-on and a 'posted price'<sup>20</sup> arrangement for TTs and other add-ons

Article 14: provides for cancellation of the block exemption in respect of the ticket type in question if Article 13 is not met as regards that ticket type

<sup>21</sup> Meaning that the operator who collects the money keeps it, and, over time, the revenues will balance themselves out.

Article 15: requires revenue from MITs to lie where it falls<sup>21</sup>

Article 16: provides for cancellation of the block exemption in respect of the MIT in question if Article 15 is not met

Article 17: specifies that a request for information must be complied with within 10 working days of receipt

Article 18: provides for cancellation of the block exemption for failure to comply with Article 17

Article 19: provides for the OFT to cancel the block exemption in relation to a particular public transport ticketing scheme if the scheme does not meet the conditions in section 9(1) of the Act (see paragraphs 2.16 and 2.19), and

Articles

20–21: specify the mechanism for cancelling the block exemption in the circumstances set out in Articles 18 or 19.

**3.11** A copy of the block exemption, as amended, has been included in Annex A.<sup>22</sup>

<sup>22</sup> The amended version of the block exemption has been prepared by the OFT incorporating the changes made by SI 2005 No 3347 into SI 2001 No 319.

## Assessing agreements within this framework

**3.12** Agreements which do not benefit from the block exemption are subject to the normal application of the Act and EC competition law. Such agreements are not, however, necessarily prohibited by the Chapter I prohibition or Article 81.

**3.13** Agreements may fall within the Chapter I prohibition only where they have as their object or effect an appreciable restriction of competition within the United Kingdom (and may affect trade within the United Kingdom), and within Article 81(1) where they have as their object or effect an appreciable restriction of competition within the common market (and may affect trade between Member States).<sup>23</sup> Ticketing agreements containing clauses that only have a neutral or benign effect on competition do not fall within the Chapter I prohibition or, where applicable, Article 81(1). For example, where a local bus company and a train operating company are not actual or potential competitors in a particular market, or where operators merely standardise the format of their ticketing documents, it is unlikely that an agreement between them will fall within the Chapter I prohibition because there will be no appreciable restriction of competition. Similarly small scale<sup>24</sup> public transport ticketing schemes are unlikely to have an appreciable effect on competition due to the limited scope of their effect.

<sup>23</sup> See further Part 2 above for more detail on the legal framework.

<sup>24</sup> For example, an MTC covering only a few routes in a small town.

**3.14** Where a restrictive agreement does not fall within the conditions of the block exemption but it does satisfy the conditions in section 9(1), the agreement is not prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment the conditions in section 9(1) are satisfied and for as long as that remains the case.

**3.15** In addition, agreements which do not benefit from the block exemption are not prohibited by the Chapter I prohibition if they fall within another exemption or exclusion, even if they have an appreciable effect on competition (see paragraphs 2.22 to 2.24).

<sup>25</sup> Articles 11,13 or 15.

**3.16** Some public transport ticketing schemes may include arrangements covering more than one ticket type. If the agreement contains a provision that breaches one of the conditions relating to one of the ticket types,<sup>25</sup> the arrangement for that particular ticket type is not covered by the block exemption even though the rest of the agreement is exempted. If, for example, an agreement covered an MTC and a MIT and the MIT arrangement breached Article 15, that MIT arrangement would not benefit from the block exemption. However, providing that the MTC still met all the conditions in the block exemption, the MTC part of the arrangement would continue to benefit from the block exemption.

<sup>26</sup> In Article 4 (and defined in Article 3), and the conditions listed in Articles 6-9, 11, 13 and 15.

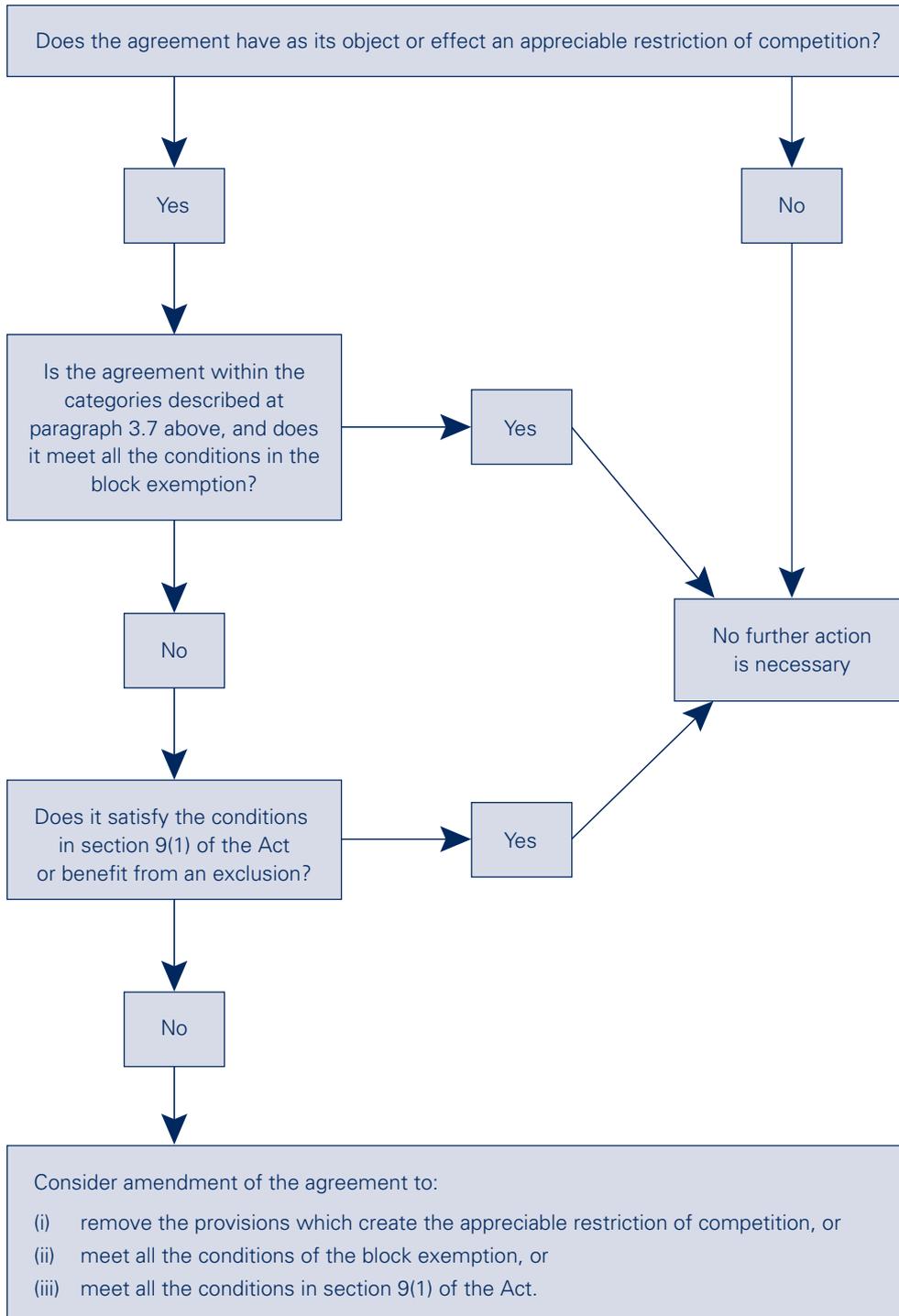
**3.17** The categories of agreements and the conditions contained in the block exemption<sup>26</sup> allow local transport operators to determine whether existing or potential agreements benefit from the block exemption or whether the terms of the agreement would need to be changed to fall within the block exemption. It is for operators to make that decision. There are two situations to consider:

