

Completed acquisition by Arriva Passenger Services Limited of the remainder of the entire share capital of Centrebus Holdings Limited

ME/6226-13

CMA decision of 6 May 2014

Summary

1. The Office of Fair Trading (OFT)¹ launched an own-initiative merger investigation by sending an enquiry letter on 4 October 2013. The deadline for the CMA to make a decision on whether or not to refer the merger to a Phase 2 investigation is 6 May 2014.
2. Centrebus Holdings Limited (CBH) was set up in 2008 as a joint venture between Arriva Passenger Services Limited (Arriva), with a 43.9% shareholding, and three individual shareholders² (the Sellers), each with a shareholding of 18.7%. In the present merger, Arriva is acquiring the remaining 56.1% of shareholding of CBH, thereby becoming the sole shareholder of CBH.
3. As a result of the merger, Arriva has gone from having material influence in CBH, to sole control, resulting in two enterprises ceasing to be distinct. The share of supply test is met in Leeds, Huddersfield, Wakefield and Leicester. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created as per section 23 of the Enterprise Act 2002 (the Act).
4. Arriva and CBH overlap in the provision of commercial and tendered bus passenger services in West Yorkshire and Leicestershire. The CMA analysed the effects of the merger on commercial bus routes; the tender market in each of West Yorkshire and Leicestershire; and the operation of networks in West Yorkshire and Leicestershire.
5. The CMA identified a realistic prospect of a substantial lessening of competition (SLC) arising from the merger in overlap flows on CBH routes 231/232 which operate between Huddersfield and Wakefield and the 262

¹ The Competition and Markets Authority (CMA) was established on 1 October 2013. By virtue of the Enterprise and Regulatory Reform Act 2013, the OFT's functions were transferred to the CMA on 1 April 2014.

² Together the directors of Centrebus Limited, a separate company operating in and around the South-East of England.

which operates between Huddersfield and Dewsbury. The parties were the only bus operators on the overlap flows and there is no evidence of any imminent entry by another operator. Therefore, the merger resulted in a decrease from two bus operators to one on these flows.

6. With respect to competition for tenders, the CMA did not identify any competition concerns in Leicestershire given the presence of an average of four other bidders per tender. The parties did compete on a small number of tenders (8 out of 157 tenders between April 2010 and January 2014) in West Yorkshire, for services in Huddersfield and Leeds. However, the parties were not each other's closest competitors in tender competition in West Yorkshire and the CMA found a number of other credible operators who had participated in and won tenders across West Yorkshire including for services around Huddersfield and Leeds.
7. With respect to network competition in Leicestershire or West Yorkshire, the CMA found that the parties' bus networks do not significantly overlap in Leicestershire and West Yorkshire, and that the merged entity will face network competition from FirstGroup (First), which is the largest operator in West Yorkshire.
8. The CMA did not find competition concerns in relation to the loss of potential competition since it found very limited instances of head-to-head competition between the parties; that rival networks were present; and that the parties' operations were differentiated (such as their depot locations).
9. The CMA considered whether to exercise its discretion under section 22(2)(a) of the Act, not to refer the merger to a Phase 2 investigation on ground of de minimis. In deciding whether or not exercise its discretion, the CMA carefully considered the size of the market, the strength of its concerns, the magnitude of the likely harm, and the durability and replicability of the harm, and concluded that on the present facts it should exercise its discretion.
10. This merger will therefore **not be referred** to a Phase 2 investigation under section 22(1) of the Act.

Parties

11. **Arriva** is a wholly-owned subsidiary of Arriva plc. Arriva plc is split into three divisions: UK Bus, UK Rail and Mainland Europe. Arriva is organised around regional divisions. Arriva operates in West Yorkshire and Leicestershire through Arriva Yorkshire and North East, and Arriva Midlands respectively.
12. **CBH** and its subsidiaries operate local bus services in Yorkshire and Leicestershire. CBH owns four depots in Yorkshire (two in Huddersfield, one

in Halifax and one Leeds) and one depot in Leicestershire (Hinckley). CBH has three wholly-owned subsidiaries through which it provides local bus services: Huddersfield Bus Company Limited (HBC), Teamdeck Limited (TMD) and White Rose Bus Company Limited (WRB). CBH's turnover for the financial year ended 30 April 2013 was £15.7 million.

Transaction

13. CBH was started as a joint venture between Arriva, with a 43.9% stake, and the three individual shareholders³ (the Sellers), each with an 18.7% stake, in 2008. On 9 September 2013 Arriva acquired the remaining 56.1% of CBH from the Sellers for a consideration of £[~~XX~~].

Jurisdiction

Enterprises ceasing to be distinct

14. The CMA believes that Arriva and CBH (together 'the parties') have ceased to be distinct, as a result of the merger, for the purposes of section 23 of the Act.
15. Arriva submitted that its existing shareholding in CBH gave it at least 'material influence'⁴ over the CBH business, since it is above 25%, a level above which the CMA typically concludes that the shareholding is 'presumptively conferring the ability to materially influence policy'.⁵ Therefore, the parties submitted that the CMA should employ its discretion in this area and conclude that the acquisition does not constitute a relevant merger situation.
16. Under section 26(4) of the Act, when an acquirer acquires control in stages (leading to a change in the acquiring business's ability to influence the target company's policy), each stage may give rise to a separate relevant merger situation. Where the acquiring business moves from 'material influence' to 'de facto control' or from 'de facto control' to 'de jure control', then the merger may be reviewable as a separate relevant merger situation, subject to meeting the turnover or share of supply test, as above. As a result of the merger, the CMA considers that Arriva has moved from having material influence to de jure control of CBH. In view of the competition concerns resulting from the merger, discussed below, the CMA considered it appropriate to exercise its discretion under section 26(4) of the Act to take

³ Together the directors of Centrebus Limited, a separate company operating in and around the South-East of England.

⁴ Material influence is the lowest level of control that may give rise to a relevant merger situation, CMA Jurisdictional and Procedural Guidance (2014), paragraph 4.14.

⁵ *Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2*, January 2014, paragraph 4.19.

jurisdiction in the present case and considers that the acquisition has resulted in two enterprises ceasing to be distinct.

Share of supply test

17. The CMA considers that the share of supply test, as defined in section 23 of the Act, is satisfied in the present merger in relation to the supply of local bus services in Leeds, Wakefield, Huddersfield and Leicester.⁶ The parties together have a share of supply in each of these areas which is above 25% and the merger gives rise to an increment in each of these areas.⁷ Arriva does not dispute that the share of supply test is met in the present case.

