

## Rail franchises: A guide for potential bidders

This updated guide (which supersedes the document *Rail Franchises: Q&As*, last updated in April 2014) is published to assist franchise bidders and other stakeholders by explaining the CMA’s approach to reviewing the award of rail franchises under its merger control duties.

This updated guide reflects developments to streamline the CMA’s review process and ensure close coordination between the CMA and the franchise awarding body. Alongside this guide, the CMA is [consulting on guidance](#) on its methodology for reviewing franchise awards.

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### 1. The CMA’s role in franchise awards

The CMA is an independent non-Ministerial department with a statutory duty to promote competition for the benefit of consumers.

Under section 66(3) of the Railways Act 1993, entering into a rail franchise agreement constitutes an acquisition of control of an enterprise under the merger control provisions of the Enterprise Act 2002 (EA02). The CMA therefore has a statutory role in reviewing the award of rail franchises, which it aims to complete prior to the start of a new franchise.

The CMA's role is to assess whether a franchise award could give rise to competition concerns. Its review seeks to protect passengers from fare increases and/or degradation of services which might arise where the successful bidder for a rail franchise already operates rail, bus or coach services on the same routes. For example, in relation to rail services, franchisees compete on certain routes by offering cheaper dedicated tickets to passengers and these fares may be increased or withdrawn once the services come under common ownership.

## **2. How and when bidders or prospective bidders for rail franchises should contact the CMA**

All bidders are encouraged to enter into pre-notification discussions with the CMA shortly after having submitted their bids.

Although the CMA will only ultimately conduct a formal merger investigation into the winning bid, pre-notification with all bidders will allow the investigation timetable to commence as soon as the winner is announced.<sup>1</sup> The CMA believes that, in practice, this process is necessary, given the relatively short timescale between selecting the winning bid and the start of operations. Bidders should commence formal pre-notification four to six weeks prior to the expected date of the award.<sup>2</sup>

Generally, pre-notification will involve bidders providing the CMA with a draft Merger Notice for discussion, with the aim of producing a final Merger Notice that allows the CMA's investigation to begin in the event the bidder is awarded the franchise.

In order to limit the information required and to assist the CMA's preliminary analysis, the CMA encourages each individual bidder to discuss with it as early as possible what information should be provided in the Merger Notice about the overlaps between the bidder's existing bus, coach and train services and the rail franchise route(s), taking account of the specific facts of each bidder's case.<sup>3</sup> For example, it may be possible for bidders to provide detailed information only for the overlaps which are more likely to raise competition concerns.

Where there are no overlaps between a bidder's existing services and the rail franchise routes, the bidder is asked to inform the CMA of this position in writing. If the franchise is awarded to this bidder, the bidder is free to decide whether to

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<sup>1</sup> Where the winning bid meets the jurisdictional thresholds for notification under the European Merger Regulation, the CMA's timetable will not begin before the European Commission has taken a decision on reference to the UK (see Question 6 below).

<sup>2</sup> In some cases, there may be sufficient time between the announcement and the commencement to conduct part of the pre-notification in this period, but bidders are encouraged to discuss this with the CMA.

<sup>3</sup> The CMA notes that, for the purposes of making their bid as requested in the invitation to tender, bidders will generally already have conducted an assessment of the possible competition concerns their bid could give rise to. The CMA expects that this assessment will further reduce the burden on bidders in pre-notification discussions with the CMA.

formally notify the franchise award to the CMA given the voluntary merger regime in the UK.<sup>4</sup> For example, the CMA did not investigate the 2016 award of the East Anglia franchise to Abellio.

The CMA is conscious that some bidders are potential new entrants to the UK or have not been awarded a franchise in the current bidding round. The CMA is particularly keen to engage with such bidders as part of its work to ensure a healthy franchise bidding market.

### **3. The CMA's merger review process**

The CMA aims to engage with bidders on competition issues as part of the pre-award process (ie pre-notification) to allow sufficient time for a Phase 1 review to be completed prior to the start of the franchise. Depending on timetables, this may mean that a complete Merger Notice needs to be submitted as soon as the winning bid is announced. In other cases, some elements of the pre-notification process may take place post-award depending on the time period between award of the franchise and commencement. Once the CMA deems that a Merger Notice is complete, with all relevant data provided, the CMA will start its statutory 40 working day review period.

