

Completed acquisition by Midland General Omnibus Limited of the commercial bus services of Felix Bus Services Limited

ME/5360/12

The OFT's decision on reference under section 22(2)(a) given on 30 May 2012. Full text of decision published 26 July 2012.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality

PARTIES

1. **Midland General Omnibus Limited ('Midland General')** is part of the Wellglade Group ('**Wellglade**'), which operates bus services in Nottinghamshire, Derbyshire, the Loughborough area and South Yorkshire through Midland General and its other group companies Trent Motor Traction Company and Barton Buses Limited ('**Trent Barton**'), Nottingham and Derbyshire Traction Company Limited (operating as 'Notts + Derby'), Kinchbus Limited, and TM Travel Limited.
2. **Felix Bus Services Limited ('Felix Bus and Coach')** operated commercial bus services between Ilkeston and Derby, consisting of the Black Cat service and the Ilkeston Flyer service (this part of Felix Bus and Coach's business referred to as '**Felix**'). Felix's revenues in 2011 (excluding the other businesses of Felix Bus and Coach that were not part of the transaction) were around £[].

TRANSACTION

3. On 30 January 2012 Midland General acquired Felix (the '**Transaction**'). Felix's assets consisted of the six single-deck buses that Felix used to operate the Black Cat and Ilkeston Flyer services. Under the TUPE regulations, Felix's six drivers and one cleaner also transferred to Midland General. Midland General did not acquire the tendered bus services business of Felix Bus and Coach, which were terminated shortly after the

Transaction,¹ nor its coaching business, which was sold to a different company.

JURISDICTION

4. As a result of the Transaction, Midland General and Felix ceased to be distinct. The OFT considers that not only Midland General but also Felix constitutes an enterprise for the purposes of determining whether a relevant merger situation has been created. This is because Felix consists not only of the buses used for the commercial bus services operated by Felix Bus and Coach, but also the employees engaged in these services. After the Transaction, Midland General used these buses and employees to continue to operate the services under the same service names.²
5. Given Felix's revenues, the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the '**Act**') is not met. As these enterprises overlap in the supply of commercial bus services between Ilkeston and Derby, the OFT considered whether the share of supply test in section 23(4) of the Act was met.
6. In its market investigation into local bus services, the Competition Commission (the '**CC**') considered the supply of bus services in a number of 'urban areas' in the UK, including the Derby urban area and the Nottingham urban area.³ Felix's services ran between these urban areas, as the CC treated Ilkeston as part of the Nottingham urban area.⁴ The CC found that Trent Barton, which is a group company of Midland General, has around 58 and 29 per cent of bus services in the Derby urban area and the Nottingham urban area respectively.⁵ The combined share of supply of Midland General's group of companies and Felix in the area consisting of the Derby and Nottingham urban areas therefore exceeds 25 per cent. The

¹ At the time of this decision, Felix Bus and Coach is selling the buses that it used for its tendered services in the open market.

² See *Mergers Jurisdictional and procedural guidance* (OFT527, June 2009), paragraphs 3.8-10.

³ CC's final report of 20 December 2011 in its local bus services market investigation (the '**CC Bus Report**'), paragraph 4.11. The CC defined these urban areas as cities or towns (or groups of nearby cities or towns) and their nearby suburbs which have a highly interconnected bus network that is in some sense distinct from the wider bus network.

⁴ Appendix 4.2 to the CC Bus Report, page A4(2)-14.

⁵ Appendix 4.3 to the CC Bus Report, pages A4(3)-4 and 8.

OFT further considers that the area consisting of the Derby and Nottingham urban areas constitutes a substantial part of the UK for the purposes of the share of supply test, since these urban areas together have around 911,000 inhabitants.⁶

7. The share of supply test in section 23 of Act is therefore met. Consequently, the OFT believes that it is or may be the case that the Transaction has resulted in the creation of a relevant merger situation.
8. The OFT had begun an own-initiative investigation before the Transaction completed. Since the Transaction completed on 30 January 2012, the statutory deadline is 30 May 2012. This date is also the administrative deadline.

