

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

Decision on acceptance of undertakings in lieu of reference

ME/6820/19

The CMA's decision to accept undertakings in lieu of reference under section 73(2) of the Enterprise Act 2002 given on 15 August 2019. Full text of the decision published on 6 September 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. 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**).
3. On 23 July 2019, AEML, Abellio and Greater Anglia (**GA**) offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act. The CMA gave notice to the Parties on 25 July 2019, pursuant to section 73A(2)(b) of the Act, that it considered that there were 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 was considering the offer (the **UILs Provisional Acceptance Decision**).

4. The text of the SLC Decision and the UILs Provisional Acceptance Decision are available on the CMA webpages.¹

The undertakings offered

5. 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 remove the dedicated fare, or reduce the number of tickets available, on both the Norwich to Ely and Thetford to Ely flows, and/or may increase the inter-available fares on the Thetford to Ely flow.
6. As set out in the UIL Provisional Acceptance Decision, 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). Abellio and AEML have also offered not to 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 flow where that would have the result of reducing the availability of advance fares relative to their availability under those rules. Abellio, AEML and GA shall provide to the DfT and the CMA an update on the fares in order to facilitate the monitoring of compliance with these undertakings during each fares setting round. In addition, AEML undertakes to provide to the DfT and the CMA written confirmation that it has complied with its obligations on the availability of advance fares. Further details are available in the text of the consultation on the CMA webpages (the **UILs**).²

Consultation

7. On 26 July 2019, pursuant to paragraph 2(1) of Schedule 10 to the Act, the CMA published the UILs, inviting interested parties to give their views on the UILs. The relevant text from the consultation is set out at Annex 1 of this decision.³ For the reasons set out in the consultation, the CMA's preliminary view was that the UILs would resolve the SLC identified in the SLC decision in

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

² See <https://www.gov.uk/cma-cases/abellio-east-midlands-limited-east-midlands-rail-franchise>.

³ The full consultation text was published on <https://www.gov.uk/cma-cases/abellio-east-midlands-limited-east-midlands-rail-franchise>.

a clear-cut manner, ie without giving rise to material doubts about the overall effectiveness of the UILs or concerns about their implementation.⁴

8. The CMA received no submissions during the consultation period. Subsequent to the consultation period, Abellio, AEML and GA submitted changes to the UILs. The changes do not affect the substantive nature of the underlying obligations in the UILs and instead ensure that the correct legal entities are subject to the obligations in the UILs. To the extent that these changes could be seen as material (as they relate to the identity of the person subject to the UILs), the CMA nevertheless considers that it has special reasons, in accordance with paragraph 9 of Schedule 10 of the Act, to dispense with the requirement to conduct a further consultation under paragraph 2(4) of that Schedule of the Act.⁵ The CMA considers that the special reasons which apply in this case are the timing of the franchise, which is not within the control of the Parties, and the need for making a decision as soon as reasonably practicable with a view to the removal of uncertainty pursuant to section 103(1) of the Act. The CMA therefore considers that the UILs offered by AEML, Abellio and GA (as modified) are clear-cut and appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision.

Decision

9. For the reasons set out above, the CMA considers that the UILs provided by AEML, Abellio and GA are as comprehensive a solution as is reasonable and practicable, and that they remedy, mitigate or prevent the SLC identified in the SLC Decision and any adverse effects resulting from it. The CMA has therefore decided to accept the UILs offered by AEML, Abellio and GA pursuant to section 73 of the Act. The Franchise Award will therefore not be referred for a phase 2 investigation.
10. The undertakings, which have been signed by AEML, Abellio and GA and will be published on the CMA webpages,⁶ will come into effect from the date of this decision.

Colin Raftery
Senior Director, Mergers
Competition and Markets Authority
15 August 2019

⁴ *Merger remedies, (CMA87)*, December 2018, Chapter 3, in particular paragraphs 3.27, 3.28 and 3.30.

⁵ *Merger Remedies, (CMA87)*, December 2018, paragraph 4.28; *Mergers: Guidance on the CMA's jurisdiction and procedure, (CMA2)*, January 2017, paragraph 8.30.

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

Annex 1

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

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

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

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>.

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 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 fares⁵ 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

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.

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 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

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

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