

The Transport Act 2000 and The Transport (Scotland) Act 2001

Guidance on the Competition Test

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This guidance is not a substitute for the Transport Act 2000, the Transport (Scotland) Act 2001, or the Competition Act 1998, and it is not a definitive interpretation of the law. It should be read in conjunction with the legislation. The examples or illustrations in this guidance should not be taken as guidance as to the extent of any legal obligations or powers under the Transport Act 2000 or Transport (Scotland) Act 2001. Enquiries as to the extent of any legal obligations or powers under this legislation should be made to the Department for Transport or the Scottish Executive, as appropriate. Anyone in doubt about how they may be affected by the legislation should seek legal advice.

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1 INTRODUCTION

- 1.1 This guidance explains how the Office of Fair Trading ('the OFT') will exercise its functions under the Transport Act 2000 and the Transport (Scotland) Act 2001 (together 'the Transport Acts') to apply the competition tests contained in the Transport Acts (the 'competition test').
- 1.2 The guidelines referred to in this guidance form part of a series issued by the OFT, in conjunction with the sector regulators, about the Competition Act 1998 and its application and enforcement. These guidelines are available by telephoning 0870 60 60 321 or faxing 0870 60 70 321. The guidelines are also available on the OFT's website at www.offt.gov.uk
- 1.3 Before describing the competition test, the following paragraphs describe some of the functions of a local transport authority ('LTA') contained in the Transport Acts. The following paragraphs do not, however, provide a comprehensive explanation of the powers of LTAs under the Transport Acts, or how LTAs can and cannot use these powers. Questions as to the extent of the legal powers and obligations of LTAs should be addressed to the Department for Transport or the Scottish Executive, as appropriate.

The Transport Acts

- 1.4 The Transport Acts contain provisions relating to local transport:
- the Transport Act 2000 requires LTAs in England and Wales to develop local transport plans 'for the promotion and encouragement of safe, integrated, efficient and economic transport facilities and services to, from and within their area'¹. As part of such a plan, each LTA in England and Wales must prepare a 'bus strategy'²; and
 - the Transport (Scotland) Act 2001 gives local transport authorities in Scotland new powers in respect of 'relevant general policies'³.

¹ See section 108(1)(a) Transport Act 2000

² A document setting out the LTA's general policies as to how best to carry out its functions in order to secure that: (i) bus services meet the requirements of users the LTA considers should be met; (ii) bus services meeting those requirements are provided to the standards the LTA considers that they should be provided; and (iii) that such additional facilities and services connected with bus services that the LTA considers should be provided are provided (section 110 of the Transport Act 2000)

³ See section 3(1)(a) and section 48 Transport (Scotland) Act 2001

- 1.5 In order to implement their bus strategies in England and Wales, or to implement relevant general policies in Scotland, an LTA, or two or more acting jointly, may:
- make quality partnership schemes;
 - make ticketing schemes; and
 - (under certain circumstances) make quality contract schemes with local transport operators.
- 1.6 Under **quality partnership schemes** an LTA, or two or more LTAs acting together, provide particular facilities (such as bus stops, bus stations, bus lanes etc). Operators of local services who wish to use the facilities must undertake to provide local services of a particular standard, and may also be required to use vehicles meeting specified requirements. In Scotland, operators may be required to operate services to minimum frequencies. Operators which are not part of the quality partnership scheme are not able to use the facilities provided under the scheme.
- 1.7 An LTA, or two or more acting together, may make a **ticketing scheme**, which requires operators to make and implement arrangements under which passengers may purchase, in a single transaction, certain types of ticket which cover more than one journey or service. The descriptions of tickets which may be covered by a ticketing scheme are:
- tickets which entitle the holder to make more than one journey on particular local services. These include *multi-operator travel cards* as defined in the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 ('the block exemption')⁴;
 - tickets entitling the holder to make a particular journey using two or more local services. These include *through tickets* as defined in the block exemption;

⁴ In accordance with advice from the then Director General of Fair Trading, the Secretary of State for Trade and Industry made The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, SI 2001/319 taking effect retrospectively from 1 March 2000, granting a block exemption from the Chapter I prohibition contained in the Competition Act 1998 to certain specified types of ticketing arrangements. This means that an agreement which meets the conditions set out in the block exemption Order is automatically exempt and should not be notified to the OFT. The OFT has issued a guideline on the Public Transport Ticketing Schemes Block Exemption.

- where a particular journey could be made on local services provided by any of two or more operators, tickets entitling the holder to make a journey on whichever service the holder chooses. These are defined as *multi-operator individual tickets* in the block exemption; and
- in England and Wales, tickets entitling the holder to travel both on one or more local services and on one or more connecting rail or tram services. These may include *short distance add-ons*⁵ or *long distance add-ons*⁶, as defined in the block exemption.