<sup>27</sup> The benefit of the block exemption may be withdrawn in respect of a particular agreement where the section 9(1) conditions are not satisfied. This is discussed further at paragraphs 4.23 and 4.24 below.

- 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.<sup>27</sup> They only have to prove that the restrictive agreement is block exempted; consequently the agreement is not prohibited, and no further action is necessary. However, the parties may wish to consider whether it is appropriate to seek legal advice to confirm whether or not the agreement falls within the block exemption, or
- Where a restrictive agreement does not fall within the terms of the block exemption consideration will need to be given to the following:
  - if it **does** have as its object or effect an appreciable restriction of competition:
    - does it satisfy the conditions in section 9(1) of the Act so as not to be prohibited? See paragraph 2.16 above, or
    - should it be amended so as to bring it within the terms of the block exemption?

- if it **does not** have as its object or effect an appreciable restriction of competition then no further action needs to be taken.

**3.18** The situation can be represented graphically as follows:



### Informal Advice

- 3.19** Undertakings will generally be well placed to analyse the effect of their own conduct under the Chapter I prohibition in the light of relevant Community case law, Community instruments and European Commission notices. Further, United Kingdom case law and competition law guidelines such as this one are also available to assist undertakings in considering the application of the law under the Act.
- 3.20** The OFT may at its discretion offer confidential informal advice to undertakings on the application of the Chapter I prohibition and the block exemption in some limited circumstances, such as where novel or unusual questions in relation to the application of UK competition law arise. Such requests should be made through contact with OFT officials on an ad hoc basis. Requests for informal advice should be made in the first place by calling the OFT enquiries line at 08457 22 44 99, or emailing [enquiries@oft.gsi.gov.uk](mailto:enquiries@oft.gsi.gov.uk). Views given by way of informal advice are not binding.

### Administrative Priorities

- 3.21** It is the OFT's practice to consider, on a case by case basis, whether an agreement falls within its administrative priorities so as to merit investigation.

# 4 The Application of the Block Exemption

**4.1** This Part sets out in detail how the block exemption is applied to agreements. It begins with a discussion of the types of public transport ticketing schemes covered by the block exemption and explains the distinctions between the different types of scheme. It then discusses the conditions which must be satisfied for agreements to benefit from the block exemption. Some of these are general conditions which apply to all public transport ticketing schemes, while others apply to specific types of public transport ticketing schemes. Finally a number of other requirements which must be met are noted.

**4.2** Generally, the block exemption exempts agreements which:

- have as their object or effect an appreciable restriction of competition and which therefore fall within the scope of the Chapter I prohibition, and which are not otherwise exempted or excluded
- fall within the categories of agreements specified in Article 4 of the block exemption, and set out in para 3.7 above, and
- do not breach the conditions in the block exemption.<sup>28</sup>

<sup>28</sup> Articles 6, 7, 8, 9, 11, 13 and 15.

## Categories of Agreements covered by the block exemption

**4.3** Public transport ticketing schemes covered by the block exemption involve the following ticket types:

- multi-operator travelcards (MTCs)
- through tickets (TTs)
- multi-operator individual tickets (MITs)
- short distance add-ons, and
- long distance add-ons.

These ticket types are described in more detail in paragraph 3.7 and in the discussion on each ticket type below.

- 4.4** The distinctions between these different ticket types are important, as the type determines which conditions must be met for the public transport ticketing scheme to fall within the scope of the block exemption.
- 4.5** To benefit from the block exemption, MTCs cannot be available for journeys on routes which are ‘substantially the same’. Similarly, TTs cannot benefit from the block exemption if they relate to journeys on services which are in competition with each other over a ‘substantial part of the route’ in question. The block exemption defines tickets for journeys which can be made on services provided by two or more operators as MITs, and again these must satisfy the relevant conditions in the block exemption in order to fall within its scope.
- 4.6** In assessing whether a ticket is an MTC or a MIT, operators will have to consider carefully whether the scheme genuinely covers at least three substantially different routes and services in order to qualify as an MTC.<sup>29</sup> It is generally likely that a ticket that is valid over an entire geographical area, with many routes and many services, will be an MTC. This will require more careful consideration where, for example, an MTC is relatively small-scale, covering only a small number of routes and services in a small town.
- 4.7** For many routes which operators will wish to include in any MTC or TT scheme, there will be at least a **minimal** overlap between the component legs of any journey. This is because, for example, all services in a town may have to pass down one particular street in order to reach the bus station. This guideline cannot give a definitive formula which will enable operators always to assess whether any two particular routes are ‘substantially the same’. Common sense and local knowledge will play an important role in making this assessment. However, 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
  - they account for all or most of the stops in a particular fare zone, or

<sup>29</sup> The public transport ticketing scheme will additionally have to entitle a passenger to make three or more journeys on the routes and services.