During the review, the CMA will assess the impact of the franchise award on competition (details of the approach to the assessment are set out in Question 4 below).

The CMA will seek the views of local authorities, competitors and customer groups in the course of its review. As set out at Question 5 below, the CMA will work closely with the Department for Transport (DfT), Transport Scotland (TS) or Transport for Wales (TfW) as well as devolved regional administrations with a role in the franchising process. If additional information is required, the CMA will send further information requests to the franchisee during the course of the investigation.

The franchisee will be provided with a 'state of play' update between days 15 and 20 of the investigation. If the CMA has identified potential competition concerns, an 'issues meeting' will be held with the franchisee around day 25 of the investigation. The CMA will announce its decision by no later than day 40 of the investigation.<sup>5</sup>

If the CMA finds that there is a realistic prospect of a substantial lessening of competition at the end of its Phase 1 review, the franchisee has the opportunity to

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<sup>4</sup> This does not apply to notification to the European Commission where the winning bid meets the jurisdictional thresholds under the EU Merger Regulation.

<sup>5</sup> Where the review of a franchise award is referred back to the UK by the European Commission, the CMA is required to reach its decision by day 45 (see question 6 below).

offer undertakings in lieu of being referred to a Phase 2 inquiry.<sup>6</sup> In order to be accepted, any offered undertaking must address the competition concerns identified in a clear-cut and readily implementable manner. For example, in the CMA's 2017 review of the award of the South Western Franchise, a fare cap on the rail route between London and Exeter was agreed with the winning bidder in lieu of being referred for a Phase 2 inquiry.

The CMA is fully aware of the tight timescales involved in the rail franchise process, especially between the announcement of the winning bid and the start of the services. The CMA recommends that, where relevant, bidders and their legal advisers consider possible undertakings in lieu of a reference to Phase 2 as early as possible in the process and ideally during pre-notification. The CMA case team is open to engage in early discussions with bidders on possible undertakings. This will maximise the chances of acceptance of undertakings that are offered at the end of the CMA's Phase 1 investigation, should the franchise award give rise to competition concerns.<sup>7</sup>

If undertakings cannot be agreed in circumstances where competition concerns arise, a Phase 2 inquiry will take place.

General guidance on the CMA's procedures and a template Merger Notice for parties to complete are available for download on the CMA's website: [Mergers - the CMA's jurisdiction and procedure: CMA2](#).

#### **4. How the CMA assesses the effect of a rail franchise award on competition**

As a starting point for the analysis, the CMA will identify point-to-point journeys (described as 'flows') on which the rail services of new franchise overlap with the existing transport services provided by the winning bidder.

The CMA will examine whether fare increases and/or degradation of services might arise where the successful bidder for a rail franchise already operates rail, bus, tram or coach services on the same flows and routes.<sup>8</sup>

Where a significant number of overlaps are identified, the CMA will apply a series of filters for prioritisation purposes in order to focus its analysis on the flows most likely to raise competition concerns.

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<sup>6</sup> See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), chapter 8.

<sup>7</sup> See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), paragraph 8.7.

<sup>8</sup> Flows form part of longer routes and the CMA will consider whether competition is affected at the route level as well as the flow level.

The analysis of flows prioritised for further assessment will consider factors including how closely the overlapping services competed prior to the franchise award, the extent to which pricing and service decisions are constrained by regulation, the number of current and potential competing operators and local factors affecting competition.

Competition concerns are more likely to arise where the transport services coming under common ownership competed closely prior to the franchise award, where there are few competitors and where regulation provides only a limited constraint on fare setting and service provision.

Detailed guidance on the CMA's methodology for reviewing franchise awards is published alongside this guide. This is a draft for consultation, and the CMA [welcomes comments on it](#).

## **5. Information sharing between the CMA and DfT, TS and TfW, and the confidentiality of a bidder's commercially sensitive information**

It is important for the CMA and the franchise awarding body to work closely together to ensure that the CMA merger review and franchise award timetables are aligned as far as possible, to enable industry knowledge to be shared and to avoid duplication in the information requested from bidders.