The competition test

1.8 Schedule 10 to the Transport Act 2000 ('Schedule 10') and section 37 of the Transport (Scotland) Act 2001⁷ contain a 'competition test' which applies where LTAs:

- make or vary quality partnership schemes;
- make or vary ticketing schemes; or
- invite or accept tenders for subsidised services under sections 89 and 91 of the Transport Act 1985⁸.

1.9 The competition test does **not** however, apply to quality contracts, or to the powers or duties of local transport authorities in relation to the provision of information about bus services.

⁵ A 'short distance add-on' means a multi-operator travelcard as an add-on to a ticket (or tickets) entitling the holder to make a particular journey on a local public transport service pursuant to an agreement which provides onward travel connections for passengers on complementary services.

⁶ A 'long distance add-on' means:

(a) a ticket (or tickets) entitling the holder to make a journey solely on the local public transport services of any one operator;

(b) a multi-operator travelcard; or

(c) a through ticket,

each being an add-on to a ticket (or tickets) entitling the holder to make a particular journey on one or more connecting services.

⁷ Implemented by the Transport (Scotland) Act 2001 (Conditions attached to PSV Operator's Licence and Competition Test for Exercise of Bus Functions) Order 2001 (SI 2001/2748 (S.14)), made under section 104 of the Scotland Act 1998, 'the section 104 Order'.

⁸ Subject to certain exceptions, sections 89 and 91 of the Transport Act 1985 provide that an agreement cannot be entered into by an LTA that involves providing a subsidy for the provision of public passenger transport unless the tender has been awarded following a competitive tendering procedure. For convenience, throughout the rest of this guidance, the word 'schemes' should be taken to include tenders, unless the context otherwise requires.

1.10 There are three distinct stages to the competition test:

- an assessment of whether the scheme or proposed scheme⁹ has, or is likely to have, a significantly adverse effect on competition. If it does not have such an effect, then the competition test will be satisfied. If, however, it does have a significantly adverse effect on competition, or is likely to have such an effect, the second and third stages below must be considered;
- an assessment of whether a scheme which has a significantly adverse affect on competition may be justified. A scheme may be justified if it is set up with a view to achieving one or more of three specific purposes, which are set out in paragraph 2.21 below;
- an assessment of whether the significantly adverse effect is, or is likely to be, 'proportionate' to the achievement of the purpose or purposes of the scheme. Proportionality is explained in more detail in paragraphs 2.22 to 2.25 below.

1.11 If an LTA exercises or proposes to exercise one of the three functions described in paragraph 1.8 above, it can ask the OFT for a decision as to whether the competition test is met. Any operator of local services who is, or is likely to be, affected by an LTA's exercise of a function can also apply for such a decision.

1.12 Where the OFT decides that the competition test is met, no further action will be taken, unless it subsequently considers that:

- it has reasonable grounds to believe that there has been a material change of circumstances since it made its decision; or
- it has a reasonable suspicion that the information on which it based its decision was incomplete, false, or misleading in a material way.

1.13 If the OFT decides that the competition test is not met, it may give the LTA concerned whatever directions it considers to be appropriate. These may include prohibiting the exercise of the function in question; varying or revoking a scheme; varying or withdrawing an invitation to tender under the Transport Act 1985; and varying or terminating an agreement resulting from the acceptance of such a tender. Further information on decisions made by the OFT under the Transport Acts is given in part 6 of this guidance.

⁹ In the Transport Acts, this is referred to as 'the exercise or proposed exercise of a function' but, in essence, it is the scheme which is examined under the competition test.

- 1.14 Some schemes may be subject to both the competition test and general competition legislation, such as the Competition Act 1998 ('the Competition Act') and the Enterprise Act 2002. This issue is dealt with in part 8 below.
- 1.15 The competition test applies only to the exercise of those functions that LTAs can exercise under the Transport Acts. Where an LTA does not have the power to impose obligations on bus operators, any agreement between operators will be voluntary, and subject to consideration under the provisions of the Competition Act. If, therefore, for example, a quality partnership scheme contains some terms with which an LTA does have the power to compel operators to comply, and some with which it does not, those parts of the scheme that an LTA can impose on the operators will be considered under the competition test, and those terms with which it cannot compel the operators to comply will be considered under the Competition Act. If, therefore, a scheme is made using any of the legal powers provided to LTAs by the Transport Acts, one relevant issue is the extent of those legal powers.

Local transport authority powers under the Transport Acts

- 1.16 The Transport Acts do not give LTAs the power to set fares, either for ticketing schemes or as part of a quality partnership.
- 1.17 The Transport Act 2000 does not give LTAs in England and Wales the power to specify the frequency or timings of services as part of a quality partnership. However, under the Transport (Scotland) Act LTAs in Scotland may specify *minimum* frequencies of services in a quality partnership. An LTA may not, however, specify *maximum* frequencies of services or their timings. As noted earlier, any questions relating to the powers available to LTAs under the Transport Acts should be referred to the Department for Transport or the Scottish Executive, as appropriate.
- 1.18 An agreement on fares or (in England and Wales) frequencies included in a quality partnership or ticketing scheme will be considered under the competition test only if it results from the exercise of legal powers available to an LTA under the Transport Acts or other legislation. A voluntary agreement formed between operators which does not result from the exercise of legal powers will not be considered under the competition test but will be subject to the provisions of the Competition Act.