COUNTERFACTUAL

9. The OFT generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger, but will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that there is not a realistic prospect of the pre-merger conditions continuing.⁷ Felix Bus and Coach informed the OFT that it would have ceased operating Felix in the event that it had not been able to sell it. It also stated that Midland General was the only operator to make an offer for Felix despite Felix Bus and Coach's search for other buyers, which included sending out information about Felix to several other bus and coach operators. The OFT therefore considered whether the appropriate counterfactual to assess the Transaction is not the state of competition before the Transaction but Felix's exit from the market.
10. In forming a view on an 'exiting firm' scenario, the OFT will consider:
 - a) whether the firm would inevitably have exited the market, in particular whether the firm was unable to meet its financial obligations in the near future and to restructure itself successfully

⁶ Idem. See also *Tramlink Nottingham Consortium/NET Phase Two Concession*, OFT decision of 12 September 2011, in which the OFT found the Nottingham urban area to be a substantial part of the UK for jurisdictional purposes (paragraph 18).

⁷ *Merger Assessment Guidelines* (CC2 and OFT1254, September 2010), paragraph 4.3.5.

- b) whether there would have been a substantially less anti-competitive alternative purchaser for the firm or its assets, and
 - c) what would have happened to the firm's sales in the event of its exit.⁸
11. The OFT notes that where a merger raises concerns relative to the pre-merger situation, the OFT is slow to clear a transaction based on the 'inevitability' of exit of the target business and will only do so when it has sufficient compelling evidence.⁹ In this case, Felix Bus and Coach stated that it was a family-owned business [that was exiting]. This is supported by the fact that Felix Bus and Coach also exited from its other businesses besides Felix, as it ceased its tendered bus services and sold its coaching business (see paragraph 3 above). Further, third parties confirmed that Felix Bus and Coach had approached them with a view to selling Felix.
12. However, the OFT notes that Felix was not unprofitable before the Transaction. Felix Bus and Coach did not produce separate accounts for Felix, but informed the OFT that Felix was 'marginal' and could become loss-making after expected changes to the Bus Service Operators Grant (BSOG) and increases in fuel duty. Hence, the OFT was not given compelling financial data to show that the financial state of Felix was such that it would inevitably have been closed in the absence of the Transaction.¹⁰ Also, the OFT notes the possibility that some form of restructuring could have improved Felix's performance, although it acknowledges that, given the small size and relatively straightforward nature of Felix's business, it is not clear that there would have been much scope for any restructuring to make a significant difference to its performance.
13. Based on the factors set out above, the OFT considers that, given the high evidentiary standard that the OFT must use in 'exiting firm' cases, there is not sufficient compelling evidence that at the time of the Transaction Felix

⁸ *Merger Assessment Guidelines*, paragraphs 4.3.8-18.

⁹ See for example *Kerry Foods Limited/Headland Foods Limited*, OFT decision of 12 July 2011, paragraph 10.

¹⁰ This is in contrast to *First West Yorkshire Limited/Black Prince Buses Limited* (OFT decision of 27 May 2005), in which the OFT accepted an exiting firm counterfactual based, in part, on financial data showing that the business that was being acquired had not made an operating profit for several years and that its finances appeared unsustainable.

would have **inevitably** exited the market in the short term. In particular, there is no evidence that Felix was in such a parlous financial situation that, absent the Transaction, it would have been forced to exit. This means that consideration a) for the 'exiting firm' counterfactual (see paragraph 10 above) is not met. There was therefore no need for the OFT to consider considerations b) and c).

14. Consequently, the OFT considers that the pre-merger conditions of competition constitute the appropriate counterfactual for its competitive assessment of the Transaction. However, taking into account in particular that Felix Bus and Coach approached several potential buyers for Felix, as confirmed by third parties, and that it exited from all of its businesses shortly after the Transaction, the OFT accepts that the evidence, while insufficient to apply an 'exiting firm' counterfactual when measured against the OFT's 'realistic prospect' threshold, does suggest that there was a likelihood that Felix would have exited the market in the short to medium term absent the Transaction. The OFT has considered this further at paragraph 51 below.