The CMA and the franchise awarding bodies have therefore taken a number of steps in recent investigations to ensure that they coordinate closely, enabling the effective sharing of industry knowledge and a faster and less burdensome investigation process. Where relevant, the CMA will also engage with relevant regional devolved bodies with a role in the franchise award process. All discussions between the CMA and the franchise awarding bodies and the sharing of any commercially sensitive information is on a confidential basis.

## **6. Circumstances in which bidders should notify the European Commission of a rail franchise bid**

In some cases, bidders for rail franchises will also meet the jurisdictional thresholds for notification to the European Commission under the EU Merger Regulation (EUMR). It is the responsibility of bidders to consider whether the EUMR applies in their respective cases and to contact the European Commission for pre-notification discussions where appropriate.

As stated in the CMA's jurisdictional and procedural guidance,<sup>9</sup> mergers with an EU dimension that might be considered to have a particular impact on competition in the UK should be brought directly to the attention of the CMA at the earliest possible stage, in addition to making the mandatory notification to the European Commission. The CMA considers this to apply to any UK rail franchise.

The CMA expects that there will be strong reasons for a referral of rail franchise mergers back to the UK where they may have a significant impact on competition, since rail franchises concern only the UK and remedies may not be open to the European Commission given that the affected markets may not be a substantial part of the common market. Bidders may therefore wish to consider making a pre-notification request under Article 4(4) EUMR for referral back to the CMA, in cases where the appropriate tests are satisfied. The CMA is willing to discuss the possibility of such a request in more detail on an individual basis.

## **7. Information that bidders should provide to the CMA**

The winning bidder will be expected to notify the CMA using the Merger Notice template (see Question 3 above). The template sets out the categories of information required for the purposes of a merger investigation and should be read in conjunction with the CMA's guidance on its assessment of rail franchise awards, which provides more detail on the information required. Parties are free to supply the required information using the Merger Notice template or to provide a submission in a written format of their choosing, accompanied by a completed Merger Notice indicating clearly where in that submission the required information can be found.<sup>10</sup>

The CMA is conscious that the information required for it to conduct its assessment is likely to vary depending on the case. As set out in Question 2, the CMA therefore welcomes informal discussions on an individual basis in pre-notification to determine the information required in order to conduct its assessment.

## **8. When interim measures are necessary**

The CMA has the power to impose initial enforcement orders (IEO) in both anticipated and completed mergers.<sup>11</sup> An IEO requires merging parties to hold their business activities separate during the course of the CMA's investigation.

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<sup>9</sup> *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), paragraph 18.12.

<sup>10</sup> See paragraph 17 of the preamble to the Merger Notice.

<sup>11</sup> Section 72 of EA02 (as amended by the Enterprise and Regulatory Reform Act 2013). Further information on the CMA's approach to initial enforcement orders is in paragraphs 7.28 to 7.31 and Annexe C of *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2).

An IEO will only be necessary in circumstances where the franchise commences prior to the conclusion of the CMA's merger investigation (for example, if the award is referred for a Phase 2 inquiry). As set out in Question 2, the CMA intends that engagement with bidders on competition issues as part of the pre-award process (ie pre-notification) will allow sufficient time for a Phase 1 review to be completed prior to commencement of the franchise.

In circumstances where an IEO is required, the CMA will ensure that the IEO will not prevent the franchisee from meeting its obligations under the franchise agreement upon commencement of the franchise.<sup>12</sup> The IEO will instead focus on ensuring that there is no unnecessary integration nor any alteration to the supply terms for the overlapping franchise network and the franchisee's activities unless in the ordinary course of business. On an exceptional basis, the CMA's template IEO will be specifically tailored for rail franchise cases.

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<sup>12</sup> For example, Arriva commenced the operation of the Northern franchise during the CMA's Phase 2 inquiry in 2016.

## **9. Contacting the CMA to discuss the merger investigation process as it applies to rail franchises**

Please contact the Merger Unit's rail franchise team using the contact details set out below.

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

Email: [mergers@cma.gsi.gov.uk](mailto:mergers@cma.gsi.gov.uk)

Telephone: 020 3738 6586