1.19 If an LTA is engaged in economic activity, which may include situations where it receives revenues directly (for example from a tendered service), it may be regarded as an ‘undertaking’¹⁰ and therefore be subject to the provisions of the Competition Act. The application of the Competition Act to local authorities is discussed in part 8 of this guidance, and in guidelines published by the OFT.

¹⁰ The term ‘undertaking’ is not defined in the Competition Act, but its meaning has been set out in European Community law and extends to any entity engaged in economic activity regardless of its legal status and the way in which it is financed. It includes companies, partnerships, individuals operating as sole traders, agricultural co-operatives, associations of undertakings (for example, trade associations), non-profit making organisations and (in some circumstances), public entities that offer goods or services on a given market. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case.

2 APPLYING THE COMPETITION TEST: THE OFT'S APPROACH

- 2.1 As explained in part 1 above, there are three stages to the competition test. The application of each stage is explained below.

Effect on competition

- 2.2 The OFT will first consider whether a scheme has a significantly adverse effect on competition by assessing its actual or likely effects on competition. It will consider the overall effect on competition, rather than the effect on particular competitors. It is possible that a scheme may have a significantly adverse effect on a particular competitor, but this does not necessarily mean that there is an adverse effect on competition, because it may still be possible for other operators to compete. The normal approach to this assessment will be to define the relevant market, to identify the position of the existing or potential party or parties on the market, and to assess the effect on competition of the proposed scheme.
- 2.3 At this stage, the OFT will be considering only the *effect* that the scheme has on competition. The *purpose* of the scheme will not be considered at this stage.

The relevant market

- 2.4 The relevant market will normally have two dimensions: the relevant goods or services (the *product* market) and the geographic extent of the market (the *geographic* market). In defining the relevant market, the OFT will adopt the same approach that it uses in the context of the Competition Act. Further guidance on this approach is available in the competition law guideline ***Market Definition***.
- 2.5 The boundaries of the relevant market will be determined by the extent to which consumers are willing and able to switch to alternative suppliers, and the extent to which alternative suppliers are able to supply the market at short notice. The key test is whether this substitution, or the potential for it, would prevent prices from rising above competitive levels. For a product to be within the same market, it will normally be necessary for consumers or suppliers to be willing and able to switch quickly¹¹.

¹¹ Competition law guideline ***Market Definition***.

- 2.6 In defining the relevant product market in local transport cases, the main issue is likely to be whether different modes of transport (for example, buses and trains) are substitutes and so form part of the same market. The answer will vary from case to case depending on the facts. When considering the availability of substitutes for the purposes of defining the product market, the relevant issue is whether passengers are willing and able to switch to alternative services, operators or modes of transport within a short period of time. The OFT is particularly aware that it may be difficult for some passengers to switch to alternative means of transport: for example, passengers on lower incomes may not be able to afford to switch to travelling by car if bus fares were to increase significantly, and that those who travel to congested urban areas might not be able to find suitable parking.
- 2.7 The relevant geographic market definition will also always be considered on a case-by-case basis. The starting point will usually be to assess whether an individual route or the area covered by a scheme constitutes a separate market. The market will be wider if competition from other routes or areas would prevent fares from rising above competitive levels. It is unlikely that bus users would switch between routes in response to fare increases, but sometimes the market may be wider owing to the ability of operators on neighbouring routes or in neighbouring areas to serve the routes covered by the scheme.

Position on the market and the effect on competition

- 2.8 The following is a (non-exhaustive) list of possible implications of schemes that are likely to have a significantly adverse effect on competition¹²:
- the direct or indirect fixing of fares by members of the scheme;
 - the sharing of markets, by, for example, allocating particular routes or frequencies to particular operators, by members of the scheme;
 - the limiting of the scope of operators to determine independently the services that they provide, including restricting the tickets they offer, the routes they serve, or the frequencies they operate;
 - the raising of barriers to entry by, for example, preventing, without objective, transparent and non-discriminatory reasons, some operators from taking part in a ticketing scheme;

¹² These examples are illustrative and should not be taken as guidance as to the extent of powers conferred on LTAs under the Transport Acts, but only that the OFT is likely to consider these examples potentially as having a significantly adverse effect on competition.

- the raising of barriers to entry by, for example, setting the standards of a quality partnership at a level that deters or prevents a significant proportion of current or available bus operators from providing bus services;
- the facilitation of exchanges of commercially sensitive information between operators that may enable price-fixing; and
- ‘bundling’ a significant proportion of tendered services so that smaller operators may be unable to tender for the services.