Timing

18. The merger completed on 9 September 2013 and was made public on the same day. The OFT (now the CMA) launched an own-initiative merger investigation by sending an enquiry letter on 4 October 2013. The statutory clock was stopped on 6 November 2013 and restarted on 30 January 2014, when a satisfactory submission was received. The statutory and administrative clocks were then stopped on 10 February 2014 and restarted on 14 March 2014. The administrative deadline for the CMA to make a decision on whether or not to refer the merger to Phase 2 investigation is 6 May 2014 and the statutory deadline is also 6 May 2014.

Conclusion on jurisdiction

19. For the reasons set out above, the CMA believes that it is or may be the case that a relevant merger situation has been created.

Counterfactual

20. The CMA generally adopts the prevailing conditions of competition, or the pre-merger situation in the case of completed mergers, as the counterfactual against which to assess the impact of the merger.⁸ In this case, the CMA has

⁶ In its decision in the completed acquisitions by *Stagecoach Group plc of Eastbourne Buses Limited, and Cavendish Motor Services*, 13 May 2009, the OFT found that Eastbourne and Hailsham, with a population of approximately 114,000, constituted a substantial part of the UK for the purposes of section 23 of the Act. The population in each of Leeds, Wakefield, Huddersfield and Leicester is greater than this (population based on 2011 census data): Leeds: 751,500; Wakefield: 325,800; Huddersfield: 162,949; Leicester: 329,839.

⁷ The shares are as follows: in Leeds, the parties have a combined share of at least 26%; in Wakefield the parties have combined shares of supply of 91.2% (with an increment of 2.6%); in Huddersfield the parties have combined shares of supply of 26.3% (with an increment of 8.4%); in Leicester the parties have combined shares of supply of 57% (with an increment of 8.5%).

⁸ *Merger Assessment Guidelines*, joint publication of the Competition Commission (CC) and OFT, September 2010, paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA. See *Mergers: Guidance on the CMA's Jurisdiction and Procedure, CMA2*, Annex D, January 2014.

received no evidence to give it reason to depart from this position and therefore has assessed this merger against the pre-merger situation.

Frame of reference

21. The parties overlap in the supply of local bus services in West Yorkshire and Leicestershire. Arriva, through Arriva Yorkshire and Arriva Midlands, provides local bus services in England, including commercial and tendered services in Yorkshire and Leicestershire. CBH provides local bus services in West Yorkshire (it has four depots in Leeds, Halifax and Huddersfield) and Leicestershire (it has one depot in Hinckley).
22. In considering the relevant frames of reference in this case, the CMA has taken account of previous OFT and CC decisions (detailed below) and the CC's *Local bus services market investigation: a report on the supply of local bus services in the UK (excluding Northern Ireland and London)* (2011) (Local Bus Report).

Product scope

The provision of commercial bus services and competition for tenders

23. In past merger decisions, the OFT has assessed competition for tenders separately from the provision of commercial bus services, while taking into account that there may be some linkages between commercial and tendered services.⁹ The distinction arises from the fact that competition in tendered services occurs at the tendering stage, during which providers compete for the right to offer bus services on the basis of terms set out by the commissioning authority, typically the local transport authority. Therefore, competition for tenders is a form of competition for the market, whereas competition in the provision of commercial bus services is competition in the market.
24. The CMA's investigation has not uncovered any evidence that contradicts this analysis. Therefore, the CMA assesses competition for tender contracts separately from competition in the provision of commercial bus services.

⁹ See, for example, the OFT's decisions regarding the *completed acquisition by Stagecoach plc of the business and assets operated from the Lockett Road Wigan Depot of First Manchester Limited*, 26 February 2013; the *anticipated acquisition by Greater Manchester Buses (South) Limited, a wholly owned subsidiary of Stagecoach plc, of Bluebird Bus and Coach*, 22 February 2013 (Stagecoach/Bluebird); and the *anticipated acquisition by Stagecoach Group plc of the North Devon business and assets of First Devon and Cornwall Limited*, 10 July 2012.

Competition between commercial bus services and tendered bus services

25. While the CMA considers that there is a separate frame of reference for competition for tendered contracts, commercial and tendered services are likely to be seen as alternatives from a passenger perspective, where they meet their requirements for travelling between two specific points (origin to destination) and other important aspects for passengers such as service frequency and fares.
26. The Local Bus Report found that commercial and tendered services can constitute alternatives from a demand-side perspective since, for passengers, tendered operations provide a service in the same way as a commercial route.¹⁰ The OFT has also previously considered that, as operators are encouraged to grow passenger revenue on tendered services, the structure of the contracts incentivises the tendered operator to compete with commercial services.¹¹ A merger involving overlapping commercial and tendered services may therefore lead to a loss of competition.
27. The CMA's investigation in this case has not found evidence that indicates that this approach is no longer appropriate. It has therefore included the provision of commercial and tendered services in the same frame of reference when considering competition between bus operators at a network, route and flow level (but, as noted above, it considers separately competition for tendered contracts).

Other forms of transportation

28. Arriva submitted that other modes of transport represent a competitive constraint on bus travel. Arriva submitted that, in its view, the relevant product market is any form of transport capable of taking an individual from origin to destination. This would include alternative modes of transport such as car, taxi and rail, as well as travel by bicycle and on foot. The CMA notes that in previous cases, the OFT has not included other forms of transport in its product frame of reference.¹² The CC has found in previous merger inquiries that other forms of transport were not part of the same product market as bus transport.¹³

¹⁰ Local Bus Report, paragraph 7.114.

¹¹ Stagecoach/Bluebird, paragraph 17.

¹² For example, *Completed acquisition by Stagecoach plc of the business and assets operated from the Lockett Road, Wigan depot of First Manchester Limited*, OFT decision 25 February 2013, paragraph 20.

¹³ Local Bus Report, paragraph 7.64.

29. An exception to this approach may arise where passengers face good alternatives to bus services in the form of fixed modes of transport (for example, rail or tram).¹⁴ Therefore, the CC concluded that in certain circumstances, the relevant product market should be extended to include fixed modes of transport.¹⁵ The CMA has therefore assessed the impact that rail has on specific overlap flows in this case.
30. The CMA did not receive evidence, warranting a departure from the approach in previous cases, that car travel, journeys on foot or by bicycle impose a significant constraint on local bus services. Therefore, the CMA considers that the frame of reference is local bus services and does not include alternative forms of transport in the relevant frame of reference. However, the CMA takes account of constraints imposed by alternative forms of public transport in the competitive effects section below, which assesses the effects of the merger on a flow-by-flow basis, taking into account the characteristics of the local transport network available to passengers.

