

## THE GO-AHEAD GROUP PLC

### RESPONSE TO PUBLIC TRANSPORT TICKETING SCHEMES BLOCK EXEMPTION GUIDANCE CONSULTATION

#### 1. INTRODUCTION

- 1.1 The Go-Ahead Group plc (**Go-Ahead**) is one of the UK's leading passenger transport companies operating three rail franchises for the UK Government and over 4,700 buses in London, Oxford, East Anglia, Tyne & Wear, East & West Sussex, Brighton, Southampton, Dorset and the Isle of Wight.
- 1.2 As stated in our submission (the **Review Submission**) during the Public Transport Ticketing Schemes Block Exemption (the **Block Exemption**) Review, Go-Ahead considers that the existing guidance accompanying the Block Exemption (the **Existing Guidance**) can be difficult to use. The CMA's decision to review the Existing Guidance as part of the Block Exemption review is therefore welcome.
- 1.3 Go-Ahead was also grateful for the opportunity to review and provide comments on an early draft of the section on the definition of Multi-Operator Travelcards (**MTC**) (the **MTC Submission**). There are clear benefits in engaging with stakeholders during the drafting phase of proposals and this level of ongoing and constructive engagement by the CMA is reflected in the high quality of the draft guidance to the Block Exemption (the **Draft Guidance**).
- 1.4 Go-Ahead has identified a number of areas where it considers that the Draft Guidance could be enhanced, which are arranged thematically below. If it would be of assistance, we would be happy to meet with the CMA team to discuss any of these points in more depth.

#### 2. SMART TICKETING

- 2.1 The CMA's commentary on smart ticketing in paragraphs 3.3 to 3.6 is a welcome development in the Draft Guidance. Whilst the Existing Guidance was drafted when electronic ticketing arrangements were in their relative infancy, smart ticketing is now recognised as being capable of delivering a step change in the industry. In particular, smart technology will enable operators to produce innovative ticketing products which are closely aligned with the needs of bus users. The importance of smart ticketing is recognised by the Government, which has made the adoption of this technology a major policy objective. This goal has the full support of Go-Ahead.
- 2.2 The capability of smart ticketing is evolving quickly as technology develops and passengers become more comfortable with the processes. This rapid change introduces a risk that the Draft Guidance may be superseded soon after its introduction. It would be helpful to understand whether the CMA has made any contingencies by, for example, planning any future discrete guidance on the smart ticketing arrangements or re-opening a consultation process on this guidance.

#### 3. GUIDANCE ON SMART TICKET TYPES

- 3.1 The use of capped pricing is one of the most beneficial forms of smart ticketing for passengers and its expansion across the UK is an industry objective and fully endorsed by the Department for Transport. However, the Guidance appears to suggest that the setting of a cap by competing operators potentially triggers competition law issues. The CMA's confirmation in the Draft Guidance that a capping arrangement which satisfies the conditions of an MTC will fall within the Block Exemption provides operators with a degree of comfort. However, Go-Ahead considers that applying the MTC test rigidly to such arrangements will cause practical difficulties which could dis-incentivise operators from adopting highly beneficial capping arrangements.

