

The OFT and the bus industry

COMPETITION

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This document is not a substitute for the Competition Act 1998, the Transport Act 2000 or the Transport (Scotland) Act 2001, or for regulations and orders made under those Acts. Nor should it be regarded as a substitute for statutory guidance issued in relation to those Acts. Parties to an agreement or conduct should seek their own legal advice before coming to a final view on any particular competition issue themselves.

Introduction

What we do

The OFT applies competition law to the bus industry. There are two particularly important pieces of legislation:

- (1) the Competition Act 1998
- (2) the Transport Act 2000 and the Transport (Scotland) Act 2001.

Our objective

is to deliver benefits to passengers by ensuring that the market is both fair and open. Through competition, passengers are provided with choice. Competition is also likely to result in more competitive fares than where a monopoly exists. It is likely to lead to improved services through encouraging innovation.

What we don't do

The OFT is not the bus regulator. Unlike the Strategic Rail Authority, we do not set levels of fares, quality standards, or frequencies of services.

The Competition Act 1998

The Competition Act 1998 contains two prohibitions: Chapter I and Chapter II.

Chapter I

Agreements or concerted practices that would prevent, restrict or distort competition are prohibited.

Who does Chapter I apply to?

It applies to anti-competitive agreements between bus operators. In some circumstances it could also apply to agreements between bus operators and local authorities or Passenger Transport Executives (PTEs).

Does this mean that bus operators can never talk to each other or form agreements?

No, agreements or concerted practices are prohibited only if they **damage competition**. Some agreements, for example, to fix the level of fares, will almost always breach the Competition Act. However, some agreements will not be anti-competitive. For example, two operators who run connecting services (from A to B and then B to C) can agree to co-ordinate the times of their services, so that passengers are able to catch the

connecting service. Such agreements will not normally breach the Competition Act.

And some agreements will be anti-competitive only in certain circumstances – for example, if the operators involved have a combined market share of 25 per cent or more. Such agreements have to be considered on the basis of the facts.

Some agreements that reduce competition may still be in passengers' interests

The Competition Act recognises that some agreements that have anti-competitive effects may still be beneficial for passengers. The Competition Act allows such agreements where they meet specified criteria (see page 12).

One of the criteria for allowing such agreements is that it must produce a fair share of benefits for passengers.

Can operators talk to each other about proposed agreements?

Operators are free to discuss proposed agreements, to see whether they could form an agreement, and whether it would breach the Competition Act or qualify for an exemption.

It would clearly be necessary for operators who wished to apply to the OFT for an exemption to discuss the matter between themselves.

What operators cannot do is **enter into** an agreement that breaches the Competition Act. The difference is between discussing a proposal (talking about a potential agreement), which is permissible, and actually reaching an agreement. An agreement for these purposes means an understanding between at least two parties. An agreement does not have to be formal, or written. If in doubt, you should seek legal advice.

Ticketing schemes

Ticketing schemes between rival bus operators will often breach the Competition Act, but they do produce real benefits for passengers.

The OFT has introduced a block exemption for certain ticketing agreements between operators if certain criteria are met. The effect of the block exemption is automatically to permit ticketing agreements which meet the criteria - there is no need to apply to the OFT. For a summary of the conditions see page 13.

Chapter II

Chapter II prohibits the abuse of a dominant position by a bus operator.

What is a dominant position?

Typically a bus operator will not hold a dominant position unless it has at least a 40 per cent share of the market. A single route could constitute a distinct market. Merely holding a dominant position is not, in itself, an abuse.

What is an abuse of a dominant position?

It is where an operator exploits their position to leave passengers worse off. There are a number of ways that a dominant position can be abused, for example charging excess fares. The most common example in the bus industry is predatory pricing. That is, charging fares that do not cover the costs of operating the service, with the specific purpose of forcing a rival operator off the route.

Isn't it in passengers' interests to charge low fares?

It is in passengers' interests for fares to be at a reasonable level – a level that reflects the costs of running the service. Cutting

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

fares to force a competitor to cease operating is not in passengers' interests. Once there is only one operator on the route fares are likely to rise and the quality and frequency of services are likely to be reduced.