MARKET DEFINITION

15. The merged parties overlapped only in the provision of commercial local bus services. The OFT and the CC have considered market definition for local bus services in several previous merger reviews.¹¹ The OFT has received no evidence in the current case to suggest that the approach adopted in these reviews should not be followed in this case.
16. As regards the product scope of the market, in previous cases a distinction was made between the provision of commercial local bus services and the provision of tendered local bus services. As the Transaction does not include tendered bus services, the OFT has only assessed the impact of the Transaction in the provision of commercial local bus services.
17. As regards the geographic scope of the market, consistent with previous OFT and CC merger reviews, the OFT has assessed the impact of the Transaction on a flow-by-flow basis, where a 'flow' is defined as a connection between two specific points along a route (or more than one

¹¹ An overview is provided in the OFT's most recent decision in this sector, *McGill's Bus Services Limited/Arriva Scotland West Limited*, OFT decision of 18 April 2012, paragraph 15.

route where routes run on the same road). This approach is taken because passenger demand is for travel between two points. The OFT has also considered whether nearby flows on other routes may be in the same market, given the CC's finding that flows that have their origin and destination within 500 metres of one another are likely to be demand-side substitutes.¹²

18. In previous merger reviews, the OFT and the CC also considered the impact of mergers in a wider area consisting of networks of bus services in order to assess the merger's impact on potential competition between merging bus operators. However, in this case the OFT considers that Felix did not compete with Midland General or its group companies on a network basis and that Felix did not form a potential competitor. Felix was part of a small family-run business that operated only two commercial bus services that both ran between Ilkeston and Derby. It had not operated any other commercial services for many years,¹³ and there was no evidence that it intended to expand into any other flows. Further, third parties stated that Felix Bus and Coach never appeared to be interested in expanding its commercial services operation, with one third party stating that Felix Bus and Coach concentrated on its coaching business. No concerns on network competition were raised by any third parties. It was therefore not necessary for the OFT in this case to consider a wider geographic scope of the market than individual overlap flows.

UNILATERAL EFFECTS

19. Before the Transaction, Felix and Midland General's group company Trent Barton ran two commercial bus services between Ilkeston and Derby under the same service names:
 - a. The Black Cat service operated by Felix and Trent Barton runs from Ilkeston Community Hospital to Derby bus station via West Hallam and Stanley and on a main road on the edge of the Oakwood and Chaddesden areas of Derby. The route of Felix's Black Cat service was

¹² See, for example, *Stagecoach plc/Preston Bus Limited*, CC report of 11 November 2009, Appendix I, paragraphs 5-10.

¹³ The OFT understands that Felix Bus and Coach started operating the Black Cat service in the 1920s, which later became a joint service with Trent Barton, and added the Ilkeston Flyer service between the same towns when Trent Barton began this service in the 1990s.

the same as the route of Trent Barton's Black Cat service, except that Felix's service made a loop into West Hallam and into the Shipley area of Ilkeston. Trent Barton's Black Cat service continued from Ilkeston to Mansfield, but there was no overlap between the merged parties on that part of the service.

- b. The Ilkeston Flyer service, also operated by Felix and Trent Barton, runs from Ilkeston Wharncliffe Road to Derby bus station via Kirk Hallam and Spondon with a limited number of stops. This service therefore runs along a different route from the Black Cat service.
20. As noted above (paragraph 1), Midland General and Trent Barton are both part of Wellglade. The result of the Transaction is therefore that the Black Cat and Ilkeston Flyer services are being run by one economic entity, even though the Felix services may continue to be operated by Midland General and hence under a different trade name and by a different group company. This was not disputed by the merged parties.
 21. Before the Transaction, Trent Barton and Felix had been operating both the Black Cat and the Ilkeston Flyer services as joint services for many years, in the sense that they both ran buses as part of the same service, produced joint timetables and accepted each other's tickets.¹⁴ On the Ilkeston Flyer service, both companies also had the same livery. The timetable and frequencies of both companies were such that buses were equally spaced on both services. On the Black Cat service, as each company ran one bus per hour, this resulted in a half-hourly service. On the Ilkeston Flyer service, as Felix ran one bus and Trent Barton two buses per hour, this resulted in a bus every 20 minutes. Felix did not run any buses on Sundays so that only Trent Barton's buses operated the Black Cat and Ilkeston Flyer services on Sundays. Fares were virtually the same on both parties' buses.
 22. In previous merger reviews in the local bus sector, the OFT and the CC adopted a filtering approach to focus on the overlap flows that are most

