

Anticipated acquisition by Abellio East Midlands Limited of the East Midlands 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/6820/19

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**). The text of the SLC Decision is available on the CMA webpages.¹

¹ See <https://www.gov.uk/cma-cases/abellio-east-midlands-limited-east-midlands-rail-franchise>.

4. On 23 July 2019, AEML, Abellio and Greater Anglia (**GA**)² offered Undertakings in Lieu of reference to the CMA for the purposes of section 73(2) of the Act.
5. On 25 July 2019, 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 AEML, Abellio and GA's offer (the **UIL Provisional Acceptance Decision**).

The undertakings offered

6. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to rail services on the flows between Norwich and Ely, and Thetford and Ely. The CMA's concern is that Abellio may increase the price of the dedicated fare or to remove the dedicated fare, or to reduce the number of tickets available, on both the Norwich to Ely and Thetford to Ely flows, and may increase the inter-available fares on the Thetford to Ely flow.
7. As set out in the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA, AEML, Abellio and GA have offered Undertakings 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). In addition, the Undertakings will ensure that Abellio and AEML will not depart from the business rules applied by the East Midlands Franchise immediately prior to the Franchise 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. 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

² 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.

³ See <https://www.gov.uk/cma-cases/abellio-east-midlands-limited-east-midlands-rail-franchise>.

currently does not have material doubts about the overall effectiveness of the Proposed Undertakings or concerns about their implementation.⁴ This is because 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 fares⁵ and/or increase effective prices paid through reducing the number of advance fare tickets available on the Thetford to Ely 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, 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.

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. The text of the Proposed Undertakings is available on the CMA web pages.⁶
12. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this

⁴ *Merger Remedies* (CMA 87), December 2018, Chapter 3, in particular paragraphs 3.27, 3.28 and 3.30.

⁵ Dedicated fares and inter-available fares.

⁶ See <https://www.gov.uk/cma-cases/abellio-east-midlands-limited-east-midlands-rail-franchise>.

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.⁷

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

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

Email: anastasija.rogozianskaja@cma.gov.uk
Telephone: 020 3738 6173

Deadline for comments: 9th August 2019

⁷ Under paragraph 2(4) of Schedule 10 to the Act.