Fares would be predatory only if they were both loss-making and designed to force out a competitor - that is to say, there is no absolute prohibition against running loss making services, but operators may have to be able to show that loss making services are not intended to force out a competitor.

Cross subsidisation of routes or services is generally allowed.

Both of these Acts create a competition test that applies when local transport authorities:

- form Quality Partnerships
- make ticketing schemes
- offer services to tender.

When does the test apply?

The test applies if an authority making a scheme, or a bus operator affected by a scheme makes an application to the OFT, or we decide to investigate a scheme.

Schemes also include tenders for the purposes of this guide.

What is the test?

The test is whether one of these schemes would have a significantly adverse effect on competition. If it does, the scheme can still pass the test if it meets one or more of the following justifications:

- it secures improvements in the quality of vehicles or facilities used, or
- it secures other improvements in local services of substantial benefit to users of local services, or

Further information

- it reduces or limits traffic congestion, noise or air pollution.

And the effect on competition must be proportionate to the achievement of one of these objectives.

What happens if the test is passed?

There is no problem with the scheme as far as the OFT is concerned.

What happens if the test is not passed?

There is a problem, and the OFT can make any direction we consider appropriate, including the termination of the scheme.

Where can I find out more about the competition test?

The OFT has produced draft guidance which can be downloaded from our website or obtained by post (see page 11).

- **'Frequently asked questions about the bus industry'** can be downloaded from our website:

www.oft.gov.uk/Business/Legal+Powers/ca98+publications.htm#bus

- **The Competition Act** can be downloaded from

www.legislation.hmso.gov.uk/acts/acts1998/19980041.htm

- **The ticketing scheme block exemption** can be downloaded from

www.hmso.gov.uk/si/si2001/20010319.htm

- **The OFT guideline** which explains both the above can be downloaded from our website:

www.oft.gov.uk/Business/Legal+Powers/ca98+publications.htm#transport

or printed copies can be ordered free of charge by calling 0870 60 60 321.

- There is **general information about the Competition Act 1998** and copies of guidance on our website:

www.oft.gov.uk/Business/Legal+Powers/ca98+publications.htm

- **draft guidance on the Transport Acts competition test** can also be downloaded from our website:

www.offt.gov.uk/News/Publications/Leaflets+Ordering.htm

– then look in Reports and Transport

- you can contact **the OFT**
by telephone 020 7211 8140
by email oftbusenquiries@oft.gov.uk
by post

Bus competition team
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Any discussions are informal, free of charge and will normally be in confidence.

See over for further details on

- conditions for an individual exemption under the Competition Act
- ticketing scheme block exemption conditions under the Competition Act.

The Competition Act: conditions for an individual exemption

An agreement that could breach the Competition Act may still be allowed if it contributes to:

- improving production or distribution (for example, increasing the number of bus services), or
- promoting technical or economic progress (for example, improving the quality of bus services).

The agreement must allow consumers a fair share of these benefits.

But it must not

- impose on the parties restrictions unless these are indispensable to the improvements or progress, (for example, the improvement in bus services could not be achieved without the restriction), or
- eliminate competition across substantial parts of the services in question (the agreement must not result in competition being completely removed).

The Competition Act: ticketing scheme block exemption conditions

The block exemption applies to:

- multi-operator travelcards
- multi-operator individual tickets (MIT)
- through tickets
- long and short distance add-ons

A ticketing scheme must:

- be open to all operators to join, unless there is an objective, transparent and non-discriminatory reason why not
- allow money to 'lie where it falls' if the scheme is an 'MIT'
- remunerate operators on the basis of 'passenger miles', if the scheme is a travelcard (unless it is not 'reasonably practicable' to do so)
- allow operators to make independent commercial decisions about number of vehicles, headways, timings, etc (except where this is necessary for onward connections)
- be accompanied by 'own brand' singles and/or returns if it is an 'MIT'

A ticketing scheme must not:

- limit the variety or number of routes offered by individual operators
- limit the price or availability of any single operator ticket
- limit the frequency or timing of any service operated by individual operators (except where this is necessary for onward connections)
- facilitate an information exchange between parties, except where this information exchange is indispensable to the scheme and conducted in an open and transparent way
- allow price fixing for tickets, except travelcards (posted prices are allowed for through tickets and add-ons).

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