- the pattern of usage (in terms of their location and/or the volume of passengers travelling between them, for example), means that the common stops could form a stand-alone route in their own right.

**4.8** Where different bus services have a few bus stops in common, for example, provided that these bus stops do not form a substantial part of any of the routes in question, then issuing an MTC or TT valid on these routes should not diminish competition on any part of the routes in question. This is therefore permitted by the block exemption. Any public transport ticketing scheme where there was a limited overlap because the operators had carved up routes in order to raise prices would not, however, meet the requirements of the block exemption.

**4.9** Operators should assess whether different routes do compete with each other from the passengers' point of view. In other words, operators should assess whether routes are substitutes from a demand side perspective. In this particular instance, substitution from the operators' point of view (the supply side) is not taken into account.

**4.10** A book of single tickets or a 'carnet' will be either an MTC if it is valid across a specified geographical area or a MIT if it is valid for a particular journey on a particular route.

### **Conditions that apply to all public transport ticketing schemes**

**4.11** The block exemption sets out a number of general conditions that must be met by all public transport ticketing schemes.

#### **Article 6**

**4.12** This condition requires that any public transport ticketing scheme must be accessible to any local public transport operator, or potential operator, wishing to join it. A public transport ticketing scheme which prevents an operator from joining it will benefit from the block exemption only if there is an objective, transparent and non-

discriminatory reason for the exclusion. This condition is to ensure that public transport ticketing schemes do not exclude operators from the market, or form barriers that restrict the ability of new operators to enter the market. Examples (the list is not exhaustive) of reasons for excluding operators or potential operators which are **not** objective, transparent or non-discriminatory include:

- requiring an operator to incur costs on joining a public transport ticketing scheme which are not indispensable to the effective operation of that scheme. Such costs may include, for example:
  - requiring unreasonable investment in on-board hardware for recording the data required to administer the public transport ticketing scheme, or
  - requiring unreasonable investment in advertising to the public the existence of the public transport ticketing scheme
- failing to distribute between the parties to a public transport ticketing scheme the revenue received through the scheme as regularly as reasonably practicable.<sup>30</sup> This is to ensure that the cash flows of smaller operators are not unduly restricted by the public transport ticketing scheme
- requiring any operator to incur costs on leaving a public transport ticketing scheme which are not indispensable to the effective operation of the scheme. Such costs may include:
  - requiring an unreasonable notice period to be given, or
  - imposing an unreasonable financial or other penalty on a party for leaving the public transport ticketing scheme
- apportioning between the parties to a public transport ticketing scheme the fixed or variable costs of administering the scheme on terms which do not reflect the actual usage of services in the scheme, or
- requiring any party to a public transport ticketing scheme to not participate in any other such scheme.

<sup>30</sup> It is recognised that it is helpful for operators to receive revenue from annual season ticket sales, for example, in one instalment in the accounting period in which the ticket is bought. 'Regularly', in this instance, does not mean that distribution of the revenue from the sale of the ticket should be spread over the 12 months' validity of the ticket, unless the operational requirements of the ticketing scheme otherwise require it.

## Article 7

- 4.13** A public transport ticketing scheme must not limit the variety or number of routes each operator operates, nor must it limit the ability of the operators to make commercial decisions about their own single or return fares or the price of single-operator season tickets. A public transport ticketing scheme must not interfere with, for example, the price, fare structure, geographic validity or availability of single-operator tickets. This 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.

## Article 8

- 4.14** Operators must be free to take independent commercial decisions about the number of vehicles to be operated on any particular route, the headways to be used or the times of services, for example. The only exception is that a public transport ticketing scheme may include agreement on schedules if it is indispensable for providing connecting services through, for example, a long distance add-on or a TT.

## Article 9

- 4.15** Article 9(1) prevents a public transport ticketing scheme from facilitating the exchange of commercially confidential information between operators. Such exchanges of information may dampen the competitive process and may facilitate collusion.
- 4.16** Clearly, however, some exchange of information between the parties to a public transport ticketing scheme is essential to the operation of many schemes. Article 9(2), therefore, allows the exchange of information which is 'directly related and indispensable' to the effective operation of the public transport ticketing scheme itself, provided it is carried out on an 'objective, transparent and non-discriminatory' basis. Parties to public transport ticketing schemes will have to consider whether exchange of a particular type of information meets these criteria.

<sup>31</sup> See paragraphs 4.40 to 4.44 below regarding revenue lying where it falls.

<sup>32</sup> See paragraph 4.33 below.

**4.17** Article 9(2) does not give examples of the sort of information which could be exchanged. Given that revenue from MITs must lie where it falls, it is likely that these schemes will require little or no information exchange.<sup>31</sup> Similarly the need for information exchange for TTs should be limited to informing participants of the posted prices and providing information relating to such reimbursement.<sup>32</sup> The OFT therefore expects that the need to exchange information will arise principally in the case of MTC schemes and will relate to the price of the MTC, the distribution of revenue received through the scheme and the apportionment of administration costs. The parties will clearly have to exchange information regarding the passenger numbers and revenues relating to the usage of the MTC, but it should **not** be necessary to exchange information on revenues and passenger numbers relating to their own ticket sales, or for information to be (directly or by inference) identified as relating to a particular route.

**4.18** The parties to large scale MTC schemes in metropolitan areas are likely to have to exchange such information only by means of a strictly confidential bilateral exchange of information with an impartial person who is neither an operator nor a potential operator (an 'information referee'). A less stringent approach is likely to be suitable for small-scale schemes where the revenue or potential revenue does not allow for the appointment of an impartial third person to act as an information referee.

### Article 10

<sup>33</sup> See paragraphs 2.10 and 2.11 above.