2.9 In addition, providing for revenue from a multi-operator travelcard scheme to be allocated on the basis of revenue forgone rather than, say, by reference to actual passenger miles travelled¹³ may have a significantly adverse effect on competition. The OFT’s concern is that, whatever method of revenue allocation is used, it should not provide operators with any incentive to increase their ordinary single and return fares so as to increase their share of the revenue ‘pot’ from the scheme.

2.10 The test is not simply whether there is an effect on competition, but whether there is a *significantly* adverse effect on competition. What is to be regarded as a *significantly* adverse effect is likely to depend on the nature of any restriction of competition, and the position of the parties on the relevant market.

2.11 A scheme that creates an adverse effect on competition is likely to have a significantly adverse effect where the parties to the scheme possess a substantial degree of market power – that is, if they are not subject to those constraints which would usually ensure that they behave in a competitive manner¹⁴. One indicator of market power is the market share held by the parties. A scheme is unlikely to have a significantly adverse effect on competition if, for example, the combined market share of the operators is low. However, market share is not the only factor that the OFT will consider in this context. The OFT is likely to conclude that there is a significantly adverse effect on competition even where the combined market share is low if:

- the scheme involves a serious restriction of competition, such as directly or indirectly fixing prices or sharing markets; or

¹³ The block exemption exempts such schemes from the Chapter I prohibition in the Competition Act provided that revenue is allocated, ‘as far as is reasonably practicable’ on the basis of the actual passenger miles travelled (see in particular, paragraph 3.20 – 3.27 of the Competition Act guideline **Public transport ticketing schemes block exemption**).

¹⁴ See the competition law guideline **Market Power**.

- the scheme is part of a network of similar schemes and/or other agreements between operators which have a cumulative effect on the market in question.
- 2.12 Alternatively, a scheme that results in an adverse effect on competition might not have a significantly adverse effect even where operators have a high combined market share. This might be the case if there is a strong threat of new entry into the relevant market, for example.
- 2.13 If a scheme does not have a significantly adverse effect on competition, it will satisfy the competition test and it will not be necessary to consider the two further stages of the test.

Possible effects of particular schemes

Quality partnership schemes

- 2.14 The main competition concern that is likely to arise from quality partnership schemes is that they could raise barriers to entry or force the exit of existing operators. For example, those operators that do not fulfil the standard of service conditions required by a quality partnership may be prevented from using the facilities provided by an LTA, and an operator may consider that, without access to the facilities provided under the scheme, it would not be able to compete in the market. In Scotland, the setting of minimum frequencies as part of a quality partnership scheme may act as a barrier to entry if these are set at unrealistically high levels¹⁵. The fact that a particular operator cannot comply with the requirements of a quality partnership does not necessarily mean that the quality partnership scheme has a significantly adverse effect on competition, however: there may, for example, be other operators who can comply and who can provide effective competition.

Ticketing schemes

- 2.15 The competition concerns that are likely to arise as a result of ticketing schemes are discussed in the competition law guideline ***Public Transport Ticketing Schemes Block Exemption***¹⁶. These concerns include, in addition to those effects identified at paragraphs 2.8 and 2.9 above, the effect of eliminating individual operator single tickets, which can provide a competitive discipline on ticketing scheme prices.

¹⁵ In Scotland a scheme may include requirements as to *minimum* frequency of services although it may not include requirements as to the *maximum* frequency or timing of services. In England and Wales quality partnership schemes may not include requirements as to frequency or timing of services at all.

¹⁶ OFT 439.

2.16 In assessing whether a ticketing scheme has a significantly adverse effect on competition, the OFT expects to follow an approach which is consistent with that taken in the block exemption¹⁷. Ticketing schemes could, in particular, have a significantly adverse effect on competition if they:

- prevent any operator (existing or potential) from taking part in the scheme, without 'objective, transparent and non-discriminatory' reasons;
- limit the variety or number of routes, or the price or availability of any single operator tickets offered by individual operators;
- limit the frequency or timing of any public transport services operated by individual operators, except where doing so is indispensable to providing effective onward travel connections for passengers; or
- facilitate an exchange of commercially sensitive information between operators, except where the exchange of information is directly related, and indispensable, to the effective operation of the scheme, and the provision requiring the exchange of information is 'objective, transparent and non-discriminatory'¹⁸.

Tenders under the Transport Act 1985

2.17 Tenders for subsidised services may foreclose the market from new entry. This can occur either where the duration of the tender is unreasonably long, or where tenders for more than one service are unnecessarily 'bundled' together.

2.18 Where a service may be economically viable only with a subsidy from an LTA, competition is likely to exist only for the tender (and not between operators of services on the road). The longer the duration of the tender, the more likely it is that it will have the effect of foreclosing the market, as there will be no competition for the duration of the tender. A tender granted for a longer period is more likely to have a significantly adverse effect on competition. Correspondingly, it is more likely that such a tender will have to fulfil one or

¹⁷ Under the Transport Acts, a ticketing scheme may require operators to enter into certain ticketing arrangements. It should be noted that those ticketing arrangements which fall within the block exemption are called 'public transport ticketing schemes' in the block exemption.

