

# Anticipated acquisition by First Trenitalia West Coast Rail Limited of the West Coast Partnership Rail Franchise

## Decision that undertakings might be accepted

**ME/6828-19**

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, given on 15 November 2019. Full text of the decision published on 15 November 2019.

### Introduction

1. On 14 August 2019, the Department for Transport (**DfT**) announced that First Trenitalia West Coast Rail Limited (**FTWCRL**) was the successful bidder for the West Coast Partnership Franchise (**Franchise**). FTWCRL is a joint venture between First Rail Holdings Limited and Trenitalia UK Limited (**TUKL**) which are ultimately owned by FirstGroup plc and FS Group,<sup>1</sup> respectively. FS Group owns TUKL by virtue of its ownership of Trenitalia SpA (**Trenitalia**). In this decision, FirstGroup plc and Trenitalia are together referred to as the **Parties**. On 28 August 2019, DfT and FTWCRL entered into a franchise agreement confirming the award of the Franchise to FTWCRL (the **Franchise Award**). The Franchise is due to commence on 8 December 2019.
2. The Franchise Award constitutes the acquisition of control of an enterprise by virtue of section 66(3) of the Railways Act 1993. FTWCRL and the Franchise will therefore cease to be distinct.
3. On 7 November 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

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<sup>1</sup> The latter by virtue of FS Group's ownership of Trenitalia SpA which owns TUKL.

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 12 November 2019, the Parties 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 21 flows on a continuous stretch of track between Preston and Edinburgh/Glasgow (listed in Annexes 1 and 2 of the SLC Decision). To address this SLC, the Parties have offered to give undertakings in lieu of a reference to cap fares on the 21 flows listed in Annexes 1 and 2, and not to reduce the availability of advance fares (the **Proposed Undertakings**).
9. The Proposed Undertakings will comprise:
  - (a) an undertaking to ensure that the Parties continue to maintain the same availability of advance fares on all 21 flows referred to in paragraph 8 of this Decision as are available on a series of comparable flows, in relation

to both FirstGroup's TransPennine Express (**TPE**) services and the Franchise services; and

- (b) an undertaking linking the pricing of unregulated fares offered by each of West Coast Rail Partnership Franchise and TPE on each of the 21 flows to the equivalent fares offered on a series of comparable flows.
10. The Proposed Undertakings will be monitored by the CMA through reports to be provided by the Parties following each fare setting round detailing changes to relevant fares on the flows. In the monitoring reports, the Parties 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 FTWCRL will be required to demonstrate compliance with its obligations regarding the availability of advance fares. These monitoring reports will also be sent to the DfT. An independent body will be appointed to conduct an assurance audit of the first year of the Proposed Undertakings. The Parties will be required to inform the CMA of any breach of the undertakings provided to the CMA and take any reasonable steps to remedy the breach and comply with the Proposed Undertakings.

### **The CMA's provisional views**

11. 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.<sup>2</sup>
12. 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 the Parties may have gained as a result of the Franchise Award, to increase effective prices paid through reducing the number of advance fare tickets available on each of the 21 flows; and
  - (b) remove any ability or incentive which the Parties may have gained as a result of the Franchise Award, to raise prices of unregulated fares on each of the 21 flows.

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<sup>2</sup> [Mergers remedies \(CMA87\)](#), December 2018, Chapter 3 (in particular paragraphs 3.27, 3.28 and 3.30).

13. As such, the Proposed Undertakings may result in replacing the competitive constraint that would have been imposed by the award of the Franchise to an operator which did not raise competition concerns, which would otherwise be lost following the Franchise Award.
14. 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.<sup>3</sup>
15. 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.
16. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger 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**

17. 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.<sup>4</sup>

## **Decision**

18. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by the Parties, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 21 January 2020 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this

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<sup>3</sup> [CMA 87](#), paragraph 3.32.

<sup>4</sup> [CMA2](#), paragraph 8.29.

timeframe pursuant to section 73A(4) of the Act to 17 March 2020 if it considers that there are special reasons for doing so. Where possible, the CMA aims to complete and publish its assessment prior to commencement of the Franchise.<sup>5</sup> If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

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**Competition and Markets Authority**  
**15 November 2019**

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<sup>5</sup> [Rail Guidance](#), paragraph 2.1.