**4.19** Article 10 provides that breach of any of the conditions in Articles 6, 7, 8 or 9 will result in the block exemption being automatically cancelled in relation to the public transport ticketing scheme to which the breach relates. This includes all the public transport ticketing schemes which are part of the same 'agreement' within the broad meaning of section 2 of the Act.<sup>33</sup>

## Conditions which apply to multi-operator travelcard schemes

**4.20** 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
- operating on three or more routes
- provided that those routes and services are not 'substantially the same', and
- passenger usage and revenue received from the ticket demonstrate that it is not a MIT or a TT (see paragraphs 4.5 to 4.10 above). It is likely that, in most cases, subject to any local conditions imposed, a PlusBus add-on ticket<sup>34</sup> will be an MTC.

<sup>34</sup> This is an add-on option to single and return rail tickets starting and/or finishing at any station where a PlusBus scheme exists through the Journey Solutions initiative.

**4.21** As explained in paragraphs 4.12 to 4.18 above, Articles 6 to 9 of the block exemption set out the general conditions which an MTC must satisfy to benefit from the block exemption.

### Agreeing the price of an MTC

**4.22** While Article 13 prohibits price-fixing for TTs, MITs and add-ons, under the block exemption operators are not prohibited from agreeing the price of MTCs. In addition, Article 13(2)(b) allows parties to an MTC scheme to agree the price at which they sell an MTC which may be purchased as an add-on. The flexibility of passenger use of MTCs, with the consequence that operators will not know what journeys have been made using each ticket, means that it is clearly not possible to use a 'posted price' mechanism for revenue reimbursement for MTCs in the same way as for other ticket types (see paragraph 4.34 below). The operators could conceivably each agree to participate in an MTC in exchange for a fixed fee, which could then form the basis of the price at which each operator decided to sell the MTC in the light of that commitment. That would be cumbersome, at the least, and would impose some risk on operators.

It would also mean that the revenue received from the scheme would bear no resemblance to usage of the services of each operator. Therefore, the only satisfactory solution is for a common agreed price for an MTC.

- 4.23** Therefore, when assessing whether an MTC scheme benefits from the block exemption, the starting point is that the participating operators can agree to set the MTC price at a certain level. However, the benefit of the block exemption may be withdrawn in respect of a particular agreement if it is not compatible with the section 9(1) conditions. 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). However, the need to satisfy the section 9(1) conditions does not prevent the operators from agreeing to increase the MTC price because cost pressures have resulted in some or all of them raising their own ticket prices.
- 4.24** Operators should therefore consider whether the section 9(1) conditions are likely to be satisfied in such cases. 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 premium of say, 7 per cent above the price of the travelcard issued by one or a group of the participating operators. 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 the leading operator's travelcard in an area, to ensure that the MTC is always sold at a premium over the price of its own travelcard, would make the MTC unattractive to passengers, thereby weakening the ability of rival operators to compete through participation in the MTC scheme.

## MTC revenue distribution

**4.25** Under the block exemption, 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 (Article 11).

**4.26** Therefore, the operators participating in the MTC scheme can agree on **any** revenue distribution method that serves them best, as long as it meets these two conditions. There are many revenue distribution methods that meet these conditions, for example methods based on:

- **passenger miles or kilometres** - this approach would divide revenue according to how many miles are travelled by passengers using tickets issued under the MTC scheme, typically assessed using passenger surveys (for example, **if** passengers used the ticket to travel 100 miles on an operator's service, out of a total mileage of 1000 miles travelled using the ticket on all operators' services, that operator would get a 10 per cent share of the scheme's revenue)
- **weighted passenger miles** – this approach would take account of both passenger journeys and a notional fare that reflects cost differences between different types of journey (for example, the notional fare could allocate proportionally higher shares to short journeys or to journeys on higher cost modes of transport such as ferries)<sup>35</sup>
- **passenger journeys** - this approach would divide total revenue according to how many journeys are undertaken on each operator's service, with no account taken of the length of the journey or the mode of transport
- **registered mileage** - this approach would divide revenue based on the mileage operated by each bus company on routes on which the ticket was valid, or

<sup>35</sup> The notional fare could take account of the fare differences between the participating operators, as long as there was no direct link to the actual fares charged by the operators.

- **revenue lies where it falls** – under this approach the operator who collects the money retains it, there is no distribution of the revenue depending on how customers use the tickets.

An example of a revenue distribution method that meets these conditions is set out in more detail below.

### Example 1

The system of allocation involves the surveying of passengers to determine an estimate of miles travelled. This data is then converted into 'adult equivalent fares' according to a predetermined scale of distances:  $\geq 1\text{km}$ ,  $\geq 2\text{km}$ ,  $\geq 3\text{km}$ ,  $\geq 4\text{km}$ ,  $\geq 5\text{km}$ ,  $\geq 10\text{km}$ ,  $\geq 15\text{km}$ ,  $\geq 20\text{km}$ .

The 'adult equivalent fare' is calculated by using a weighted average of fares charged for the distances shown above by the member operators. Under these notional fares shorter journeys cost proportionately more per mile travelled than longer journeys.

Each operator's share of the total value of these notional fares is calculated. This proportion is multiplied by the total revenues from sales of the MTC to determine the operator's share of the revenues.

**4.27** In contrast, a revenue distribution method that involves a direct link to the actual fares charged by operators is unlikely to meet the condition that the method must not result in an incentive for operators to increase their own fares. For example, if operators are reimbursed for their participation in an MTC scheme on the basis of revenue forgone (the amount the passenger would have paid if charged the operators' own fares for each journey), there is a real danger that they will have an incentive to increase their own fares. Under this system, the higher an operator's fares, the bigger the share of the travelcard reimbursement pot the operator receives.

**4.28** In certain very limited circumstances, schemes where revenue is distributed on the basis of revenue forgone may benefit from the block exemption. This could be the case, for example, where for all of the participating operators the MTC revenue is very small compared

to the operator's other revenue (representing, say, only a few per cent), and it is unlikely that the share of the MTC revenue will grow appreciably, such that there is no incentive to raise own fares. Operators will therefore need to ensure that their scheme does not result in an incentive to increase their own fares and that it does not significantly reduce the incentive for each of the operators to compete for passengers.