- 3.2 The principal uncertainty relates to the unpredictability of passengers' patterns of travel within a capping zone. Particularly, how to classify occasional journeys where an agreed cap is met but the pattern of usage is consistent with an MIT or TT rather than an MTC. In this case, the application of an agreed cap is tantamount to agreeing the price of an MIT, which is contrary to the Block Exemption. This unpredictability creates significant uncertainty for operators regarding whether a capping scheme is compliant with the Block Exemption for **all passengers**. The risk of introducing a non-compliant MIT or TT may discourage operators from adopting capping arrangements. As a solution, the Draft Guidance should clarify that, provided a capped contactless ticket is used on a network which satisfies the "not substantially the same" test for MTCs, this is sufficient for the capping arrangement to satisfy the Block Exemption as an MTC. An annual reconciliation exercise would then be undertaken to review usage. If usage across passengers as a whole during this time period was considered to be inconsistent with an MTC, then the capping arrangement would need to be reviewed to ensure that it is compliant with the exemption in section 9(1) of the Competition Act (CA'98).
- 3.3 It is also important for the Draft Guidance to emphasise that agreeing the level of a cap is distinct from agreeing the price of tickets which may be the "building blocks" of a capped fare. For example, in order to reach a capped limit, a passenger may purchase two MITs (the fares for which are determined independently by operators in accordance with the Block Exemption). Although the passenger ultimately pays a fare which is agreed between the operators in the capping scheme, this should not undermine the fact that the price for the MITs was determined independently by the operators and is therefore compliant with the Block Exemption. This is an important distinction for operators who must be able to understand that entering into a capping arrangement will not undermine the status of their individual tickets.
- 3.4 Finally, Go-Ahead notes that "pay-later with best price guarantee" is listed in footnote 7 as an example of a smart ticket. However, it should be clarified that this type of arrangement is not in fact a discrete ticket type. The purpose of this approach is to ensure that a passenger pays for the type of ticket which most closely reflects their pattern of travel at the end of a specified period travel (e.g. a day, week or month). Rather than being a discrete ticket type this mechanism is more accurately described as a reconciliation exercise. This should be reflected in the Draft Guidance so operators are aware that a pay later with best price guarantee does not need to satisfy the terms of the Block Exemption.

#### 4. **MTC DEFINITION**

- 4.1 Go-Ahead's Review Submission highlighted the importance of applying the MTC tests in the Block Exemption flexibly and the CMA's subsequent amendments to the Block Exemption helped to achieve this aim. The Draft Guidance provides operators with some further clarity on how to assess whether proposed schemes satisfy the definition. However, in certain respects the guidance opts for an unnecessarily restrictive approach.

##### The Second Criterion: "Not Substantially the Same"

- 4.2 Go-Ahead's MTC Submission emphasised that the driving principle behind MTC schemes and smart ticketing is to enable passengers to benefit from access to wider networks, regardless of the number of individual operators who run services throughout the area. Therefore, it is vital that this criterion is applied flexibly to prioritise the passenger benefit of enhanced network access, ensuring that MTC schemes which include some overlapping routes but otherwise offer significantly wider network access, are adopted. Go-Ahead therefore welcomes the CMA's view in paragraph 3.25 that a detailed analysis of a scheme will not be necessary if an MTC scheme covers a large network.

- 4.3 Similarly, the 3 proposed sub-criteria, listed in paragraph 1.6, for assessing whether routes are substantially similar are helpful. However, the current drafting indicates that this is not a cumulative list, but that where any of these circumstances apply, routes are to be considered substantially the same and, therefore, cannot fall within the Block Exemption.
- 4.4 However, this approach does not recognise the practical situation on the ground in many locations. For example, there may be circumstances where routes operated by different operators generally serve different point to point journeys (for example from different suburbs into a city centre), but have a preponderance of overlapping stops within a particular area or small fare zone. This situation could arise in a city or large town where a central bus station is accessed via a long arterial road, which could also be a single fare stage. Alternatively, on a rural network, routes may converge in a single market town, which could also be a single fare zone. A rigid application of the paragraph 1.6 sub-criteria could result in these types of routes failing to satisfy the Block Exemption conditions.
- 4.5 Go-Ahead proposed in its MTC Submission that the revised guidance should clearly state that any assessment of this criterion should consider the sub-criteria as a cumulative list, and only when all three filters are failed should an MTC option be rejected. Go-Ahead once more submits that such an approach must be followed to ensure that operators are not discouraged from setting up and / or participating in schemes that do not clearly satisfy just one of the sub-criteria especially given the perceived importance of the existence of such schemes amongst policy makers in local authorities. As illustrated in 4.4 this possibility is more than trivial and must be taken account of.

