

Anticipated acquisition by First MTR South Western Trains Limited of the South Western Franchise

Notice under paragraph 2(1) of Schedule 10 to the Enterprise Act 2002 (the Act) – consultation on proposed undertakings in lieu of reference pursuant to section 73 of the Act

ME/6664/16

Introduction

1. On 27 March 2017, the Department for Transport (**DfT**) announced that First MTR South Western Trains Limited (**FMSWTL**), a joint venture between FirstGroup plc (**First**) and MTR Corporation (**MTR** and together with First, the **Parties**), was the successful bidder for the South Western Franchise. DfT and FMSWTL entered a franchise agreement and associated agreements confirming the award of the South Western Franchise to FMSWTL (the **Franchise Award**). The South Western Franchise is due to commence on 20 August 2017 for an initial term of seven years, expiring on 18 August 2024 (subject to a possible extension of 11 reporting periods¹).
2. On 11 July 2017, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Franchise Award consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**). The text of the SLC Decision is available on the CMA webpages.²
3. On 12 July 2017, the Parties offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.

¹ 44 weeks.

² See <https://www.gov.uk/cma-cases/firstgroup-and-mtr-south-western-rail-franchise-merger-inquiry>.

4. On 19 July 2017, the CMA gave notice to the Parties, pursuant to section 73A(2)(b) of the Act, that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the Parties' offer (the **UIL Provisional Acceptance Decision**).

The undertakings offered

5. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to in relation to rail services on the flow between London and Exeter.
6. As set out in the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA, the Parties have offered:
 - (a) an undertaking to ensure that the Parties continue to maintain the same availability of advance fares on the London to Exeter flow as are available on a series of comparable flows, in relation to both GWR services and the South Western Franchise services; and
 - (b) an undertaking linking the pricing of unregulated fares offered by each of the South Western Franchise and GWR on the London to Exeter Flow to the equivalent fares offered on a series of comparable flows.
7. The text of the undertakings is available on the CMA webpages (the **Proposed Undertakings**).³

CMA assessment

8. The CMA currently considers that, subject to responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings will resolve the SLC identified in the SLC Decision in a clear-cut manner, ie the CMA currently does not have material doubts about the overall effectiveness of the Proposed Undertakings or concerns about their implementation.⁴ This is because the CMA believes the Proposed Undertakings will both:

³ See <https://www.gov.uk/cma-cases/firstgroup-and-mtr-south-western-rail-franchise-merger-inquiry>.

⁴ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7–5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

- (a) remove any ability or incentive which the Parties may have gained as a result of the Franchise Award, to raise prices on the London to Exeter flow; and
 - (b) remove any ability or incentive which the Parties may have gained as a result of the Franchise Award, to increase effective prices paid through reducing the number of advance tickets available on the London to Exeter flow.
- 9. The CMA also considers that the Proposed Undertakings would be capable of ready implementation. In particular, the CMA notes the ease of implementation of behavioural remedies in the context of rail franchise awards can be distinguished from the implementation of comparable remedies in mergers in other industries in a number of ways. In the case of rail franchise awards, the parties are subject to existing regulation, and there are other restrictions on the operation of rail services provided for in the franchise agreements. For these reasons, the CMA currently thinks that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.

Proposed decision and next steps

- 10. For the reasons set out above, the CMA currently considers that the Proposed Undertakings are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.
- 11. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Franchise Award for a phase 2 investigation.
- 12. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views on the Proposed Undertakings known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a result. If the CMA considers that any representation necessitates any material change to the Proposed

Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.⁵

13. Representations should be made in writing to the CMA and be addressed to:

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Mergers Group
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

Email: verity.doyle@cma.gsi.gov.uk

Telephone: 020 3738 6268

Deadline for comments: 8 August 2017

⁵ Under paragraph 2(4) of Schedule 10 to the Act.