- 4.29** Breach of the condition requiring revenue from an MTC to be distributed through a method with the correct incentive structure (as set out in paragraph 4.25 above) will cancel the block exemption in relation to the scheme only to the extent that MTCs are offered for sale under the scheme. This means that any MTCs sold under the particular scheme will not benefit from the block exemption, and that part of the scheme may therefore be in breach of the Chapter I prohibition unless it satisfies the conditions in section 9(1) so that it is not prohibited. Where other ticket types are offered under the scheme and these arrangements satisfy the relevant conditions of the block exemption, the block exemption will continue to apply to the provisions for these other tickets.
- 4.30** In certain limited circumstances, an MTC scheme that does not benefit from the block exemption may satisfy the conditions in section 9(1) of the Act so that the scheme is not prohibited by the Chapter I prohibition (see paragraph 2.15 above). This could be the case, for example, where the scheme distributes revenues on the basis of revenue forgone and does not satisfy Article 11 but it is not feasible for a different method to be used (this could be the case if operators are already required to calculate amounts owing under local authority concessionary fares schemes under the Transport Act 1985 by reference to revenue forgone, and the revenues from the scheme are too small to make apportionment by two methods feasible). Note that it would only be in exceptional circumstances that it would be possible to argue that this method of revenue sharing was indispensable and therefore that the scheme would satisfy the section 9(1) conditions.

### Conditions that apply to through ticket schemes

**4.31** A TT is a ticket:

- valid on more than one operator's services
- for completion of a particular journey (whether single or return) on two or more services, and
- where the journey is made on 'complementary services', that is services where the operators do not compete with each other over a 'substantial part of the route' covered by the ticket in question (see paragraph 4.5 above).

**4.32** As explained in paragraphs 4.12 to 4.18 above, Articles 6 to 9 of the block exemption set out the general conditions which a TT must satisfy to benefit from the block exemption.

#### Posted prices

**4.33** Article 13(1) prohibits price fixing for, among other things, TTs. While an MTC clearly 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. In order to retain the benefits of the block exemption, operators must not, therefore, agree the price of a TT.

**4.34** Article 13(2)(a), however, 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. The following example shows how this posted prices system works.

#### Example 2

Suppose the TT is for a journey from A to C via B, where Operator 1 provides the service from A to B and Operator 2 provides the service from B to C.

Each operator will independently set a posted price which is the revenue it requires for carrying a passenger using a TT on its leg of the journey. Each operator will also set a price at which it sells the TT for the complete journey. The prices for the TT will be determined independently by the two operators taking into account the costs and demand each faces for the leg of the journey it provides and the posted price each must pay to the other operator.

If a passenger journeying from A to C purchases her ticket from Operator 1, she will pay the price that has been set by Operator 1. Operator 1 will initially receive all the revenue but will pay Operator 2 the posted price that Operator 2 has set for the journey from B to C.

Similarly, if the passenger purchases her ticket from Operator 2, Operator 2 will receive the price that he has set for the complete journey from A to C but will pay Operator 1 the posted price that Operator 1 has set for the journey from A to B.

- 4.35** The amount of reimbursement is likely to be related to the cost of providing the relevant service to the passenger. Parties to the scheme are not likely to set the amount for reimbursement excessively, since to do so might make it more attractive for passengers to purchase two single-operator tickets instead of buying a TT. So long as single tickets are priced competitively, a posted pricing scheme should provide the minimum possible distortion of competition required to allow these tickets to be offered.
- 4.36** It is important to note that the condition is satisfied only if the relevant operators charge each other **non-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 or long distance operator who has sold a TT valid for travel between those two points.
- 4.37** Breach of the conditions in Article 13 will cancel the block exemption in relation to the scheme only with regard to the TTs offered for sale under that scheme. This means that any TTs sold under the particular scheme will not benefit from the block exemption, and that part of

the scheme may therefore infringe the Chapter I prohibition unless the scheme satisfies the conditions in section 9(1) of the Act so as not to be prohibited. If, however, other ticket types are offered under the scheme and these arrangements satisfy the relevant conditions, the block exemption will continue to apply to the provisions for these other tickets.

### Conditions that apply to multi-operator individual ticket schemes

**4.38** A MIT is a ticket:

- valid on more than one operator's services, and
- 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.

**4.39** As explained in paragraphs 4.12 to 4.18 above, Articles 6 to 9 of the block exemption set out the general conditions which a MIT must satisfy to benefit from the block exemption.

### Revenue lies where it falls

**4.40** Article 13(1) prohibits price fixing for, among other things, MITs. While an MTC clearly cannot operate without agreed common prices, it is generally not indispensable for operators to agree the prices of MITs. 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 block exemption, operators must not, therefore, agree the price of a MIT.

- 4.41** 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 will balance themselves out. This is a very low-cost method of organising public transport ticketing schemes and is already in common usage for MIT schemes.
- 4.42** This method of revenue allocation may not be viable when one operator mainly runs daytime services and the other operator mainly runs evening services (which can often be subsidised by the local authority). Many passengers will buy a ticket during the day from the daytime operator and travel back with the evening operator, using the same ticket. Hence, most of the revenue will be collected by the daytime operator and the evening operator will collect very little revenue. The operators will want to agree a method to redistribute revenue that does not involve ‘revenue lies where it falls’ but distributes revenue on the basis of actual use of the MITs.
- 4.43** Although MIT schemes that use a different revenue distribution method do not meet the condition of Article 15 and hence cannot benefit from the block exemption, the OFT considers that these schemes are likely to satisfy the conditions in section 9(1) of the Act (see paragraph 2.16 above), provided that the revenue distribution method is limited to what is necessary for the MIT scheme to work and does not result in the operators agreeing the price of the MIT.
- 4.44** Breach of the price-fixing condition for MITs in Article 13 will cancel the block exemption in relation to the scheme only to the extent that the respective MITs are offered for sale under that scheme (Article 14). Similarly, breach of Article 15 will cancel the block exemption in relation to the scheme but only insofar as it relates to the MIT (Article 16). This means that any MITs sold under the particular scheme will not benefit from the block exemption, and that part of the scheme may, therefore, be in breach of the Chapter I prohibition unless it satisfies the conditions in section 9(1) so that it is not prohibited. If, however, other ticket types are offered under the scheme and these arrangements satisfy the relevant conditions, the block exemption will continue to apply to the provisions for these other tickets.