Bus services with different frequencies

31. The CC and the OFT have in previous cases adopted an approach which distinguishes between services of significantly differentiated frequencies. This approach stems from the importance of route frequency as an element of the competitive offering to passengers.¹⁶ Therefore, the CMA considers that in relation to each of these services, the following are in the same product scope:
- (a) Frequent services are those services running every 10 minutes or less: to provide an effective constraint a competitor would need to run a service with a frequency of no more than 10 minutes greater.
 - (b) For 'less frequent' services: competitors running with frequencies no more than twice as long were considered effective competitors (and in the same market).
 - (c) In-hours and out-of-hours travel: there are two potential relevant markets for 'in-hours' travel (7am to 7pm Monday to Saturday), and 'out-of-hours' travel (7pm to 7am Monday to Saturday, and Sunday all day). Two services were considered to be a part of the same market if there was at least a partial overlap between the two types of travel. In addition to this

¹⁴ *ibid*, paragraph 7.54.

¹⁵ *ibid*, paragraph 7.63.

¹⁶ See, for example *Completed acquisition by Stagecoach Group plc of Preston Bus Limited*, Appendix I, paragraph 14.

division, the market could be divided into peak and off-peak travel, and commuter (weekdays) and leisure (weekends and bank holidays) travel.

32. The CMA has employed this approach in order to identify services which offer an effective competitive constraint on the parties' services. Given the limited number of overlaps that require consideration, the CMA has not relied on this methodology in assessing overlaps between the parties' services. The CMA has instead considered these overlaps individually and assessed whether they compete on the basis of frequency and hours of operation.

Geographic scope

Flow level

33. Consistent with previous cases, the CMA has assessed the impact of the merger on a flow-by-flow basis, where a 'flow' is defined as a connection between two specific points. This approach is taken because passenger demand is for travel between two points. The CMA has included routes serving flows within 500 metres in the same market, given the CC's finding in *Preston Bus* that flows that have their origin and destination within 500 metres of one another are likely to be demand-side substitutes.¹⁷
34. The CC found that head-to-head competition between providers of local bus services may take place over the entire route or on sections of the route. Where a significant proportion of passengers see the two services as similar (in terms of flows served and other aspects of the passenger offer) and are therefore likely to switch in the event of a worsening of the offering from one of the providers, competition between the services is likely to be effective in delivering benefits to passengers in the form of service frequency and lower fares (among other aspects).¹⁸
35. The Local Bus Report also found that short-term competitive responses typically resulted in alterations of service frequency, but could sometimes be in the form of special fare offers on competitive routes. In the long term, providers could alter fare structures over a wide geographic area and these reviews were typically carried out annually.¹⁹ Therefore responses to competitive interaction are most likely at route level, although some parameters of the competitive offer may be set at a wider level but less frequently changed as a result.

¹⁷ Local Bus Report; *Completed acquisition by Stagecoach Group plc of Preston Bus Limited*, 11 November 2009, Appendix I, paragraphs 5–10.

¹⁸ Local Bus Report, paragraph 26.

¹⁹ *ibid*, paragraph 6.41.

Competition for tendered contracts

36. In previous OFT cases the geographic frame of reference for tendered contracts has been considered to be sub-national, based on the region where the tenders are offered.²⁰ This is consistent with the Local Bus Report which found that the market for tenders will generally include all bus operators in the local area.²¹
37. In the absence of evidence warranting a departure from this approach, the CMA considers the impact of the merger on competition for tendered contracts in each of West Yorkshire and Leicestershire.

Network level

38. In previous OFT cases it was considered that it may be appropriate to assess the impact of a merger at a network level in addition to competition on specific point-to-point flows, since some customers use bus services to make multi-journey (as opposed to point-to-point) trips across their networks. Furthermore, on the supply side, potential entry/expansion from one party in the provision of local bus services may exert a significant competitive constraint on the other party on non-overlap flows at the level of the network.
39. On this basis, the CMA has considered the impact of the merger on both actual and potential competition at a network level.

Conclusion

40. The CMA concludes that the relevant frames of reference for consideration are:
 - (a) the provision of local bus services (commercial and tendered) on overlapping flows;
 - (b) competition in tenders for supported routes in each of West Yorkshire and Leicestershire; and
 - (c) the provision of bus networks in each of West Yorkshire and Leicestershire.

²⁰ For example, *Anticipated acquisition by Stagecoach plc of the business and assets operated from the Lockett Road, Wigan Depot of First Manchester Limited*, OFT decision of 25 February 2013, paragraph 25.

²¹ Local Bus Report, paragraph 7.120.

Unilateral effects

The extent to which the parties competed pre-merger

41. Arriva submitted that it had a 43.9% shareholding in CBH, giving it at least material influence. However, despite the large shareholding, both Arriva and the Sellers have submitted that in practice the day-to-day running of CBH was conducted by the Sellers.²² Arriva noted that within CBH there were two levels of corporate control: one being high-level strategy and the other being the day-to-day operation. Arriva submitted that given that it was the largest single shareholder it had a role in the high-level strategy of CBH, but that the day-to-day operation was a matter for the other shareholders of CBH.
42. The CMA has considered whether Arriva's shareholding in CBH affected the extent to which the parties competed pre-merger.

(i) Contractual position under CBH's corporate documents

43. Under the joint venture agreement, corporate control of CBH rested with six directors. Arriva was entitled to appoint two of these and the Sellers were together entitled to appoint four. Under CBH's articles of association, to achieve quorum, board meetings had to be convened with two directors – at least one of whom had to be an Arriva-appointed director and the other a Seller-appointed director. General shareholder meetings also required one member present from Arriva and one from any of the Sellers to be quorate.
44. The articles stipulate that the board shall be convened not less than monthly, although in practice the CMA understands the board was convened less frequently. The corporate documents stipulate that resolutions were to be passed by simple majority, except in certain circumstances, which did not cover operational matters, where 90% of the votes were required.²³ The corporate documents do not detail what type of decision is a matter for the board as opposed to management. In response to the OFT's request under section 31 of the Act (now replaced by section 109) Arriva submitted that there are no board minutes of these meetings.
45. The above would suggest that Arriva was, at least contractually, able to influence the corporate governance of CBH through its Board representation and voting powers. Next, the CMA considered whether Arriva was active in

²² Arriva's response to OFT information request of 4 February 2014, p1.

²³ These circumstances have no bearing on the merger. They cover financial grounds (eg creating a security interest over the assets, making a loan or giving a guarantee or indemnity) and shareholding matters (eg variation of rights attached to a class of share, allotment of future share capital, amendments to the articles of association).

employing this ability and whether this resulted in reduced head-to-head competition between the parties.