The Third Criterion: "in practice not substantially used by passengers as an MIT or TT

- 4.6 In its MTC Submission, Go-Ahead highlighted concerns with the application of an apparently fixed 80% threshold as a benchmark to determine whether an MTC was not substantially used as an MIT or TT. Whilst the proposed 80% threshold is a simple approach to self-assessing the most appropriate category of multi-operator ticket, Go-Ahead has concerns that the "80% rule" must be applied flexibly to reflect the typical patterns of travel of many users of MTCs.
- 4.7 The key utility of the MTC is that it can be used flexibly during the week and weekends as well as during the day and in the evenings. For example, many passengers' usage patterns are likely to include a point to point commute on Monday to Friday (typical of an MIT or TT) and a more varied pattern during the evenings and weekends.
- 4.8 Although this is a common usage pattern, the utilisation statistics may show that the "80% test" is failed in this instance on certain days or weeks, depending on the volume of leisure journeys. However, an MIT or TT alone would not provide passengers with the necessary network access for this flexible usage. Instead, passengers would potentially need to purchase an MIT or TT for use during the week and an MTC for evening or weekend travel. This could cause confusion for passengers, who may have to carry multiple smart cards or passes, undermining the inherent "one stop shop" benefit of an MTC. In addition, purchasing two tickets would be likely to increase costs for the passenger, potentially dis-incentivising their bus usage. It is clearly vital that MTCs have the flexibility to account for a typical commuter usage pattern.
- 4.9 To overcome this issue, the Draft Guidance should clearly state that the 80% threshold should be assessed separately during periods of peak, daytime off peak and evening / weekend travel. The criterion should only be failed if the threshold in at least 2 of the 3 travelling periods (i.e. daytime week, evening week and weekend) is exceeded.

- 4.10 The proposed review periods to determine whether tickets should be used as MTCs are also a good idea in principle, although an elongated timetable would better reflect the time that a new MTC can take to "bed-in" and deliver genuine customer utility. Peoples' travel patterns, especially when associated with changes in employment for example, can take a long time to respond to new products or opportunities in the market. The preferred approach would be to avoid firm timetables, and ensure that each MTC is assessed at appropriate intervals in the light of the resources of the operators, the features of the MTC and the nature of the market. This would maximise flexibility. However, if the CMA wishes to include indicative time periods, we would suggest a period of at least one year before the first assessment in the light of potential seasonality (and the need to have at least a whole year's sample for a proper assessment to be made) and the fact that it may take a while for an MTC to "seed" successfully. If the position is unclear after a year it should be reassessed after a further 6 months and only then should a final decision be made on the ticket's compatibility with the Block Exemption. Otherwise, a two year cycle of reassessment would appear reasonable.

## 5. THE APPLICATION OF ARTICLE 6

- 5.1 Box 3 contains a number of indicative reasons for excluding operators from a scheme which would not be considered objectively justifiable under Article 6. The first example of a non-compliant requirement is obliging operators to use specific on-board hardware where alternative cheaper or existing systems could deliver sufficient functionality. Effectively, this example implies that a requirement to use anything other than the cheapest hardware would not comply with Article 6.
- 5.2 Whilst requiring smaller operators to incur unnecessary capital expenditure may be a discriminatory barrier to entry, this should not prevent operators from agreeing to use hardware which is more expensive but offers better value over the product life cycle taking into account enhanced build-quality, functionality and / or reliability. Indeed, these benefits support a view that such additional expenditure is indispensable to the efficient running of a scheme.
- 5.3 This concern would be better addressed by stating that new joiners should not be required to prematurely replace existing equipment that has the necessary functionality. However, when the time for replacement arrives, it is permissible to require that any new equipment meets a specification set out in the relevant multi-operator agreement. This approach strikes the correct balance between minimising the costs of joining (thereby facilitating membership by smaller operators) and ensuring that operators are using equipment which enhances the efficiency of the scheme.
- 5.4 With advances in smart ticketing and payment methods, the role of on-board hardware and its importance to multi-operator schemes will inevitably grow. As well as identifying the types of restrictions which are incompatible with Article 6, the Draft Guidance is a useful opportunity for the CMA to confirm that reasonable requirements of multi-operator schemes which help to facilitate the adoption of new technologies are objectively justifiable and compatible with Article 6 of the Block Exemption. Particularly, that it is objectively justifiable to require operators to (1) offer contactless payment functionality (2) accept a capped payment scheme and (3) be capable of transmitting accurate data for revenue settlement in a timely manner relating to transactions in a capped environment.