¹⁸ For large scale and profitable multi-operator travelcard schemes in metropolitan areas parties are likely to have to exchange information only on a strictly confidential, bilateral basis through an impartial person (an 'information referee'). A less stringent approach is likely to be suitable for small-scale schemes where the revenue or potential revenue does not allow for the appointment of an information referee. For multi-operator individual tickets it is likely that little or no information will need to be exchanged.

more of the justifications, and be proportionate¹⁹. While the circumstances of each case will differ, the OFT believes that, in general, a tender for longer than five years would be likely to have a significantly adverse effect on competition.

- 2.19 Bundling blocks of routes together for one bid (or operators block bidding for tenders) can have the effect of excluding from the market smaller operators who would be unable to operate large numbers of services, but who would be able to tender for a small number of services. Tendered services have traditionally provided an important method of entry into the bus market for new and small operators. If that method is not available, competition for tenders may ultimately be reduced. This is likely to be a greater problem the larger the number of services that are bundled, as this reduces the number of non-bundled services available to tender. Concerns may also be raised where part of the tender requires the purchase of buses specifically suited to the terms of the tender (for example low- or flat-floor buses), which may then provide the successful operator with an advantage when the route is re-tendered.
- 2.20 The competition test recognises, however, that even if a scheme has a significantly adverse effect on competition, this may be justified if the scheme produces certain benefits, and is 'proportionate'.

Justifications

- 2.21 In order to satisfy the competition test, a scheme which has a significantly adverse effect on competition must be justified. Justification for a scheme exists if it:
- secures improvements in the quality of vehicles or facilities used for or in connection with the provision of local services, by, for example:
 - requiring compliance with the Disability Discrimination Act 1995, by specifying newer vehicles with wheelchair access or low- or flat-floor buses, providing better access for disabled passengers and passengers with children; or
 - providing bus stops that give electronic real-time information concerning waiting times; or

¹⁹ See paragraph 3.11 below.

- secures other improvements in local services of substantial benefit to users of local services, by, for example:
 - providing more reliable services possibly at greater frequency; or
 - providing greater inter-modal integration of services; or
 - providing journey time savings; or
- reduces or limits traffic congestion, noise or air pollution, by, for example:
 - requiring compliance with EC emission standards by the introduction of vehicles that produce fewer emissions; or
 - achieving increased public transport usage, leading to less pollution from private vehicles.

Proportionality

2.22 Where a scheme has or is likely to have a significantly adverse effect on competition, but can be justified, the adverse effect on competition must be 'proportionate' to the achievement of the justification.

2.23 Where a scheme meets the first or second justification, the OFT will adopt a two-stage approach:

- first, it will balance any benefits to passengers against the detriment to competition. Accordingly, a significantly adverse effect on competition may still be considered proportionate if the benefits produced for passengers outweigh the detriments to competition, so that, overall, passengers or the wider general public are better off;
- secondly, it will consider whether those parts of the scheme which result in a significantly adverse effect on competition are necessary to achieve the justification(s).

The OFT is not likely to consider that the elimination of all competition will be proportionate.

- 2.24 It is possible that a scheme may meet more than one of the justifications: for example, an improvement in the quality of bus services may also benefit the public at large, by encouraging increased use of public transport, and consequently reducing pollution and improving air quality.
- 2.25 The purpose set out in the third justification above concerns benefits to the public at large. Where a scheme meets the third justification, the OFT will assume that the benefits of the scheme to passengers or the public outweigh the detriment to competition, unless there is evidence to the contrary. However, it will still be necessary for an LTA to demonstrate that the restriction is necessary to achieve the third justification.

3 APPLYING THE COMPETITION TEST TO PARTICULAR SCHEMES

- 3.1 If the OFT establishes that the scheme does have a significantly adverse effect on competition, then it will apply the rest of the competition test. While the application of the competition test will vary depending on the facts of each case, this part provides some guidance as to how the competition test will be applied in practice.

