

Anticipated acquisition by Abellio East Midlands Limited of the East Midlands Franchise

Decision that undertakings might be accepted

ME/6820/19

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, given on 25 July 2019. Full text of the decision published on 25 July 2019.

Introduction

1. On 10 April 2019, the Department for Transport (**DfT**) announced that Abellio East Midlands Limited (**AEML**), a subsidiary of Abellio Transport Group Ltd (**Abellio**), was the successful bidder for the East Midlands Franchise. DfT and AEML entered a franchise agreement confirming the award of the East Midlands Franchise to AEML (the **Franchise Award**). The East Midlands Franchise is due to commence on 18 August 2019 and run until 22 August 2027. In this decision, Abellio, AEML and the East Midlands Franchise are together referred to as the **Parties**.
2. The Franchise Award constitutes the acquisition of control of an enterprise by virtue of section 66(3) of the Railways Act 1993. AEML and the East Midlands Franchise will therefore cease to be distinct.
3. On 19 July 2019, 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**).
4. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, the CMA did not refer the Franchise Award for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision in order to allow the Parties

the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act.

5. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. Accordingly, on 23 July 2019, AEML, Abellio and Greater Anglia (**GA**)¹ offered undertakings to the CMA for the purposes of section 73(2) of the Act.
6. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to the Parties 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 offer.

The undertakings offered

7. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the merger parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
8. The SLC Decision found that the Franchise Award gives rise to a realistic prospect of an SLC in relation to public transport (rail) services on the flows between Norwich and Ely, and Thetford and Ely.
9. To address this SLC, AEML, Abellio and GA have offered to give undertakings in lieu of a reference to cap fares on the Norwich to Ely and on the Thetford to Ely flows, and not to reduce the availability of advance fares (the **Proposed Undertakings**).
10. The Proposed Undertakings will comprise:
 - (a) an undertaking restricting fare increases by AEML on the Norwich to Ely flow, and by AEML and GA on the Thetford to Ely flow, whereby advance fares on the Norwich to Ely flow and all unregulated fares on the Thetford to Ely flow are subject to price caps linked to inflation (RPI).
 - (b) an undertaking to ensure that Abellio and AEML will not depart from the business rules applied by the East Midlands Franchise immediately prior

¹ Abellio East Anglia Limited, a train operating company which operates the Greater Anglia rail franchise as part of a joint venture agreement between Abellio and Mitsui.

to the Award to determine the availability of advance fares on the Norwich to Ely flow and on the Thetford to Ely flows where that would have the result of reducing the availability of advance fares relative to their availability under those rules.

11. The Proposed Undertakings will be monitored by the CMA through reports to be provided by AEML, Abellio and GA following each fare setting round detailing changes to relevant fares on the flows. In the monitoring reports, AEML, Abellio and GA will be required to demonstrate compliance by providing a calculation of actual changes in fares against a formula specified within the undertakings provided to the CMA and AEML will be required to demonstrate compliance with its obligations regarding the availability of advance fares. These monitoring reports will also be sent to the Department for Transport.

The CMA's provisional views

12. The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation. The CMA's starting point when assessing undertakings is to seek an outcome that restores competition to the level that would have prevailed absent the merger.²
13. The CMA believes that the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA. Specifically, the CMA believes that the Proposed Undertakings will:
 - (a) remove any ability or incentive which AEML may have gained as a result of the Franchise Award, to raise prices of advance fares and/or increase effective prices paid through reducing the number of advance fare tickets available on the Norwich to Ely flow; and
 - (b) remove any ability or incentive which AEML and/or GA may have gained as a result of the Franchise Award, to raise prices of unregulated fares³ and/or increase effective prices paid through reducing the number of advance fare tickets available on the Thetford to Ely flow.
14. As such, the Proposed Undertakings may result in replacing the competitive constraint that would have been imposed by the award of the East Midlands

² *Merger remedies (CMA87)*, December 2018, (in particular paragraphs 3.27, 3.28 and 3.30).

³ Dedicated fares and inter-available fares.

Franchise to an operator which did not raise competition concerns, which would otherwise be lost following the Franchise Award.

15. The CMA currently believes that the Proposed Undertakings are capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The CMA also believes at this stage that the Proposed Undertakings may be capable of ready implementation. In particular, 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, there are other restrictions on the operation of rail services provided for in the franchise agreements, and the SLC is time-limited due to the time-limited award of the franchise.⁴
16. 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.
17. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Franchise Award for a phase 2 investigation will be informed by, among other things, third party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA.

Consultation process

18. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.⁵

Decision

19. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by AEML, Abellio and GA, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 30 September 2019 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 25 November 2019 if it considers that there are special reasons for doing so. If

⁴ CMA 87, paragraph 3.32.

⁵ [CMA2](#), paragraph 8.29.

no undertakings are accepted, the CMA will refer the Franchise Award for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

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25 July 2019