

Consultation on the CMA Draft Guidance for The Public Transport Ticketing Schemes Block Exemption

Response from Bath & North East Somerset Council

Overview

The document refers to operators “self-assessing” competition law compliance at 1.4, 2.10, 3.22, 4.35, 5.5, 5.8 and 5.9. We believe it is misleading to state (as at 2.10) “they **solely** need to satisfy themselves (‘self-assess’) that the agreement meets the conditions set out in Section 9.(1)”.

My italics are for emphasis, but an agreement between bus operators (only) is a Qualifying Agreement (as defined at 17.4(a) of Part 2 of Schedule 10 of the Transport Act 2000 (as amended). In accordance with para 20 of the same Act then any such agreement is prohibited unless it is exempt by application of the Competition Test at Part 2 of Schedule 10.

In previous guidance (OFT 452- Guidance on the Application of Competition Law to Certain Aspects of the Bus Market following the Local Transport Act 2008) the Application of the Competition test to Qualifying Agreements is considered. At Paragraph 4.9 of OFT 452 it states that a Qualifying Agreement that has the effect of preventing, restricting, or distorting competition is subject to certification by the LTA (or LTAs) under the terms of the Part 2 Competition test of the Act as revised.

This puts an important public interest test into the validation of agreements between bus operators. The guidance does allow for the possibility of LTAs not providing such certification, but in the absence of this it is likely that a Qualifying Agreement would not meet the standards required to secure exemption from the 9(1) prohibitions of the Competition Act 1998.

Bath & North East Somerset Council has direct experience of applying the Competition Test to Qualifying Agreements between operators. Operators have welcomed this process of scrutiny and review in developing arrangements that benefit passengers in our area. In no small part this is because there is re-assurance that the arrangements are compliant with Competition Law, and we believe without this re-assurance the operators would have been unlikely to be able to agree on delivering the benefits to passengers enshrined in those agreements.

We further note that there may be substantial imbalances in the size of operators involved in Qualifying Agreements. Where this is the case the legal advice and resources available to a large bus operator may be substantially greater than those of a small operator, and there may be a predisposition to weighting agreements in favour of the larger operator.

Given the risks concerned we consider it likely that a self-assessment regime will lead to Qualifying Agreements not being developed; and bus passengers will not secure the benefits of those agreements. We are therefore very

critical of the new draft guidance as it does not draw appropriately on the legal framework of the Part 2 Competition Test, which sets a role for the LTA in protecting the public interest where bus passengers are concerned.

Other Comments

In section 3.31 onwards there is an attempt to distinguish between MTC schemes and MITs. Even though this is admitted as difficult to define (3.32), the following paragraphs introduce an 80% rule which may or may not be appropriate in different circumstances.

It is, however, very clear (from 3.14) that a MIT is a ticket for a particular single or return journey. A MTC differs from this fundamentally in having a much more extended period of validity, whether for a day or longer, which creates a clear distinction from the MIT. The draft guidance gets very complicated in trying to resolve the difference by reference to service patterns and proportions of travel, when in fact this is a fairly minor issue given the fundamentals of the ticket types. We do not therefore consider the maps and routes defined in the boxes (especially Box 2) as being very helpful.

In 4.35 we welcome the view that MIT schemes may be developed on a basis beyond the limited scope of the block exemption, although we consider that these arrangements should be subject to certification by the LTA as outlined above.