(ii) Management of CBH in practice

46. Both Arriva and the Sellers have submitted that Arriva's involvement in the running of CBH was in practice limited, with board meetings being called infrequently and only for high-level discussions. Arriva submitted that board meeting agendas covered matters ranging from financial performance of the CBH business, to health and safety, commercial reports, engineering reports, operations reports, HR issues, acquisition, strategy and new business. The Sellers likewise submitted that board meetings were called to address large strategic issues, such as capital investment.
47. Arriva submitted that the day-to-day operation of CBH was a matter for the Sellers. This is corroborated by Arriva internal documents, which state 'The [share purchase agreement] reflects the fact that Arriva Passenger Services Limited holds a significant, but minority, stake in CBH and that management control has vested almost entirely with the sellers'. It is also supported by the Sellers, who submitted that, with the exception of very large tenders that would require acquiring additional buses, the decision of which tenders to bid for was taken at management level, without convening the board.
48. The above suggests that while Arriva had the ability to affect important CBH decisions, operational decisions were largely left to the Sellers, which could result, and in a limited number of instances appears actually to have resulted, in competition between the parties. This is discussed in greater detail below.

(iii) The level of competition between the parties pre-merger

49. Third parties generally noted that the level of competition between Arriva and CBH was low, with a third party noting that it would have expected the two enterprises to compete more actively pre-merger, given the scale and scope of their existing operations. For example, they noted that given the geographic location of the CBH depots, they would have expected more instances of head-to-head competition between the parties. They also note that CBH has competed effectively against other parties.
50. The CMA notes that there are examples of occasional periods of competition between the parties, which suggests that competition was possible and could be intense. For example, although competition for tenders between the parties was very limited, they did compete on two batches of tenders, relating to a

total of eight services.²⁴ Arriva's internal documents suggest that its management was concerned about competition by Huddersfield Bus Company (HBC, a wholly-owned subsidiary of CBH) in relation to tenders.²⁵ For example, the Arriva Yorkshire 2012 Budget notes that: 'Competition for tenders is increasingly high with advent of HBC. Lost 3 bus tenders to HBC; more losses possible (£120k at risk in April)'.

51. The Sellers confirmed that competition for tenders between the parties was possible and within their purview as operational management of CBH, except where a tender involved significant investment, such as in the acquisition of depot facilities. The Sellers submitted that CBH was free to, and did occasionally, compete with Arriva on tender bids.

(iv) Conclusion on the extent to which the parties competed pre-merger

52. On basis of the above, the CMA has therefore reached the conclusion that, despite Arriva's pre-merger stake in CBH, the presence of Arriva-appointed directors and the very limited number of occurrences of head-to-head competition on tender bids, there are some factors to suggest that the parties did compete at least to some extent pre-merger and there was at least scope for significant competition between the parties. This will be explored further below in the assessment of competition in different markets.

Head-to-head competition on overlap flows

53. The CMA considered whether the merger raises a realistic prospect of an SLC in the operation of bus services. This was on a flow-by-flow basis and considering the impact of the merger on the incentives for the merged entity to raise bus fares or otherwise worsen other aspects of their offering (such as frequency, quality of service or other non-price aspects).
54. The OFT and CC have previously employed a filtering approach which rules out overlaps between the parties' services and identifies potential flow overlaps upon which the merger may have a negative effect.²⁶ The approach allows the exclusion of the overlaps from further analysis if these considerations apply, since they are then unlikely to raise competition concerns:

²⁴ These were for tenders in May 2011 and July 2013.

²⁵ Annexes 2.1 and 2.2 to the response to the information request, dated 15 November 2013, titled 'Arriva Yorkshire 2012 Budget' and 'Arriva Yorkshire 2013 Budget'.

²⁶ For a summary see the CC's [Review of methodologies in transport inquiries](#) (CC Transport Methodology).

- (a) the relative importance of the overlapping flows. Routes for which overlaps account for less than 10% of passengers and revenues are excluded from further assessment;
- (b) whether flows are subject to 'effective competition' from third parties. The appropriate definition of an 'effective competitor' may vary depending on the circumstances of each case and will depend on relative frequencies or prices. Flows with effective competition are excluded from further assessment; and
- (c) whether the flow is of relatively little importance in terms of revenue, number of passengers or frequencies.²⁷

55. The CMA proceeds by assessing flow overlaps between the parties' services on the basis of the above filtering approach.

Filtering results in Leicestershire

56. There are a total of 95 overlapping flows between the parties' services in Leicestershire. However, all these overlaps can be excluded from further analysis on the basis of the filters set out above. The overlapping flows account for a small proportion of overall route revenues, from below 1% to 3% for CBH and up to around 9% for Arriva. Furthermore, third party alternatives are available to passengers on the overlapping flows, which are likely to offer a competitive constraint on the merged entity's services.

57. Therefore, the CMA does not consider that the merger raises a realistic prospect of an SLC in relation to the loss of head-to-head competition on overlapping routes in Leicestershire.

Filtering results in West Yorkshire

58. The CMA's assessment filtered out 12 overlapping flows from further analysis as follows:

- (a) three overlaps on the basis of the flow accounting for less than 10% of overall route revenues;
- (b) six overlaps on the basis of the presence of a third party competitor; and

²⁷ The CC has typically adopted £10,000 as a cut-off point for the de minimis filtering rule. See paragraph 26(c) of the [CC Transport Methodology](#).

(c) three where the flow overlap accounts for a small amount of revenues and also a small proportion of on-board passenger revenues.

59. The CMA has considered the remaining overlaps in greater detail below.

Services 231 and 232: Huddersfield–Wakefield

60. The parties' services overlap between Huddersfield and Wakefield. The CBH 231 and 232 services, which run between Huddersfield and Wakefield,²⁸ overlap with the Arriva 126, 127, 128 and 265 services, which run between Dewsbury and Wakefield.²⁹ The main area of overlap between the parties' services occurs between Horbury and Wakefield Bus Station.

61. The 231 and 232 are part-supported services, where West Yorkshire Metro provides funding for the operation of routes in the early morning, evenings and on Sunday. There are three operators of the 231 and 232: CBH, Arriva and First. CBH operates the commercial services on this route Monday to Saturday daytime, while First runs the tendered journeys on Monday to Saturday early mornings, evenings and early Sunday mornings and Sunday evenings. Arriva runs a small number of services on this route on Sundays.