¹⁴ The OFT notes that, to the extent it considers that existing arrangements between merging parties would have amounted to a breach of the Competition Act 1998, it would disregard these for the purposes of its merger assessment (see *Merger Assessment Guidelines*, paragraph 4.3.3).

likely to give rise to competition concerns.¹⁵ In this case, virtually all of the flows on Felix's two services overlap with Trent Barton's flows, so the OFT has not filtered out any flows based on their relative importance compared to the routes as a whole. Further, the merged parties offered comparable frequencies on both services (see paragraph 21 above), so the OFT has also **not filtered out** any flows based on any significant difference in frequencies between the parties.

23. The only flows where the parties' services did not overlap are the flows starting in West Hallam and in the Shipley area of Ilkeston. Felix's Black Cat route made a loop into West Hallam, where two bus stops (the Village and Scargill Road bus stops) are more than 500 metres away from Trent Barton's Black Cat route. In view of this distance (see paragraph 17 above), the flows from these bus stops in West Hallam are therefore not affected by the Transaction as there was no competition prior to the Transaction. This does not apply to the loop of Felix's Black Cat route into the Shipley area of Ilkeston as this loop did not take it more than 500 metres away from Trent Barton's Black Cat route.
24. Only one other bus service runs between Ilkeston and Derby: service 59 operated by K&H Doyle Coaches Limited ('**Doyles**'). This is a service operated under tender from Derbyshire County Council, which runs virtually alongside the Black Cat service from Ilkeston into West Hallam but from there runs along a different, more westerly route. Service 59 consists of one bus per hour from Monday to Saturday during the day.
25. The OFT has analysed the loss of competition for each of the flows on which the parties' services overlap.

Ilkeston – Derby flow

26. First, on the flow between Ilkeston and Derby, the parties face no effective competitor. Doyles' tendered service 59 service is very unlikely to be an alternative to the parties' Ilkeston Flyer service, as the journey time of service 59 is around 42 minutes compared with only 25 minutes for the Ilkeston Flyer, while the fares are similar. Also, the Ilkeston Flyer service runs three buses per hour compared to one bus per hour for service 59.

¹⁵ See most recently the OFT's decision in *McGill's Bus Services Limited/Arriva Scotland West Limited*, paragraphs 35-36.

This is in addition to the limited competitive constraint from service 59 as it is a tendered service (see further paragraph 29). The Transaction therefore reduced the number of competing operators from two to one on the Ilkeston – Derby flow.

Spondon – Derby flow

27. On the flow between Spondon and Derby, Trent Barton operates another service (the Spondon Flyer) with a frequency of six buses per hour, in addition to the two buses per hour it operates as part of the Ilkeston Flyer service. As Felix operated only one bus per hour as part of the Ilkeston Flyer service, it was not an effective competitor on this flow and the Transaction has no significant impact on competition on this flow.

Other flows on the Ilkeston Flyer route

28. On the other flows along the Ilkeston Flyer route, no other services run. The Transaction therefore reduced the number of competing operators from two to one on these flows.

West Hallam – Ilkeston/Derby flows

29. On the flows (a) between Ilkeston and West Hallam and points in between, and (b) between West Hallam and Derby, passengers have a choice between the Black Cat service and service 59, except on Sunday and during the evenings when service 59 does not run. Neither journey times nor fares differ significantly between these services for these flows, although the frequency of service 59 is lower (one rather than the Black Cat's two buses per hour). The existence of this tendered service may limit to some degree the scope for the parties to worsen their competitive offer for passengers on these flows, as some passengers may switch to this tendered service. However, any competition between service 59 and the Black Cat service is limited, as the freedom of Doyles, as operator of service 59, to change frequencies and fares in response to changes made by the parties is limited by the constraints from the fact that it is a tendered service. Since service 59 is therefore unlikely to be an effective competitor to the parties, the Transaction has resulted in a reduction in the number of effective competing operators from two to one on the flows (a) between Ilkeston and West Hallam and points in between, and (b) between West Hallam and Derby.