Quality partnership schemes

- 3.2 A not infrequent requirement of a quality partnership scheme is that operators must use low- or flat-floor buses. Schemes requiring the use of such buses are likely to meet the first and the second justifications, as they secure benefits to passengers by improving the quality of vehicles, and other improvements in local services of substantial benefit to passengers.
- 3.3 In assessing whether the effect of the quality partnership scheme on competition is 'proportionate' to the achievement of the purposes, the OFT will first consider whether the benefits outweigh the significantly adverse effect on competition. Small bus operators may not be able to make the capital investment necessary to purchase low- or flat-floor buses, and therefore would be excluded from using the facilities provided under the quality partnership scheme. The benefits of the scheme to passengers will be balanced against the significantly adverse effect on competition. The buses may produce significant benefits to passengers, particularly elderly or disabled passengers, which could outweigh the significantly adverse effect on competition.
- 3.4 The OFT will also consider whether the particular terms of the quality partnership itself are necessary to achieve the objective. For example, while the requirement for low floor buses in a quality partnership may be a proportionate means of achieving the objective of improving access to buses, a requirement that all low floor buses are purchased from one manufacturer would not be proportionate, if buses of a similar quality and with similar facilities are available from other suppliers.
- 3.5 Specifying the maximum age of buses in a quality partnership scheme might not be proportionate. If a quality partnership scheme sets the maximum age of the bus at a level which has a significantly adverse effect on competition, the condition of a maximum age limit would not be proportionate, if it were not a necessary means of achieving one or more of the justifications. A bus may meet all the objective quality standards set by the quality partnership scheme,

while being above the maximum age limit. A ten-year-old bus may, in fact, be relatively more accessible to disabled passengers or create fewer exhaust emissions than a five-year-old vehicle, for example. In such circumstances, preventing membership of the quality partnership scheme solely on the ground of the age of the bus may not be proportionate, as it would not be necessary to achieving the justification.

Ticketing schemes

- 3.6 Ticketing schemes which meet only the first and/or second criterion for justification will also be assessed first by balancing the benefits to consumers against the detriments to competition, and secondly by assessing whether the scheme is a necessary means of achieving the purpose. A ticketing scheme which meets the third justification will be assessed on the basis of whether it has the least adverse effect on competition necessary to achieve the objective.
- 3.7 The Transport Acts do not give LTAs the power to set the prices in a ticketing scheme. Any agreement concerning fares will therefore be voluntary, and subject to the provisions of the Competition Act. Fixing the price of tickets is a breach of the Competition Act. The block exemption does, however, permit operators to agree the price of a multi-operator travelcard.
- 3.8 In the case of through tickets and add-ons it will generally be feasible for operators to set non-discriminatory 'posted prices', that is, the reimbursement that an operator independently decides it requires for any passenger that it carries who uses a ticket purchased from another operator. In the case of multi-operator individual tickets, the method of achieving the objectives of the scheme with the least adverse effect on competition will be for revenue to 'lie where it falls'²⁰. It is possible, however, that price fixing by operators may be considered necessary for the achievement of the purposes of multi-operator individual tickets, through tickets and long distance add-on schemes in some exceptional circumstances²¹.

²⁰ This means that the operator that collects the money keeps it.

²¹ Such agreements would be assessed under section 9 of the Competition Act. Note that the block exemption is more prescriptive in its definitions of multi-operator travelcards, through tickets and multi-operator individual tickets than the Transport Acts. The additional conditions in the definitions of the ticket types are designed to ensure that only ticketing schemes that are genuinely multi-operator travelcards, through tickets and add-ons are able (in the case of multi-operator travelcards) to fix the price of the ticket and (in the case of through tickets and add-ons) to set posted prices. Tickets that do not satisfy the additional aspects of the definitions in the block exemption will be multi-operator individual tickets and will have to operate using a 'revenue lies where it falls' approach, in order to benefit from the block exemption. A similar approach will be adopted when considering whether the ticketing schemes meet the competition test in the Transport Acts.

- 3.9 In addition, multi-operator individual tickets schemes are likely to meet the competition test only if the participating operators also concurrently make available single and/or return tickets valid for travel on only their own services for the same routes and the same ticket-types as the multi-operator individual ticket.

Tenders

- 3.10 The exercise of a function to tender a service or services which has or is likely to have a significantly adverse effect on competition is most likely to be justified under the first and/or the second justification. The proportionality test will therefore combine a balancing exercise with an assessment of whether or not the restrictions are a necessary means of achieving the relevant benefits. An important factor is the duration of the tender.
- 3.11 Where a tender does not require capital expenditure by the operator on dedicated new assets, the duration of the tender should be such that it does not constitute a significant barrier to entry by foreclosing the market for an unreasonable length of time. As noted above, the OFT considers cases on a case-by-case basis and each will be different, but, in general, a tender for more than five years may create a barrier to entry. A tender offered for a longer period of time could, however, be justified if it met one or more of the justifications, and was proportionate. Where the tender requires capital expenditure on assets that could not easily be used elsewhere, LTAs may consider that the duration of the tender should be for the minimum period necessary to enable the net cost of the capital investment to be recovered²².
- 3.12 The bundling of tenders may serve to foreclose the market for bidding for tendered services. Where bundling of tenders has or is likely to have a significantly adverse effect on competition, it will have to be justified on the grounds that it fulfils one of the justifications, and is proportionate to the significantly adverse effect on competition caused. For example, cost savings achieved by bundling services might be used to meet one or more of the justifications in order to pass the test.

²² This approach was used by the European Court of First Instance in Case T374/94 *European Night Services v Commission*.