62. The CMA understands that CBH only tendered for the evening service, with Arriva tendering for the early morning, evening and Sunday elements. West Yorkshire Metro awarded the contract to First which submitted a combined tender for all three elements of the service.

Extent of competition between the parties on these flows pre-merger

63. The overlap between the parties' services accounts for a significant share of route revenues (for example, around 34% for CBH on the overlap with the 126 and 127 Arriva services between Northfield Lane and Wakefield Bus Station. The CBH services are also in operation at proximate times to the Arriva services.³⁰ Therefore a significant proportion of the passengers using the CBH services or the proximate Arriva services, would have been likely to consider these services as good alternatives. This effect is likely to be strengthened given the similarities in the fares of these services.³¹ This would suggest that

²⁸ Through Lepton, Netherton, Overton and Horbury.

²⁹ The 128 operates one service per hour between Monday and Saturday, and one service every two hours on Sunday. The 126 and 127 operate six services hourly between Monday and Saturday, while on Sunday there are three peak and two off-peak services. The 265 is an infrequent service (one per day) between Netherfield Avenue and Wakefield Bus Station.

³⁰ For example, between Monday and Friday, the CBH services runs from Wakefield Bus Station at 8:35am, 5 minutes before the 126 service by Arriva.

³¹ For example, between Westfield Road and the High Street, single fares on both services are 90p.

the parties' services would have been competing against each for passenger revenues.

64. However, the CMA notes that the Arriva services are significantly more frequent than CBH's.³² Furthermore, the overlaps are more significant for the CBH services in terms of share of route revenues. Therefore the competitive constraint imposed on each other is likely to be asymmetric in nature, such that the Arriva services impose a stronger constraint on CBH's 231 and 232 than vice versa.

Extent of competition from third parties

65. The parties submitted that First operates some services (370, 371 and 372) which overlap and compete with the 231/232 services from CBH.
66. The CMA notes that for bus services to offer an effective competitive constraint on each other, a significant proportion of passengers must see these as good alternatives to one another, such that a worsening of the offering on one service would see significant switching to the alternative. An important indicator of the competitive constraint imposed by competing services is the share of route revenues generated on the overlapping flow and which would be at risk of switching to the competing service in the event of a worsening of the offer on the service under consideration.
67. The overlap, as a share of total route revenues, between the CBH 231 and 232 services, and the First services is significantly below (around 10%) the overlap with the Arriva services. This would suggest that the First services impose a weaker constraint on the CBH services than the Arriva services. First suggested that [redacted]. First's service runs east to west (and vice versa) across and around Huddersfield centre, while the CBH service connects Huddersfield to Wakefield.
68. Arriva submitted that it also faces a constraint on this overlap in the form of potential competition from First, which operates the tendered part of the 231 and 232 service such that no SLC could arise on this overlap.
69. Potential entry from a competitor may act as a constraint on the merged firm, if such entry would be so quick and costless that an entrant could profitably enter and benefit from the opportunity afforded by a worsening of the competitive offering of the incumbent, for example higher prices or a lowering of

³² Arriva submitted that its services run every 10 minutes, whereas CBH's services run every half hour.

service quality. A constraint from potential entry may arise even though there may be no expectation on the part of the CMA that entry would occur.³³

70. The CC, in the Local Bus Report, noted that while potential competition may act as a competitive constraint, this was not pervasive and depended upon the specifics of the local competitive conditions.^{34,35} First told the CMA that it did not consider the 231 and 232 route as having significant commercial potential and would be unlikely to expand its presence on this route if it required investment in additional vehicles. This would suggest that entry by First is unlikely on this route and that the presence of First on the tendered sections of the 231 and 232 service is unlikely to impose a significant constraint on the parties' services.
71. In view of the above, the CMA considers that the parties' services were competing closely and that the constraint from First's services is likely to be limited. Therefore, the CMA concludes that the merger raises a realistic prospect of an SLC in relation to the 231 and 232 route overlap.

Service 262: Dewsbury Bus Station–Calder Road corridor

72. CBH's 262 service overlaps with the following Arriva services: 203, 253, 278, 202 and 254. The CMA understands that the 262 is a part-tendered service operating on a half-hourly basis Monday to Saturday and one service every two hours on a Sunday. The overlap occurs in the approach to Dewsbury Bus Station (Calder Road).

Extent of competition between the parties on this flow pre-merger

73. The overlap between the parties' services is particularly significant for the 262, as this is a shorter service between Huddersfield and Dewsbury (about 21 km in length). This is reflected in that the overlap flows accounts for a significant share of the route revenues for CBH (around 90% for the overlap between the CBH 262 and the Arriva 203, 253 and 278 services).
74. The CMA notes that the Arriva services are significantly more frequent than CBH's,³⁶ and that therefore the constraint imposed on the parties by each

³³ [Merger Assessment Guidelines](#), paragraphs 5.8.14 & 5.8.15.

³⁴ Local Bus Report, paragraph 8.164.

³⁵ The report concluded that the strength of the constraint depended on whether (a) there is a potential entrant with existing services and facilities nearby; (b) where that entrant is a financially strong relative to the incumbent; (c) the extent of the potential entrant's existing services is sufficient to confer a similar network advantage to that enjoyed by the incumbent operator; and (d) where area-specific barriers to entry are low. See paragraph 8.114.

³⁶ Arriva submitted that its services run every 10 minutes, whereas CBH's services runs every half hour. During the weekday morning peak (approximately 7am–10am), Arriva offers a total of 24 services against CBH's 5;

other is asymmetric in nature. However, where the parties operate at similar times to each other (ie twice per hour), their services would have been likely to compete closely. The fares for the services between the overlap points are also similar.³⁷ Given the preceding discussion, the CMA considers that the parties' services were competing closely.

Extent of competition from third parties

75. Arriva identified a number of bus services overlapping with the parties on route 262 or part of it. The views of the CMA on the competitive constraint presented by each of those services is set out below:
- (a) First's Calderdale services 370 and 371.³⁸ Arriva submitted that First's 371 operated on a parallel route to the 262, and because of a low bridge at Mirfield, the 371 was not able to operate on the same road as the 262. The CMA considers that the 370 and 371 services of First are unlikely to be a good substitute for passengers travelling on the 262 as they do not overlap substantially.³⁹ The 370 and 371 services operate in and around Huddersfield, whereas the parties' services are inter-urban services. Moreover, the presence of a low bridge suggests a barrier to potential expansion by First on the flows over which the parties' services overlap between Dewsbury and Mirfield. The CMA is therefore minded to conclude that this service does not represent an effective competitor to the 262 service.
 - (b) Stott's Coaches' services 374 and 375, which operate Monday to Saturday off-peak services. Given that the parties' services offer a much greater combined frequency and times of operation, the CMA concludes that this service does not represent an effective competitor to the 262 service.
 - (c) Lyles Coaches's service 205, which operates hourly peak services Monday to Saturday. The CMA notes that the 205 offers limited frequency and offers limited overlap with the parties' services. The CMA therefore concludes that this service does not represent an effective competitor to the 262 service.

during the daytime, 8 services per hour against CBH's 2; and in the afternoon peak (approx. 4pm to 7pm) 19 services against CBH's 5.