Stanley – Ilkeston/Derby flows and Oakwood/Chaddesden – Ilkeston flows

30. Only the parties' Black Cat service operates (a) between Stanley (lying between West Hallam and the Oakwood area of Derby) and Ilkeston/Derby, and (b) between the bus stops on the edge of Oakwood/Chaddesden and Ilkeston. On these flows the Transaction has therefore resulted in a reduction in the number of competing operators from two to one.

Oakwood/Chaddesden – Derby flows

31. As regards the flows between the edge of Oakwood/Chaddesden and Derby, the OFT has considered whether the Black Cat service faces competition from the competing service 26 that is operated by Arriva within Oakwood and Chaddesden. Only two bus stops along service 26 are within 500 metres of one of the bus stops of the Black Cat service, which runs along the main road at the edge of Oakwood and Chaddesden into Derby. Trent Barton also noted that many of the roads in these areas end in cul-de-sacs, resulting in only limited access to the outer road on which the Black Cat service operates. Therefore, the OFT considers that the number of passengers for whom there is a choice between service 26 and the Black Cat service is so small that there is at most very limited competitive interaction between these services (see at paragraph 17 above). Both Wellglade and Arriva also stated that competition between the Black Cat service and service 26 was limited or non-existent. Therefore, the Transaction has resulted in a reduction in the number of competing operators from two to one on the flows between the edge of Oakwood/Chaddesden and Derby.

Chaddesden Lane End – Derby bus station flow

32. Finally, on the flow between the point where the Black Cat service turns into Nottingham Road in Derby (Chaddesden Lane End bus stop) and Derby bus station, several services are operated by both Arriva and Trent Barton (or its group companies) with much greater frequencies than the one bus per hour of Felix's Black Cat service.¹⁶ Therefore, the OFT considers that Felix was not an effective competitor on this flow and the Transaction has no significant impact on competition on this flow.

¹⁶ Including Arriva's 20 and 26 services (six buses per hour each) and 22 and 24 services (four buses per hour each), and Trent Barton's Indigo service (three buses per hour).

Conclusion

33. In view of the analysis above, the OFT concludes that the Transaction has resulted in a reduction in the number of (effective) competing operators from two to one on all flows on the Black Cat and the Ilkeston Flyer routes, with the exception of the flow from West Hallam (Village and Scargill Road bus stops), the flow between Spondon and Derby, and the flow along Nottingham Road in Derby into Derby bus station. There is therefore a significant competition concern on these flows.

BARRIERS TO ENTRY

34. The OFT has considered whether entry by new bus operators, or expansion by existing bus operators, into the overlap routes could mitigate the effect of the Transaction on competition.¹⁷ In its report on local bus services, the CC identified a number of barriers to entry and expansion, including the cost of entry and expansion and the incumbent's reaction.¹⁸
35. In this case, there is a number of (mostly small) bus operators in the area that have a bus depot that may be close enough to the Black Cat and Ilkeston Flyer routes to enter these routes. However, none of the bus operators from whom the OFT received comments expressed an interest in entering the Black Cat or Ilkeston Flyer route in competition with Trent Barton and its group companies. Some third parties noted that [].
36. It therefore appears unlikely that the prospect of entry or expansion is sufficient to constrain the merged firm following the Transaction.

THIRD-PARTY VIEWS

37. Specific third-party views have been discussed above where relevant. The OFT received only limited concerns about the impact of the Transaction on competition. One passenger group identified a longer-term, hypothetical risk that Trent Barton may reduce frequencies. Another passenger group considered that the Transaction would have only a minimal impact as Felix

¹⁷ The OFT generally considers whether entry or expansion would be timely, likely and sufficient to prevent any substantial lessening of competition resulting from a merger (*Merger Assessment Guidelines*, paragraph 5.8.3).

¹⁸ Section 9 of the CC Bus Report, in particular paragraphs 9.7 to 9.68. See also the OFT decision in *McGill's Bus Services Limited/Arriva Scotland West Limited*, from paragraph 63.

and Trent Barton had run the Black Cat service in the same pattern for many years and Felix showed little interest in expanding into other services. The OFT did not receive any views from individual passengers, although the OFT has taken account of some views expressed in online forums (in particular at footnote 31 below).