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

- 4.45** 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'. 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 between those two towns. This 'add-on' would be for travel within the destination town, for example.
- 4.46** 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.
- 4.47** As defined under the block exemption, short distance add-ons only cover MTCs. Other tickets purchased as an add-on to a local public transport service may fall within the definition of a TT for the purposes of the block exemption. In contrast, there is no potential for multi-operator agreements that involve an add-on to a service provided by a long distance operator to be potentially exempted as other ticket types under the block exemption. This is why long distance add-ons which benefit from the block exemption can include single-operator tickets or TTs on local public transport services as well as MTCs.
- 4.48** As explained in paragraphs 4.12 to 4.18 above, Articles 6 to 9 of the block exemption set out the general conditions which a short or long distance add-on must satisfy to benefit from the block exemption.

## Pricing of add-ons

- 4.49** Article 13(1) prohibits price fixing for, among other things, short and long distance add-on tickets. While an MTC clearly cannot operate without agreed common prices, it is not indispensable for operators to agree the prices of add-ons. 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 block exemption, operators must not, therefore, agree the total price of a ticket including the add-on element.
- 4.50** 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 another participant has issued. The posted price is the reimbursement that an operator independently decides it requires for any passenger it carries who uses a ticket purchased from another operator.<sup>36</sup>
- 4.51** Article 13(2)(b) also allows operators to fix the price of an MTC which is purchased as a short or long distance add-on. However, for the reasons explained at paragraph 4.23 above, the benefit of the block exemption may be withdrawn if the mechanism for agreeing the MTC price is not compatible with the section 9(1) conditions.
- 4.52** Breach of the price-fixing condition for add-ons will cancel the block exemption in relation to the scheme only to the extent that the add-ons are offered for sale under that scheme (Article 14). This means that any add-ons sold under the scheme will not benefit from the block exemption, and that part of the scheme may, therefore, be in breach of the Chapter I prohibition unless it satisfies the conditions in section 9(1) so that it is not prohibited. If, however, other ticket types are offered under the scheme and these arrangements satisfy the relevant conditions, the block exemption will continue to apply to the provisions for these other tickets.

<sup>36</sup> See paragraph 3.32.

### Obligation to provide information to the OFT

**4.53** 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. Requests for information will be made in writing and must be complied with within ten working days from the date on which the request is received. If the request is not complied with, the OFT may cancel the block exemption for any public transport ticketing scheme to which the request relates.<sup>37</sup>

### Withdrawal of the block exemption

**4.54** Under Article 19, the OFT may cancel the 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 (as set out in paragraph 2.16 above). 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).

**4.55** The OFT will therefore monitor the operation of public transport ticketing schemes with particular regard to the effect on prices for single and return fares offered by individual operators. If those fares rise at a rate that passengers consider to be excessive, they should inform the OFT so that the reasons for the price increases can be investigated.

### Other Requirements

**4.56** In addition to the conditions and obligations set out above, in order for an agreement to benefit from the block exemption, there are a few further requirements that must be met:

- the agreement must be in writing,

<sup>37</sup> Article 18.

- each ticket type must be sold to a consumer, although this person may then transfer the ticket to someone else (for example, parents buying tickets to be given to children, educational establishments buying tickets to be given or sold to students, and manufacturing firms buying tickets for onward sale to employees),<sup>38</sup> and
- the agreement must relate principally to the supply of local public transport services. In relation to bus services, these are local services that are registered under the Transport Act 1985.<sup>39</sup> Any other form of public transport service will be 'local'<sup>40</sup> if it meets the following criteria:
  - broadly, one or more passengers travels less than 15 miles on the service<sup>41</sup>
  - it is a scheduled, rather than a 'chartered', service, and
  - it is not a local guided tour service.<sup>42</sup>

Other than to the extent that long distance add-ons are issued under an agreement, long distance services where, broadly, every passenger travels 15 miles or more<sup>43</sup> – for example, air services, international ferry services, or long distance rail or coach services – are not covered by the block exemption.

<sup>38</sup> This also includes group tickets where passengers travel together with only one document as evidence of their right to travel.

<sup>39</sup> Other than those 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 (section 159(1) of the Transport Act 1968), and other than local guided tour services (defined as 'tourist service' in Article 3 of the block exemption).

<sup>40</sup> Defined more fully in paragraph (b) of the definition of 'local public transport service' in Article 3 of the block exemption. This definition reflects the approach in the Transport Acts 1968 and 1985 in relation to local bus services.

<sup>41</sup> If no passenger travels less than 15 miles the service is a 'long distance service' as defined in Article 3 of the block exemption.

<sup>42</sup> Defined as 'tourist service' in Article 3 of the block exemption.

<sup>43</sup> Defined more fully in Article 3 of the block exemption.

## 5 Other competition scrutiny

**5.1** The block exemption only exempts agreements from the scope of the Chapter I prohibition. However, there are a number of other competition law provisions which may apply in limited circumstances where an operator participates in a particular ticketing scheme. These are summarised below.

### The Chapter II prohibition

**5.2** There is no provision for exemption from the Chapter II prohibition and public transport operators therefore remain subject to the Chapter II prohibition when making and considering ticketing arrangements. If an undertaking that participates in a public transport ticketing scheme holds a dominant position in a market, it must take care that its conduct does not infringe the Chapter II prohibition. A dominant operator which sets excessive or predatory fares, for example, may still infringe the Chapter II prohibition whether or not the fares were set in the context of an exempt agreement. Abuse of a dominant position by an undertaking which enters into a public transport ticketing scheme is assessed in exactly the same way as any other type of conduct under the Chapter II prohibition. This is considered in the OFT guideline *Abuse of a dominant position* (OFT402).