3.13 A proposal by an LTA to tender for additional services on a route where a commercial service is already operated may raise concerns from the operator of the existing service. The existing operator may not be able to compete with a service which is subsidised by an LTA and may be forced to leave the market. The OFT does not expect that this would generally have a significantly adverse effect on competition provided that the criteria for the tender are open, clear and transparent, as all operators, including the existing commercial operator, can compete for such a tender. However, where the tendering of additional services results in fewer services for passengers (because an existing operator ceases to operate its services which are not replaced), there may be a significantly adverse effect on competition. It would be difficult for a tender to pass the second and third elements of the competition test if it resulted in fewer services being available to bus passengers.

4 APPLICATIONS

- 4.1 It is not necessary to make applications to the OFT to decide whether a scheme meets the competition test. A scheme may be implemented without the prior approval of the OFT. However, an application *may* be made by an LTA²³ that has made, or intends to make or vary, the scheme or by any operator of local bus services who is, or is likely to be, 'affected' by the scheme.
- 4.2 An operator who is a party to the scheme will clearly be affected by the scheme. Whether operators who are not a party to the scheme will be affected will depend on the circumstances of each case. The OFT considers that operators who are active in, or potential entrants to, the relevant market are likely to be affected by the scheme for the purposes of determining whether an application may be made. Potential entrants could include operators who run services in an adjacent area or who could feasibly operate services in the area with, for example, minimal amounts of dead mileage.
- 4.3 If an LTA making or varying the scheme makes an application to the OFT for a decision, the LTA must inform any operators of local services that it considers are likely to be affected by the scheme that the application has been made. It is for the LTA to determine which operators are likely to be affected by the scheme.
- 4.4 If an operator makes an application, it must inform the LTA or LTAs exercising or proposing to exercise a relevant function.
- 4.5 The OFT must publish an application. It may do so by whatever method it considers appropriate to bring the application to the attention of those likely to be affected by it. This might include local bus user groups for example.
- 4.6 A fee of £5,000 is payable for an application under the competition test.

²³ An application may also be made collectively by two or more LTAs.

5 INVESTIGATIONS BY THE OFT

- 5.1 The OFT has discretion to investigate whether a scheme complies with the competition test. If no application has been made by an LTA or by any operator as to whether the scheme passes the competition test, the OFT can commence an investigation on its own initiative or, for example, following a request from an affected body which does not have the right to make an application, including bus user groups. During an investigation, the OFT may require any person to produce any documents or information that it considers may be relevant to the investigation.
- 5.2 The OFT anticipates that it will initiate investigations where complaints have been made concerning the effect of a scheme on competition. It is therefore open for a person (for example, passengers or another operator) to complain to the OFT, which may then exercise its discretion to commence an investigation.
- 5.3 There is no fee payable for making a complaint that a scheme does not meet the competition test.

6 DECISIONS

6.1 Where the OFT makes a decision in relation to the competition test, it must publish that decision, together with its reasons for making the decision. If the OFT decides in response to an application that the competition test has been met, it will take no further action, unless it subsequently has reasonable grounds:

- to believe that there has been a material change of circumstances since it made its decision; or
- for suspecting that the information on which it based its decision was incomplete, false or misleading in a material particular.

6.2 If the OFT decides, either as a result of an application or an investigation on its own initiative, that a scheme does not meet the competition test, it may give to the LTA or LTAs making or varying the scheme such directions as it considers appropriate. These may include:

- where a quality partnership scheme or a ticketing scheme has been proposed, a direction prohibiting the scheme in the form proposed;
- where a quality partnership scheme or a ticketing scheme has been made, a direction requiring that it should be revoked or varied; and
- where a tender under section 89 or 91 of the Transport Act 1985 is involved, a direction requiring the variation or withdrawal of an invitation to tender or of any agreement entered into by accepting the tender or requiring the acceptance of the tender.

6.3 The OFT may apply to the High Court in England and Wales or the Court of Session in Scotland for an order requiring the LTA to comply with the direction if it has failed to do so without reasonable excuse.

6.4 Schedule 10 and the Section 104 Order do not provide a mechanism for appeals against the OFT's decision. Decisions made by the OFT are, however, subject to common law judicial review.

7 INFORMATION

- 7.1 Information that has been obtained by the OFT in connection with its functions under the Transport Acts, and which relates to the affairs of an individual or any particular business, must not be disclosed during the lifetime of the individual, or while the business continues – unless the person from whom the information was obtained, or, if different, the person to whose affairs the information relates, or the person carrying on the business, agrees to its disclosure. The provision of confidentiality will not apply to the disclosure of information in certain specified situations.
- 7.2 In relation to the **disclosure** of information, a criminal offence may be committed if information obtained by the OFT in connection with its functions under the competition test is disclosed other than in specified circumstances.
- 7.3 In relation to the **provision** of information, a criminal offence may be committed by:
- knowingly or recklessly providing false or misleading information to the OFT in connection with its functions under the Transport Acts; or
 - knowingly or recklessly providing false or misleading information to another person, knowing that the information is to be used for the purpose of providing information to the OFT in connection with its functions under the Transport Acts.