38. Two competitors raised a concern about the Transaction, referring to reduced choice for passengers and a further strengthening of Trent Barton's position, but several other competitors did not raise concerns.

ASSESSMENT

39. The merged parties ran the Black Cat and Ilkeston Flyer commercial bus services between Ilkeston and Derby as joint services, in the sense that they both ran buses as part of these services in an evenly spaced timetable and accepted each other's tickets. The Transaction has resulted in a reduction in the number of (effective) competing operators from two to one on virtually all flows on the Black Cat and the Ilkeston Flyer routes. It appears unlikely that the prospect of entry or expansion is sufficient to constrain the merged firm following the Transaction.
40. The OFT identified no concerns regarding potential competition given that Felix Bus and Coach operated only two services, had not operated any other commercial routes for many years and was not viewed by third parties as being a potential competitor going forward.
41. The OFT therefore believes that the test for reference may be met in this case. However, it was not necessary for the OFT to reach a definitive conclusion in this respect for the reasons set out from paragraph 42 below (that is, that it would in any event apply the markets of insufficient importance exception to the duty to refer).

EXCEPTIONS TO THE DUTY TO REFER

42. The OFT's duty to refer a merger to the CC under section 22(1) of the Act in the event of a finding of a realistic prospect of a substantial lessening of competition is subject to the application of certain discretionary exceptions,

including the markets of insufficient importance or 'de minimis' exception under section 22(2)(a) of the Act.¹⁹

43. As the annual value of the affected market in this case is significantly less than £10 million (see paragraph 49 below), the OFT has considered whether it should apply the 'de minimis' exception. As the OFT's general policy is not to apply this exception where clear-cut undertakings in lieu of reference could be offered by the parties, the OFT has also considered whether such undertakings would be available if the duty to refer were met.
44. During the course of the investigation, Midland General stated that it would be willing to waive its procedural rights to a full investigation, including an issues letter and an issues meeting, to the extent that the OFT would apply the 'de minimis' exception to the duty to refer, and without prejudice to Midland General's views on whether the duty to refer was met. Since, as set out below, the OFT indeed decided to apply the 'de minimis' exception, it did not send an issues letter to Midland General.²⁰

Availability of undertakings in lieu

45. The OFT generally will not apply the 'de minimis' exception where clear-cut undertakings in lieu of reference could be offered by the parties to resolve the competition concerns identified. The OFT's judgment in this respect is an 'in principle' one that does not depend on any actual offer of undertakings in lieu.²¹
46. The OFT considered whether there was a clear-cut undertaking in lieu available in this case. One third party suggested that the OFT should obtain a commitment from Trent Barton to maintain existing service levels on the Black Cat and Ilkeston Flyer routes. However, this would be a behavioural undertaking, which the OFT is generally unlikely to consider to be sufficiently clear-cut to address competition concerns in view of the risks as regards, for example, monitoring and enforceability.²² This applies even

¹⁹ See *Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, December 2010) ('**Exceptions guidance**').

²⁰ *Exceptions guidance*, paragraphs 2.51 to 2.53.

²¹ *Exceptions guidance*, paragraphs 2.18 to 2.27.

²² *Exceptions guidance*, paragraph 5.39.

more when the availability of undertakings in lieu is considered in the context of deciding on the application of the 'de minimis' exception, where the OFT will take a conservative approach in assessing whether undertakings in lieu are in principle available.²³

47. The only structural remedy open to the parties to address the competition concerns raised would be to reverse the Transaction. The OFT does not include what would amount to a prohibition of the transaction when considering whether an 'in principle' undertaking in lieu is available.²⁴

48. On the basis that the OFT believes there is no clear-cut undertaking in lieu available, the OFT has proceeded to examine whether to exercise its 'de minimis' exception in this case.

Application of the 'de minimis' exception

49. The size of the market concerned, corresponding in this case with the parties' combined revenues from the Black Cat and Ilkeston Flyer services (including revenues from concessionary passengers), was around £[900,000-1m] in 2011.²⁵ That the revenues in 2011 were not unusually low compared to other years is shown by the fact that the 2010 revenues were only around £[900,000-1m]. The OFT did not receive any evidence that revenues are expected to rise significantly in the foreseeable future.

