

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

Decision on acceptance of undertakings in lieu of reference

ME/6828-19

The CMA's decision to accept undertakings in lieu of reference under section 73(2) of the Enterprise Act 2002 given on 6 December 2019. Full text of the decision published on 13 December 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,¹ 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. 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 in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).
3. On 12 November 2019, the Parties offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act. The CMA gave notice to

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

the Parties on 15 November 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 Parties' 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.²

The undertakings offered

5. As set out in the SLC Decision, the CMA found 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) (the **SLC Flows**).
6. As set out in the UIL Provisional Acceptance Decision, to address this SLC, the Parties have offered to give undertakings in lieu of a reference to cap unregulated fares on the SLC Flows, and to maintain the availability of advance fares (the **Proposed Undertakings**), as set out in more detail in the text of the consultation on the CMA webpages³ (the **UILs**).

Consultation

7. On 18 November 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.⁴ 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 a clear-cut manner, ie without giving rise to material doubts about the overall effectiveness of the UILs or concerns about their implementation.⁵
8. The CMA received one submission during the consultation period. The respondent submitted that, over the past year, advance fares on TransPennine Express (**TPE**) varied considerably and were higher than comparable fares offered by the Franchise. The respondent said that the CMA's assessment of comparator flows should take this into account.

² See <https://www.gov.uk/cma-cases/first-rail-holdings-trenitalia-uk-west-coast-partnership-rail-franchise>.

³ See <https://www.gov.uk/cma-cases/first-rail-holdings-trenitalia-uk-west-coast-partnership-rail-franchise>.

⁴ The full consultation text was published on <https://www.gov.uk/cma-cases/first-rail-holdings-trenitalia-uk-west-coast-partnership-rail-franchise>.

⁵ *Merger remedies*, (CMA87), December 2018, Chapter 3, in particular paragraphs 3.27, 3.28 and 3.30.

9. The fare caps offered by the Parties on the SLC Flows are based on applying a restriction on the percentage increase in unregulated fares set with reference to the average percentage increase on the relevant comparator flows rather than specific price levels.⁶ Therefore, any historic and/or occasional price level differences between the Franchise and TPE should not affect the Parties' incentive and/or ability to increase prices on either service..
10. The respondent also raised the possibility that an aspect of quality of service might be reduced as a result of the Franchise Award because the Franchise might stop offering its current automated "delay repay" refund system. In addition, the respondent queried whether, after the Franchise Award, in the event that TPE services are cancelled or delayed, the Franchise would continue to allow TPE customers to travel on Franchise services free of charge and whether, in the event that Franchise services are cancelled or delayed, TPE would commence allowing Franchise customers to travel on TPE services free of charge (which the respondent stated that TPE does not currently do).
11. In this respect, the CMA found in the SLC Decision that, due to the nature of the Franchise arrangements in this case and the fact that it is difficult to vary quality on an individual flow without affecting the entire route, the Parties would have no ability or incentive to adjust service quality in relation to either dedicated or inter-available tickets.⁷ The CMA also notes that delay repay is a national scheme and that automated refunds are currently offered by both Parties across their services, and not just on the overlap flows.⁸
12. For the above reasons, this third party submission did not cause the CMA to change its preliminary view that the UILs would be acceptable.
13. The CMA therefore considers that the UILs offered by the Parties are clear-cut and appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision.

⁶ Under the UILs the unregulated fares on the 21 flows shall not in any fare year increase by a percentage greater than the weighted average increase for the corresponding unregulated fares on the comparator flows.' See paragraph 3.1. and 3.2 of the Proposed Undertakings.

⁷ Paragraph 69 of the SLC Decision:

https://assets.publishing.service.gov.uk/media/5dd2778940f0b606e72c2dda/full_text_decision_west_coast_partnership_rail_franchise.pdf.

⁸ The CMA also notes that both the Franchise Agreement (paragraph 6.2) and the National Rail Conditions of Travel (paragraph 28.2) applicable to all Train Operating Companies (**TOCs**) provide that, where disruption prevents a passenger from completing the journey for which its ticket is valid and is being used, the relevant TOC will, where it reasonably can, provide the passenger with an alternative means of travel to its destination. In addition, pursuant to the National Rail Conditions of Travel (paragraph 9.4), if passengers use a ticket valid on a specific train service or train services (such as an advance ticket) and miss a service because a previous connecting train service was delayed, passengers will be able to travel on the next train service provided by the TOC with whom they were booked without penalty.

Decision

14. For the reasons set out above, the CMA considers that the UILs provided by the Parties are as comprehensive a solution as is reasonable and practicable and 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 the Parties pursuant to section 73 of the Act. The Franchise Award will therefore not be referred for a phase 2 investigation.
15. The undertakings, which have been signed by the Parties and will be published on the CMA webpages,⁹ will come into effect from the date of this decision.

Joel Bamford
Senior Director, Mergers
Competition and Markets Authority
6 December 2019

⁹ See <https://www.gov.uk/cma-cases/first-rail-holdings-trenitalia-uk-west-coast-partnership-rail-franchise>.

Annex 1

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

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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 (**First Group**) and FS Group,¹ respectively. FS Group owns TUKL by virtue of its ownership of Trenitalia SpA (**Trenitalia**). In this notice, FirstGroup and Trenitalia are together referred to as the **Parties**. On 28 August 2019, DfT and the Parties 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. 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 Merger 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

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

United Kingdom (the **SLC Decision**). The text of the SLC Decision is available on the CMA webpages.²

3. On 12 November 2019, the Parties offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.
4. On 15 November 2019, the CMA gave notice to FirstGroup and Trenitalia, 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 the Parties' offer (the **UIL Provisional Acceptance Decision**).

The undertakings offered

5. As set out in the SLC Decision, the CMA found 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).
6. As set out at paragraph 9 of the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA, Parties have offered:
 - (a) an undertaking to ensure that the Parties continue to maintain the same availability of advance fares on each of the 21 flows as are available on a series of comparable flows, in relation to both TransPennine Express (**TPE**) services and the Franchise services; and
 - (b) an undertaking linking the pricing of unregulated fares offered by each of the Franchise and TPE on the 21 flows to the equivalent fares offered on a series of comparable flows.
7. 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 See <https://www.gov.uk/cma-cases/first-rail-holdings-trenitalia-uk-west-coast-partnership-rail-franchise>.

³ See <https://www.gov.uk/cma-cases/first-rail-holdings-trenitalia-uk-west-coast-partnership-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 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;
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.
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

⁴ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7–5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

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.⁵

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

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Deadline for comments: 2 December 2019.

⁵ Under paragraph 2(4) of Schedule 10 to the Act.