8 OTHER UNITED KINGDOM COMPETITION SCRUTINY

Competition Act 1998

8.1 The Competition Act prohibits:

- agreements between undertakings, decisions by associations of undertakings or concerted practices which have the object or effect of preventing, restricting or distorting competition in the United Kingdom (or a part thereof) and which may affect trade within the United Kingdom ('the Chapter I prohibition'); and
- conduct by one or more undertakings which amounts to the abuse of a dominant position in a market in the United Kingdom (or a part thereof) and which may affect trade within the United Kingdom ('the Chapter II prohibition').

8.2 The prohibitions apply to agreements or concerted practices between two or more undertakings, or conduct by one or more undertakings. Broadly, local transport authorities will not constitute 'undertakings' for the purposes of the Competition Act unless they are engaging in economic activities on a given market²⁴. An LTA is unlikely (in most cases) to be involved in economic activity in only making or varying quality partnership or ticketing schemes. Therefore, quality partnerships and ticketing schemes will not generally be subject to the Chapter I or Chapter II prohibitions.

8.3 Agreements between two or more local public transport operators are, however, subject to the provisions of the Competition Act in the same way as agreements in other sectors of the economy in the United Kingdom. Bus operators will therefore need to consider whether the Competition Act does apply where a scheme:

- involves two or more bus operators; and
- results in two or more operators entering into separate arrangements between themselves in order to implement the scheme; or

²⁴ A bus company which is owned by a local authority will be an undertaking. A local authority will not be regarded as an undertaking for the purposes of the Competition Act, however, simply by virtue of its ownership of shares in a bus company.

- in Scotland, involves ticketing arrangements being sought by an LTA by voluntary means²⁵.
- 8.4 The exercise of a relevant function under the Transport Acts by an LTA will not therefore normally be subject to the Competition Act. However, *voluntary* agreements or concerted practices²⁶ between two or more operators resulting from the exercise of the function will be subject to the Competition Act. This may be the position with ticketing schemes, in particular. However, the Competition Act does not apply to conduct or agreements entered into to comply with a legal requirement²⁷. The key issue in assessing whether the Competition Act could apply to ticketing schemes is whether the agreement between operators is the result of a legal requirement arising from the ticketing scheme.
- 8.5 If an LTA compels operators through the exercise of legal powers to include a particular restriction in an agreement, that restriction is likely to fall outside the scope of the Competition Act, but it will be considered under the competition test.
- 8.6 On the other hand, if an LTA does not compel operators to include a particular restriction in an agreement which the operators must enter into in order to implement the scheme, but, rather, leaves the inclusion of the restriction to the discretion of the operators, such restrictions are likely to fall within the scope of the Competition Act. Voluntary arrangements or agreements between operators to implement a ticketing scheme formed by an LTA will be exempted from the Chapter I prohibition of the Competition Act if they meet the conditions and the obligations specified in the block exemption.
- 8.7 Any undertaking that holds a dominant position in a market is subject to the Chapter II prohibition. The prohibition applies only to the *abuse* of a dominant position; dominance in itself is not prohibited. Abuse of a dominant position by an undertaking which is a member of a scheme is assessed in exactly the same way as any other type of conduct under the Chapter II prohibition. This is considered in the Competition Act guideline ***The Chapter II Prohibition***.

²⁵ Section 28(4) of the Transport (Scotland) Act 2001.

²⁶ Voluntary agreements and concerted practices are those which do not arise from the exercise of legal powers by an LTA (see paragraph 1.17 above).

²⁷ If the scheme which the LTA requires operators to join compelled them to reach agreements or concerted practices with each other, such agreements may be excluded from the Competition Act as a legal requirement (paragraph 5 of schedule 3 to the Competition Act). The legal requirements exclusion is interpreted restrictively, however. The test for whether anti-competitive conduct arises from a legal requirement was considered by the European Court of Justice in joined cases C359/95P and C379/95 P *Commission of the European Communities and French Republic v Ladbroke Racing Ltd* Cases [1997] ECR I 6265.

Enterprise Act 2002

- 8.8 The OFT may make a reference to the Competition Commission under the Enterprise Act where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom. It may, for example, be appropriate to commence an investigation where the operation of schemes in conjunction with the conduct of the operators in that market has the effect of preventing the entry of new competitors, but where there is no evidence of an agreement or collusion between the operators involved which might have caused this situation to arise. If a reference is made, the Competition Commission will decide whether there is any prevention, restriction or distortion of competition.
- 8.9 Further information on market investigation references is available in guidance published by the OFT (**Market Investigation References**), and the Competition Commission (**Market Investigation References: Competition Commission Guidelines CC3**).