50. At less than £1 million, the annual value of the markets concerned is significantly below the £3 million benchmark for which a reference to the Competition Commission would generally not be justified.²⁶ However, since the Transaction has resulted in a reduction of the number of effective competitors on most of the affected flows from two to one, mergers between bus companies may generally carry a high risk of replicability, and in view of the CC's recent report on local bus services in which it urged

²³ *Exceptions guidance*, paragraph 2.27.

²⁴ *Exceptions guidance*, paragraph 2.25.

²⁵ The OFT did not receive sufficient information to calculate the precise value of the markets concerned because it does not have the parties' revenue figures for passengers travelling on the flows where the OFT considers there is *no* realistic prospect of a substantial lessening of competition. However, given that these flows form only a small part of the routes, the OFT expects that these revenues are small and that therefore the total market value is close to £[900,000-1m].

²⁶ *Exceptions guidance*, paragraph 2.15.

caution in applying the 'de minimis' exception in mergers of bus companies,²⁷ the OFT has considered carefully whether the 'de minimis' exception should be applied in this case.²⁸

51. On the basis of this analysis, the OFT has concluded that it is appropriate in this case to exercise its 'de minimis' discretion. In reaching this conclusion the OFT has taken account of, in particular, the following factors:

- The OFT's investigation indicated that Felix should not be seen as a strong or particularly active competitor on the two bus services it operated, nor as a potential competitor that may have entered other flows.
- Felix was likely to exit in the short term absent the Transaction (on a balance of probabilities standard).²⁹ Also, the OFT considers that, on the same evidentiary standard, evidence from the parties and third parties shows that Midland General was the only entity prepared to buy Felix, despite Felix Bus and Coach's marketing efforts to other potential buyers. The OFT further considers that Felix's revenues would have been most likely to accrue to Trent Barton in the event of Felix's exit given the lack of competing operators on the routes. The OFT therefore considers that the probable duration of any harm arising from the Transaction is limited.³⁰
- The OFT considers that the replicability of the present case, given its very exceptional facts, is limited. The OFT notes, in particular, Felix's very small size (consisting of six buses, six drivers and a cleaner, with revenues below £0.5 million, operating only two commercial services), the limited competitive constraint it posed to rival operators, and the fact that Felix was not viewed as a potential competitor in the area. The

²⁷ CC Bus Report, paragraph 15.357.

²⁸ See *Exceptions Guidance*, paragraphs 2.31-43.

²⁹ As noted above (paragraph 13), the OFT considered that the evidence for Felix's inevitable exit in the short term was not sufficient to meet the high evidentiary standard necessary for adopting the 'exiting firm' counterfactual. However, in the present context of considering the 'de minimis' exception, the OFT has taken the evidence of Felix's likely exit in the short term into account in considering the likely duration of any adverse effects of the Transaction.

³⁰ See *Orbital Marketing Service Group Limited/Ocean Park Limited*, OFT decision of 14 November 2008, paragraph 83.

OFT is also conscious that Felix Bus and Coach's directors wished to [] exit the market, which was the reason motivating the Transaction.³¹

- The OFT has carefully considered whether exercise of the 'de minimis' exception in this case could give rise to the risks identified by the CC in its report on local bus services,³² but it believes that this is unlikely in view of the specific facts of this case.

52. The OFT considers that the balance of factors set out above is in favour of the exercise of its 'de minimis' discretion. The OFT therefore considers that, to the extent that the duty to refer is met, it would be appropriate to exercise its 'de minimis' discretion in this case.

DECISION

53. The Transaction will therefore **not be referred** to the Competition Commission pursuant to section 22(2)(a) of the Act.

³¹ The OFT has noted that some comments in the press at the time of the Transaction stated that a different rationale was suggested by a change by Trent Barton to its timetable in October 2011, when for nine days it ran its buses shortly before Felix's buses. However, the OFT notes that Trent Barton's change in its timetable cannot have affected the decision by Felix Bus and Coach to exit the market, as this decision (in or before July 2011) preceded this change (in October 2011).

³² See footnote 27 above.