³⁷ For example, the relevant fare is: Arriva £2.50 and CBH £2.20.

³⁸ These offer a combined eight services per hour Monday–Saturday and two services per hour on Sundays.

³⁹ Measure as the share of revenues that the overlap flow accounts out of the total revenues on CBH's 262.

(d) The Northern Trains service between Dewsbury and Mirfield, which Arriva submitted operates seven days a week with up to four services per hour in each direction. Arriva submitted that the train service acts as a constraint as the fare is similar⁴⁰ and both railway stations are within walking distance of the nearest bus stops.⁴¹ However, the CMA notes that there are a further 14 bus stops along the 262 route between Dewsbury and Mirfield, which are serviced by the 262 and 203 but not the train. The CMA therefore concludes that the train does not represent an effective competitor to the 262 service.

76. Based on the above, the CMA considers that the parties' services were competing closely and that the constraint from competitors is likely to be limited. The CMA therefore considers that the merger raises a realistic prospect of an SLC in relation to the 262 route overlap between Dewsbury and Mirfield.

Head-to-head competition in tenders for supported routes

77. Some routes with particular social value which would not attract a sufficient number of passengers to be profitable enough to be operated as commercial routes can receive subsidies from the local authority, so that they can be profitably operated by bus operators. These routes are referred to here as 'tendered routes' or 'supported routes'.

78. The parties overlapped in competition for tenders for supported routes in Leicestershire and West Yorkshire. The CMA considered whether the merger may lead to an SLC for tenders for supported routes, resulting in higher prices for supported routes (in the size of the support required by the local transport authority) compared with the pre-merger situation.⁴²

Competition for tenders in Leicestershire

79. Arriva submitted that the merger does not reduce the number of competitors in tenders in Leicestershire.⁴³

⁴⁰ Arriva submitted that the price of an Adult Anytime Day single is £1.80.

⁴¹ Arriva submitted that the stations are approximately 250 metres away from the bus stop at the Mirfield end and approximately 120 metres at the Dewsbury end.

⁴² Or otherwise in a worsening of the offering of the quality of supported services.

⁴³ The Sellers also own Centrebus Limited (CBL) and Centrebus North Limited (CBN), which both trade in Leicestershire. The sale agreement of CBH to Arriva had no restriction on the operations of CBL and CBN such as non-compete clauses. Given that CBH and CBL or CBN would have been unlikely to compete on tenders and that the latter two would continue to compete for tenders in Leicestershire, the merger does not reduce the pool of potential competing bidders in Leicestershire.

80. The parties both participated in around 24% of tenders across Leicestershire over the three-year period. This figure is around 68% of tenders for non-school services. However, the CMA notes that there are on average another four other competitors which participate in these tenders.⁴⁴ Furthermore, the parties are rarely top ranking bidders, suggesting that there is limited competition between the two which drives the outcomes of tenders. Therefore Arriva would continue to face significant competition from third party providers. Third parties were generally not concerned about the impact of the merger on competition for tenders for supported routes in Leicestershire.
81. In view of the above, the CMA does not consider that the merger raises a realistic prospect of an SLC in tenders in Leicestershire.

Competition for tenders in West Yorkshire

82. Arriva submitted that post-merger a sufficient number of competitors would continue operating in West Yorkshire. It suggested that in the past three years 18 different operators have been awarded tenders for bus services by West Yorkshire Metro across West Yorkshire. Furthermore, according to Arriva, instances of competition between the parties were so limited, that the merger could not result in a realistic prospect of an SLC.
83. Arriva submitted that there was a lack of overlap in the bids in which the parties competed pre-merger given the different locations of their depots. It further submitted that the lack of overlap was not the result of arrangements between the managements of the different shareholders but because the parties identified different bids as attractive, and that this would continue to be the case post-merger, as a result of Arriva's continued desire to operate CBH as a low-cost operator, effectively submitting differentiated bids to those of the Arriva group.
84. Between April 2010 and January 2014, West Yorkshire Metro issued a total of 157 tenders for local bus services. One or both of the parties participated in 153 of these. In the majority of these the parties were not competing against each other; they competed head-to-head in only two batches of tenders, consisting of eight services (accounting for only around 4% of tenders issued over this period, representing around 7% in value). [REDACTED]
85. The CMA considers that First is likely to impose a significant constraint on the merged entity, given its wide-reaching network across West Yorkshire and bidding history. Between April 2010 and January 2014, [REDACTED]. Furthermore [REDACTED].

⁴⁴ This statistic is more stable for the non-school versus total tender split, with on average 5.5 competing bids for non-school services.

Therefore First is likely to have been a much more effective constraint on the parties (particularly CBH) than Arriva.

86. The CMA examined Arriva's internal documents and noted that they suggest that there have been instances where Arriva's management was concerned about competition from HBC, a subsidiary of CBH, in relation to tenders.⁴⁵ In addition, competition in West Yorkshire is already limited, with historically an average of two participants on tenders between 2010 and 2013. Set against this, West Yorkshire Metro told us that it had sought to and been able to increase the average number of bidders to around four more recently.
87. The CMA found that the smaller players (outside the parties and First) have actively bid in West Yorkshire and sometimes bid beyond their typical geographical reach. For example, Tates submitted to the CMA that while its operations were focused in South Yorkshire, it had bid and won tenders in West Yorkshire, including for services between Huddersfield and Wakefield. Tates submitted to the CMA that it had further plans for growing its presence in West Yorkshire.
88. Third parties were generally not concerned by the effects of the merger on competition for tenders for supported routes. Most noted the lack of competition between the parties in tenders, such that the merger was unlikely to significantly alter competitive conditions in tenders in West Yorkshire.
89. One third party did raise concerns that the merger would reduce competition in the West Yorkshire tender market, however it also noted that its concerns were lessened due to the fact that Arriva had a significant shareholding in CBH and as a result there was limited competition between the parties pre-merger. Another third party took the view that the merger may be beneficial for competition as CBH would be able to compete more effectively with First, given the post-merger resources available to it.
90. The CMA considers that the limited extent of competition between the parties pre-merger, suggests that the merger is unlikely to significantly alter competitive conditions for tenders in West Yorkshire. Furthermore the CMA notes that third parties, particularly First and Tates will continue competing with the merged entity, including for tenders between Huddersfield and Wakefield (where the parties are most likely to overlap given their networks and depot facilities). Therefore the CMA concludes that the merger does not raise a realistic prospect of an SLC in the tender market in West Yorkshire.