### EC Competition Law

**5.3** As noted in paragraph 2.3, the OFT has the power to apply and enforce Article 81 of the EC Treaty, as well as the Chapter I prohibition in relation to anti-competitive agreements.

**5.4** The block exemption under the Act does not apply outside the United Kingdom nor does it preclude the application of Article 81(1) of the EC Treaty.

**5.5** Given that the block exemption applies principally to the supply of local public transport services (see paragraph 4.56 above) it is unlikely that the types of public transport ticketing schemes covered by the block exemption would be capable of being caught by Article 81(1), as the agreement would need to have an effect on trade between Member States. However, in the rare occurrence that a public transport ticketing scheme agreement is caught by EC competition

law, and national law is applied, the relationship is governed by detailed rules. Further information on the relationship between EC and national competition laws can be found in the OFT guideline *Modernisation* (OFT442).

## The Enterprise Act 2002

- 5.6** The Enterprise Act 2002 makes provision for a system of market investigations by the Competition Commission. Under the Enterprise Act, the OFT may undertake market studies and make market investigation references to the Competition Commission. The purpose of these investigations is to inquire into markets where it appears that the structure of the market or the conduct of the suppliers or customers is harming competition. When making a reference, the OFT must have reasonable grounds for suspecting that one or more features of a market prevents, restricts or distorts competition in relation to the supply or acquisition of goods or services in the United Kingdom (or a part of the United Kingdom). The block exemption would not of itself prevent a market study or a market investigation reference in relation to particular aspects of the public transport industry.
- 5.7** The Enterprise Act also makes provision for designated consumer bodies to make 'super-complaints', where there are market features that may be harming consumers to a significant extent. Super-complaints must relate to one or more features of a market as a whole. This will not normally be the specific behaviour of individual businesses. Relevant market features that could give rise to a super-complaint include the market structure or the general conduct of firms operating in the market. As with market studies and market investigation references, the block exemption would not of itself prevent the OFT from receiving, considering and responding to a super-complaint from a designated consumer body.
- 5.8** Further information about the powers of the OFT under the Enterprise Act can be found in the OFT guideline *Overview of the Enterprise Act* (OFT518).

### The Transport Act 2000 and the Transport (Scotland) Act 2001

- 5.9** The OFT has a role under each of these pieces of legislation in applying a competition test contained in the acts where a local transport authority ('LTA'):
- makes or varies a quality partnership scheme
  - makes or varies a ticketing scheme, or
  - invites or accepts tenders for subsidised services under sections 89 and 91 of the Transport Act 1985.
- 5.10** It is not necessary to make an application to the OFT to decide whether the exercise or proposed exercise of one of the above functions meets the competition test. A scheme (including tenders) may be implemented without the prior approval of the OFT. However, such an application may be made by an LTA that has made, or intends to make or vary, the scheme or by any operator of local bus services who is, or is likely to be, affected by the scheme.
- 5.11** There are three distinct stages to the competition test:
- first, the OFT will consider whether a scheme has, or is likely to have a significantly adverse effect on competition - if the scheme does result in such an effect, the second and third stages below must be considered
  - second, the OFT will consider whether a scheme which has a significantly adverse effect on competition may be justified, and
  - finally, the OFT will consider whether the significantly adverse effect on competition as a result of the scheme is or is likely to be proportionate.
- 5.12** Further information on how the OFT applies the competition test can be found in the OFT publication *The Transport Act 2000 and The Transport (Scotland) Act 2001 – Guidance on the Competition Test* (OFT393).

# ANNEXES

## A THE BLOCK EXEMPTION

### 2001 No. 319 (and as amended by 2005 No. 3347) COMPETITION

#### The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001

#### Citation, Commencement, Duration and Interpretation

**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.

**2.** This Order shall have effect from the beginning of 1st March 2000 and shall cease to have effect at the end of the period of ten years commencing on 1st March 2001.

**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:

(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;

'long distance operator' means an undertaking (other than an operator) supplying a scheduled long distance service using one or more vehicles, vessels or craft for the carriage of passengers by road, railway, tramway, inland waterway or air at separate fares other than a chartered service or a tourist service;

'long distance service' means a public transport service in relation to which (except in an emergency) one or both of the following conditions are met with respect to every passenger using the service:

- (a) the place where he is set down is fifteen miles or more, measured in a straight line, from the place where he was taken up;
- (b) some point on the route between those places is fifteen miles or more, measured in a straight line, from either of those places,

and where a public transport service consists of one or more parts with respect to which one or both of these conditions are met, and one or more parts with respect to which neither of them is met, each of those parts shall be treated as a separate public transport service;

'members of the public' means any person other than an operator, potential operator, long distance operator or potential long distance operator;

'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;

'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;

'operator' means an undertaking supplying local public transport services;

'posted price' means, where a ticket is purchased from one undertaking (the seller), a wholesale price set independently by another undertaking ('the creditor') for the carriage of passengers bearing that ticket on the public transport services of the creditor;

'public transport ticketing scheme' has the meaning given in Article 4(2);

'register' means the register maintained by the Office of Fair Trading under rule 20 of the Office of Fair Trading's Rules set out in the Schedule to the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004;

'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;

'stopping place' means a point at which passengers are taken up or set down in the course of a public transport service;

'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;

'ticket' means evidence of a contractual right to travel;

'tourist service' means a public transport service where the price charged for that service includes payment for a live or recorded commentary about the locality being a service primarily for the benefit of tourists;

'vehicle' includes vehicles constructed or adapted to run on flanged wheels but excludes hackney carriages, taxis, cabs, hire cars and any vehicle propelled by an animal; and

'working day' means a day which is not a Saturday, Sunday or any other day on which the Office of Fair Trading is closed for business.