## 6. THE APPLICATION OF ARTICLE 9

- 6.1 As highlighted in paragraph 4.12, Article 9(1) prevents a multi-operator ticketing scheme from facilitating the exchange of confidential information between operators. This prohibition is subject to paragraph 9(2). This reflects the information sharing offence under Article 101(1) of the Treaty of the Functioning of the European Union / Chapter 1 of the CA'98 and is uncontroversial.

- 6.2 Paragraph 4.17 lists various examples of the types of information which could be shared in accordance with Article 9(2) (provided sharing is indispensable), the first of which is average fare data (which could be easily replicated using publicly available information) and current publicly available fare structures. As this example concerns publicly available information, it does not raise any issues from an information sharing perspective. For clarity, this example should therefore be removed from the list as it is clearly permissible without the need to consider Article 9(2).

## 7. JOINT MARKETING ARRANGEMENTS

- 7.1 The exclusion of joint marketing arrangements from the Block Exemption raises a number of practical concerns. As with any product, the introduction of a new multi-operator ticket will require sufficient publicity to raise passenger awareness of its existence and benefits. A joint approach to branding and marketing amongst all participating operators is therefore key to a multi-operator scheme as it ensures that any campaign is successful. Local transport authorities have been lobbying bus operators to publicise multi operator schemes more pro-actively and would react with dismay if the response was that this was unachievable because of competition concerns. Furthermore the success of such schemes in terms of the understanding of customers is dependent on a common approach and 'look and feel' of the product.
- 7.2 Whilst such agreements may satisfy the criteria in section 9(1) of the CA'98, this requires operators to take expensive legal and economic advice and inevitably introduces uncertainty. The expense of this advice may discourage operators from creating smaller schemes or from undertaking the necessary promotional activity. The CMA should review this position and confirm that joint marketing is included within the Block Exemption.

## 8. THE USE OF REAL LIFE EXAMPLES

- 8.1 Regulatory certainty is a key issue for operators during the planning of a new scheme. Examples of how the rules apply are important in helping to provide this certainty and the range of examples included in the Draft Guidance is a worthwhile development.
- 8.2 However, whilst the examples used by the CMA are helpful and illustrate the basic issues well, the situations included tend to be simplistic and therefore do not reflect the diversity and complexity of local bus networks. As noted in the Review Submission, the inclusion of "real life" examples would be particularly useful in the Draft Guidance. A good example of this issue is highlighted in paragraph 4.4 where the need for operators to travel along a single arterial road into town centres is not addressed in the guidance on the definition of MTC.
- 8.3 Clearly, it is not practicable to produce universal examples or to include sufficient scenarios to cover all possible permutations. However, examples which demonstrate how complex and idiosyncratic scenarios encountered in real local bus networks have satisfied the rules would provide greater comfort to operators regarding the flexibility and potential scope of the Block Exemption.

## 9. DEVELOPMENT OF THE GUIDANCE

- 9.1 The Review Submission highlighted the uncertainty created by the existence of multiple documents providing guidance to operators in relation to multi-operator schemes. In addition to the Existing Guidance, guidance was also produced by the Department for Transport<sup>1</sup> and is included in the Competition Commission's Final Report in the Local Bus Markets Investigation. Whilst the Draft Guidance will clearly supersede the Existing Guidance the status of the other two documents as interpretative guides to the Block Exemption remains unclear. Go-Ahead considers

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<sup>1</sup> *Building better bus services: multi-operator ticketing, Guidance for local transport authorities on planning and implementing multi-operator ticketing services*, Department for Transport, March 2013.

that the CMA should remove this uncertainty by confirming whether the Draft Guidance should take precedence over other guidance documents, in the event of a conflict.

- 9.2 Go-Ahead is also conscious of competition considerations in other joint working arrangements such as voluntary partnerships and statutory quality partnerships. Although it seems reasonable to assume that the Draft Guidance is not instructive in relation to any other forms of joint working, it would be helpful for the CMA to clarify this point.