⁴⁵ See paragraph 49 above.

Loss of network competition

91. The CMA has considered whether the merger gives rise to a loss of actual competition between Arriva and CBH at a network level, such that the effects of the merger could be expected to extend beyond the overlap flows. Network effects may influence bus operators in terms of how best to attract passengers buying multi-journey tickets. Multi-journey tickets are more valuable to customers where the size of the network is larger. Operators benefit from customers purchasing multi-journey tickets as it locks passengers into their services to the exclusion of rivals. Consequently, network effects may result in an operator providing better quality services across its network compared to a situation where they were interested in single-journey passengers alone.

Network effects in Leicestershire

92. The CMA notes that the CBH network is more extensive outside Leicester, whereas the Arriva network operates on a hub and spoke system with its depot in Leicester operating as the hub from which its operations run across Leicestershire. Furthermore, the CMA considers that the flow-on-flow overlap analysis has found no instances of significant overlaps between the parties' services, suggesting that at both at a route and at network level, the parties' services are unlikely to be close substitutes from the perspective of passengers.
93. Third parties supported this conclusion, noting that the majority of the CBH network was focused around its depot in Hinckley and as such differentiated from the Arriva network.
94. On this basis, the CMA considers that the merger does not raise a realistic prospect of an SLC in the operation of networks in Leicestershire.

Network effects in West Yorkshire

95. The CMA notes that network tickets are an important part of both parties' businesses in West Yorkshire.⁴⁶
96. Arriva submitted that the parties' networks did not overlap significantly in West Yorkshire, with CBH's network focusing on the west side of West Yorkshire (eg Bradford and Halifax) and Arriva on the east side (eg in Wakefield and Castleford).

⁴⁶ For example, network tickets accounted for between 17% and 20% of Arriva revenues in Huddersfield, Wakefield, Leeds and Halifax. These ranged between 37% and 60% for CBH.

97. The CMA considers that the parties' networks indeed do not overlap materially. For example, the flow-on-flow overlap analysis has found few instances of significant overlaps between the parties' services, suggesting that at the network level, the parties' services are unlikely to be close substitutes from the perspective of passengers. The CMA further notes that parties' combined shares of bus mileage across West Yorkshire suggest that they face competition in the operation of networks from other providers.⁴⁷ The CMA also received evidence on the parties' combined share of metrocard⁴⁸ sales which the CMA considers is likely to be a good indicator of their share of overall network tickets (both own and multi-operator network tickets). First's share is 64.9%, to Arriva's 17.7% and CBH's 4.4%.
98. On the basis of the above, the CMA therefore considers that the merger does not raise a realistic prospect of an SLC in the operation of networks in West Yorkshire.

Loss of potential competition

99. The CMA considered whether the merger removes a significant pre-merger competitive constraint in the form of potential entry into each other's routes, such that there is a realistic prospect of a substantial lessening of potential competition. The CMA considers that the proximity of bus depots is an important indicator of the potential for a bus services provider to start operating in competition with an existing provider on bus routes.
100. Arriva submitted that the parties' services are differentiated, including in terms of depot locations. Arriva's depots are located in Dewsbury, Wakefield and Castleford, while CBH's depots are located around Huddersfield and Leeds. Arriva also submitted that its existing 43.9% stake in CBH, which gave it material influence, reduced the pre-merger likelihood of potential entry into each other's routes, although it was not clear to the CMA that this would entirely have excluded the possibility of such entry.
101. Third party views were generally supportive of the parties' submissions on the likelihood of potential competition between the parties. These noted that Arriva's significant shareholding in CBH likely contributed to the lack of competition between the parties pre-merger. Historically, on the evidence obtained by the CMA, there have been no instances of entry in direct head-to-

⁴⁷ The parties' combined market shares are significantly smaller than First's: by bus mileage the parties have 30.5%, to First's 51.6%, and by number of services, the parties have 31.6% to First's 57.9%.

⁴⁸ Metrocard is a travel card that is interoperable across networks operating in West Yorkshire.

head competition on routes against each other. This would suggest that future head-to-head competition was unlikely.

102. In view of the above, the CMA considers that the merger does not raise a realistic prospect of an SLC in relation to potential competition.

Barriers to entry and expansion

103. The CC Local Bus Report identifies a number of barriers to entry and expansion into the supply of local bus services. First, the CC found that it often takes time for operators to build up new routes in competition with an existing operator and that they may incur losses on routes while they do so.⁴⁹
104. Third parties generally took the view that barriers to entry are low. Acquiring an operator's licence is not too onerous, new or used buses can be purchased or leased and there are sufficient existing depots or industrial plots of land to use as outstations.
105. However, the CMA found that barriers to entry may be significant, particularly for new entrants. One third party submitted that obtaining planning permission to build a new depot is difficult. Further, the CC found that the expectation of reprisals from the incumbent operator may reduce the incentives to enter into new areas and as such create a barrier to entry.⁵⁰ The CMA notes that Arriva internal documents suggest that aggressive scheduling may take place in response to new entry.
106. Accordingly, the CMA does not consider that there is sufficient evidence to suggest that entry or expansion would be sufficiently timely and likely to mitigate its competition concerns.⁵¹

Third party views

107. Third party views have been discussed above where relevant. The majority of respondents did not raise concerns about the merger. One third party considered that the merger may decrease competition in West Yorkshire and noted that it would have viewed the sale of CBH more positively if it had transferred to a party other than Arriva. It did, however, note that the impact the merger would have on competition was lessened by the fact that there was limited competition between the parties pre-merger. Some individual bus users noted

⁴⁹ Local Bus Report, paragraph 9.16.

⁵⁰ *ibid*, paragraph 9.38(a).

⁵¹ See *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (2010) (the Exceptions Guidance) (Section 5). The Exceptions Guidance has been adopted by the CMA. See *Mergers: Guidance on the CMA's Jurisdiction and Procedure, CMA2*, Annex D, January 2014.

that they would view the merger as a positive development if it would lead to ticket interoperability. One third party competitor also noted that the merger may increase competition between CBH and First.