## **Block Exemption**

- 4.** (1) The category of agreements identified in paragraph (2) as public transport ticketing schemes is hereby specified for the purposes of section 6 of the Act.
- (2) 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;

5. This block exemption has effect subject to the conditions and the obligation specified in Articles 6 to 17.

### Conditions and consequences of breach of conditions

6. Unless there is an objective, transparent and non-discriminatory reason, a public transport ticketing scheme shall not, directly or indirectly, in isolation or in combination with other factors under the control of the parties:
  - (a) have the object or effect of preventing any operator or potential operator from participating in that public transport ticketing scheme; or
  - (b) to the extent that the scheme provides for members of the public to purchase a long distance add-on, have the object or effect of preventing any operator, potential operator, long distance operator or potential long distance operator from participating in that public transport ticketing scheme.
7. A public transport ticketing scheme shall not, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have the object or effect of limiting:
  - (a) the variety or number of routes on which any operator or long distance operator provides or may provide public transport services; or
  - (b) the freedom of operators or long distance operators to set the price or availability of, the fare structure relating to, or the zones or geographical validity applicable for, any ticket entitling the holder to make a journey solely on the public transport services of any one operator or any one long distance operator.
8. A public transport ticketing scheme shall not, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have the object or effect of limiting the frequency or timing of any public transport services operated by any operator or long distance operator, unless such restriction is indispensable to the effective operation of that scheme, pursuant to an agreement which provides for onward travel connections for passengers.

- 9.** (1) Subject to paragraph (2), a public transport ticketing scheme shall not, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have the object or effect of facilitating an exchange of information between the parties to that public transport ticketing scheme.
- (2) Paragraph (1) shall not prevent an exchange of information between the parties to a public transport ticketing scheme which is directly related and indispensable to the effective operation of that scheme, provided that the relevant provision under which the information is exchanged is objective, transparent and non-discriminatory and that it does not breach any of the other conditions imposed by this Order.
- 10.** Breach of any of the conditions imposed by any of Articles 6, 7, 8 or 9 shall have the effect of cancelling the block exemption in respect of that public transport ticketing scheme.
- 11.** The parties to a public transport ticketing scheme, which provides for members of the public to purchase a multi-operator travelcard, shall not distribute between themselves the revenue received by virtue of the operation of that scheme in a way that provides the parties with an incentive to set their own fares higher than they would have been set in the absence of the multi-operator travelcard, or significantly reduces the incentive for each of the parties to compete for passengers.
- 12.** Breach of the condition imposed by Article 11 shall have the effect of cancelling the block exemption in respect of the relevant public transport ticketing scheme to the extent that such scheme provides for members of the public to purchase a multi-operator travelcard.
- 13.** (1) Subject to paragraph (2), a public transport ticketing scheme which provides for members of the public to purchase a through ticket, multi-operator individual ticket, short distance add-on or long distance add-on, shall not directly or indirectly, in isolation or in combination with other factors under the control of the parties have the object or effect of fixing a price at which the respective through ticket, multi-operator individual ticket, short distance add-on or long distance add-on is offered for sale.

(2) Paragraph (1) shall not prevent:

(a) the parties to a public transport ticketing scheme from agreeing to charge each other non-discriminatory posted prices for sales of the respective through ticket, short distance add-on or long distance add-on; or

(b) operators from fixing the price of a multi-operator travelcard which may be purchased as a short distance add-on or long distance add-on

provided that such action does not breach any of the other conditions imposed by this Order.

**14.** Breach of the condition imposed by Article 13 shall have the effect of cancelling the block exemption in respect of the relevant public transport ticketing scheme to the extent that such scheme provides for members of the public to purchase the relevant through ticket, multi-operator individual ticket, short distance add-on or long distance add-on.

**15.** The parties to a public transport ticketing scheme which provides for members of the public to purchase a multi-operator individual ticket, shall not distribute between themselves the revenue received by virtue of the operation of that scheme other than pursuant to terms contained in that scheme whereby the operator which sells any particular multi-operator individual ticket retains exclusively all the revenue received from that sale.

**16.** Breach of the condition imposed by Article 15 shall have the effect of cancelling the block exemption in respect of the relevant public transport ticketing scheme to the extent that such scheme provides for members of the public to purchase a multi-operator individual ticket.

## Obligation

- 17.** A person shall, within ten working days from the date on which it receives notice in writing under this Article, supply to the Office of Fair Trading such information in connection with those public transport ticketing schemes to which it is a party as the Office of Fair Trading may require.

## Cancellation by notice

- 18.** If there is a failure to comply with the obligation imposed by Article 17 without reasonable excuse, the Office of Fair Trading may, subject to Article 20, by notice in writing cancel this block exemption in respect of any public transport ticketing scheme to which the relevant request for information under Article 17 relates.
- 19.** If the Office of Fair Trading considers that a particular public transport ticketing scheme is not one to which section 9(1) of the Act applies, it may, subject to Article 20, by notice in writing cancel this block exemption in respect of that scheme.
- 20.** If the Office of Fair Trading proposes to cancel the block exemption in accordance with Article 18 or Article 19, it shall first give notice in writing of its proposal and shall consider any representations made to it.
- 21.** For the purpose of Articles 18, 19 and 20, notice in writing is given by:
- (a) the Office of Fair Trading giving notice in writing of its decision or proposal to those persons whom it can reasonably identify as being parties to the relevant public transport ticketing scheme; or
  - (b) where it is not reasonably practicable for the Office of Fair Trading to comply with paragraph (a), the Office of Fair Trading publishing a summary of its decision or proposal in the register and causing a reference to that summary to be published in:
    - (i) the London, Edinburgh and Belfast Gazettes;
    - (ii) at least one national daily newspaper; and

- (iii) if there is in circulation an appropriate trade journal which is published at intervals not exceeding one month, in such trade journal,

stating the facts on which it bases it and its reasons for making it.





## **Competition law guidelines**

The OFT has issued a series of competition law guidelines. New guidance may be published and the existing guidance revised from time to time. For an up-to-date list of guidance booklets check the OFT website at [www.offt.gov.uk](http://www.offt.gov.uk)

All guidance booklets can be ordered or downloaded from the OFT website at [www.offt.gov.uk](http://www.offt.gov.uk) Or you can request them by:

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