Countervailing factors

108. The CMA has concluded that there exists a realistic prospect of an SLC in relation to the overlapping flows on routes 231/232 and 262. The CMA has not received evidence to suggest that countervailing buyer power would be sufficient to allay concerns over an SLC in relation to these overlaps.

Exceptions to the duty to refer: de minimis

109. The CMA's duty to refer to Phase 2 under section 22 of the Act is subject to the application of certain discretionary exceptions, including the markets of insufficient importance or de minimis exception under section 22(2)(a).
110. For the reasons set out in the Exceptions Guidance,⁵² the CMA believes that it would be proportionate not to apply the de minimis exception where it considers that in principle a clear-cut undertaking in lieu of reference exists that could be offered by the parties.
111. The CMA did not consider, based on its objective evaluation of the merger, that this case was a clear candidate for resolution by means of undertakings in lieu. This is because, in the circumstances of this case, divestment of all the assets required (including a suitably located depot) for an effective competitor to operate an individual route on the overlap routes 231/232 and 262 would not be an effective or proportionate remedy.
112. The CMA notes in this respect that, due to the difficulties of enforcing behavioural undertakings, it strongly prefers structural undertakings over behavioural undertakings and has applied this cautious approach in previous decisional practice.⁵³ Accordingly, the CMA does not consider, based on its objective evaluation of the merger, that clear-cut undertakings in lieu are 'in principle' available to resolve the competition concerns that this case has raised.

⁵² See [Exceptions Guidance](#), paragraph 2.21.

⁵³ See the footnotes to the Exceptions Guidance, from paragraph 2.22.

Application of the de minimis exception

113. In determining whether it should apply the de minimis discretion under section 22(2)(a), the factors that the CMA considers include:

- the **market size**
- the **strength of the CMA's concern** (that is its judgement as to the probability of the SLC occurring)
- the **magnitude of the loss of competition** likely to result from the merger
- the **durability of the merger's impact**
- the **wider implications** of exercising the de minimis discretion (for example, where the merger may be replicated)

114. Arriva submitted that the CMA should apply its de minimis discretion not to refer the merger to Phase 2 as, in its view, the assessment of the above factors suggests that the CMA should exercise its discretion in this case. The CMA has considered each of the above factors in turn below.

Market size

115. The CMA has concluded that this merger gives rise to a realistic prospect of SLC affecting competition on the overlap flows.

116. The size of the affected markets may be informed by the extent to which a realistic prospect of an SLC arises in respect of the overlapping sections of the routes only (ie the flows) or the entire routes on which the flows are located. This may depend on whether a lessening of competition would be more likely to affect competition set at a flow level (for example, the price or fare structure relating to the overlap flow), or at a route level (for example, the frequency of service on the route as a whole). The CMA has not considered it necessary to conclude on this point for the purposes of its assessment.

117. The CMA considers that the size of the affected market lies within the range of £[~~10~~] (the total turnover on the overlap flows) and £[~~10~~] (the total turnover on the overlap routes). In either case this is below the £10 million threshold above which the market concerned is generally not likely to be regarded as being of insufficient importance.⁵⁴

⁵⁴ See [Exceptions Guidance](#), paragraph 2.14.

Strength of the CMA's concerns

118. The merger results in a reduction in the number of competitors from two to one on two overlaps (Huddersfield–Wakefield and Dewsbury Bus Station–Calder Road) involving sections of the parties' routes. Set against this, the CMA notes that the overlaps (measured as the share of revenues derived from the overlapping portions of the flows) for several of the routes are small and that other bus operators are present on part of the remainder of the routes. In particular, First is the leading operator in West Yorkshire and operates commercial and tendered bus services around Huddersfield and it already serves the tendered part of 231/232. It therefore imposes some existing constraint on the parties and can be expected to do so in the future. Furthermore, First's services 370 and 371 overlap with the 262. However, the CMA concluded that this overlap was not sufficient to outweigh the SLC, particularly in view of the barriers to potential expansion by First on the overlapping flows between the parties' services.
119. On this basis, the strength of the CMA's concern is just above the realistic prospect threshold, so at the lower end of the SLC test.

Magnitude of the competition lost

120. The CMA notes that the constraint between the parties was asymmetric, with CBH operating a significantly less frequent timetable than Arriva on both routes where the CMA found a realistic prospect of an SLC. This suggests that the magnitude of competition which may be lost as a result of the merger, while substantial, may be constrained to some extent. In particular, the CMA considers that while there may be an incentive arising from the merger for CBH to substantially alter its competitive offering at a route level, there is unlikely to be a similar incentive for Arriva to do so. The CMA notes that CBH revenues on the routes on which the overlap occurs are only around £[redacted], significantly below the size of the total route revenues for all those operating on the route.
121. Further, the CMA has found that there was limited competition between the parties pre-merger, a view which was supported by third parties. The CMA notes that Arriva was the largest single shareholder in CBH pre-merger, with 43.9%, which gave it at least material influence. Arriva's significant pre-merger shareholding means that its incentives may not change significantly post-merger as they would have done had it had no prior interest in CBH. The combination of the asymmetric constraint (less frequent services from CBH) and the pre-merger shareholding, reduces the likelihood that it will, post-merger, significantly alter price or non-price elements of its competitive offering (such as frequency).

Durability of the harm

122. While competitors have not stated that they will enter the actual overlapping flows, there are a number of active competitors in the relevant areas, including one national operator. This would tend to suggest that the duration of consumer harm will be limited.

Replicability

123. The CMA is mindful of the risk that using the exception in this case would create an expectation that similar mergers would also be cleared. In its Local Bus Report, the CC recommended that caution should be exercised when using the 'de minimis' exception in respect of bus merger cases given the risk that it creates an expectation that future small anticompetitive mergers would be cleared.⁵⁵ Replicability is one factor that may count towards not applying the de minimis exception. The CMA has taken account of the other factors in this case in its assessment and considered that, even taking account of replicability, a reference to a Phase 2 investigation would not be justified. The CMA will continue to scrutinise bus mergers where appropriate.

Conclusion on de minimis

124. Having regard to the facts of this case, and in particular the size of the relevant markets and the relatively weak pre-merger competition between the parties; the shareholding Arriva already had in CBH and the extent to which Arriva's incentives will as a result change post-merger; and the fact that First, and other local operators, will remain active in the area after the merger, the CMA has concluded that it is appropriate to exercise its discretion not to refer the case to Phase 2 because the markets concerned are not of sufficient importance to justify the making of a reference.

Decision

125. This merger will therefore **not be referred** under section 22(1) of the Act.

⁵⁵ Local Bus Report, paragraph 15.357.