Rail Franchises: Q&As

In March 2013 the Department for Transport (‘DfT’)) announced the start of a staggered programme to procure all its rail franchises over a period of eight years. For the first two franchises, Essex Thameside and TSGN (Thameslink, Southern and Great Northern), DfT expects to select the winning bidder in spring/summer 2014 and operations will start in September 2014. In addition, Transport Scotland (‘TS’) expects to award its Caledonian Sleeper franchise in August 2014, with start of operations in March 2015, and its Scotrail franchise in October 2014, with start of operations in April 2015.

Under section 66(3) of the Railways Act 1993, entering into a rail franchise agreement constitutes an acquisition of control of an enterprise under the merger control provisions of the Enterprise Act 2002. The Office of Fair Trading (‘OFT’) therefore reviews the award of rail franchises under the Enterprise Act 2002 with the aim to complete a Phase 1 investigation of the winning bidder for the rail franchise prior to the start of operations. The OFT will assess whether the award could give rise to competition concerns.®

On 1 April 2014, the Competition and Markets Authority (‘CMA’) will take over the OFT’s merger control functions. This document also reflects the position that will be taken by the CMA and references to the OFT therefore include the CMA from this date.

1. How and when does the OFT anticipate to be contacted by bidders or prospective bidders for rail franchises?

All bidders are encouraged to enter into pre-notification discussions with the OFT shortly after having submitted their bids.

Although the OFT will only ultimately conduct a formal Phase 1 merger investigation into the winning bid, pre-notification with all bidders will allow the investigation timetable to commence the moment the winner is selected by the DfT or TS.® The OFT believes that, in practice, this process is

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® The OFT will not assess possible competition concerns against the pre-award situation but against a hypothetical counterfactual in which the award is made to a firm that raises no competition concerns (or only competition concerns that are resolved through a remedy) – see Merger Assessment Guidelines (CC2 and OFT1254, September 2010), paragraphs 4.3.28-29.
® Where the winning bid meets the jurisdictional thresholds for notification under the European Merger Regulation, the OFT’s timetable will not begin before the European Commission has taken a decision on reference to the UK (see Question 4 below).
necessary, given the relatively short timescale envisaged between selecting the winning bid and the commencement of operations. Bidders should commence pre-notification four to six weeks prior to the expected date of the award.

Generally, pre-notification will involve bidders providing the OFT with a draft notification for discussion, with the aim of producing a final notification that allows the OFT’s investigation to begin in the event the bidder is awarded the franchise. In order to potentially limit the amount of information required and to assist the OFT’s preliminary analysis, the OFT encourages each individual bidder to discuss with it as early as possible what information should be provided about the overlaps between the bidder’s existing bus, coach and train services and the rail franchise route(s), taking account of the specific facts of each bidder’s case.³

Where there are no overlaps between a bidder’s existing services and the rail franchise routes, the bidder is asked to inform the OFT of this position in writing on an informal basis. If the franchise is awarded to this bidder, the bidder is free to decide whether to formally notify the franchise award to the OFT given the voluntary merger regime in the UK.⁴

The OFT also recommends that, where relevant, bidders and their legal advisers consider possible undertakings in lieu of a reference to Phase 2 as early as possible in the process and ideally during pre-notification, and the OFT is open to engage in early discussions with the bidders on possible undertakings. This will maximise the chances of acceptance of undertakings that are offered at the end of the OFT’s Phase 1 investigation, should the franchise award give rise to competition concerns.⁵

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³ The OFT notes that, for the purposes of making their bid as requested in the invitation to tender, bidders will generally already have conducted an assessment of the possible competition concerns their bid could give rise to. The OFT expects that this assessment will further reduce the burden on bidders in pre-notification discussions with the OFT.
⁴ This does not apply to notification to the European Commission where the winning bid meets the jurisdictional thresholds under the European Merger Regulation.
⁵ See Mergers: Jurisdictional and procedural guidance (OFT527, June 2009), paragraphs 8.8-8.9. Similarly, see the CMA’s Mergers: Guidance on the CMA’s jurisdiction and procedure (CMA2, January 2014), paragraph 8.7.
2. Will the OFT and DfT, and the OFT and TS, be sharing information received from bidders? How does this affect the confidentiality of a bidder’s commercially sensitive information?

The OFT will not be involved in the process to select the winning bidder. For its part, the DfT has informed the OFT that it recognises that competition issues are matters to be resolved between the relevant bidder and the OFT (or the European Commission in appropriate cases). However, it is important for the DfT that it is able to understand the impact on the franchising process of any potential intervention due to competition concerns. Invitations to tender for rail franchises therefore generally require the bidder to provide to the DfT at the bid stage information regarding the competition issues that may arise from its bid, and subsequently to advise if there are any changes in circumstances relating to these issues, or if possible intervention by the OFT (or the European Commission) is indicated or the bidder offers undertakings in lieu of a reference to Phase 2. If a bidder provides such information to the DfT, the DfT may ask the OFT to confirm this information.

TS is taking the same position as the DfT in this matter.

Following the start of the formal Phase 1 investigation after 1 April 2014, the CMA will share the following other information with the DfT, or TS as the case may be:

- the issue of a formal information request under section 109 of the Enterprise Act 2002 (see Question 7 below)
- the extension of the CMA’s statutory timetable because the bidder has not complied with such an information request, and
- any intention to issue initial enforcement orders, including proposed derogations from such initial enforcement orders (see further at Question 8 below).

3. How will the coming into force of the Enterprise and Regulatory Reform Act 2013 (‘ERRA13’) affect the merger notification process?

The ERRA13 makes a number of changes to the UK merger control regime that come into force on 1 April 2014, including the introduction of a new authority, the CMA, to take over responsibilities including conducting both
Phase 1 and Phase 2 merger investigations from the OFT and the Competition Commission.

The ERRA13 also introduces a new statutory 40 working day timetable for all Phase 1 merger investigations and a prescribed form (the Merger Notice) for notification of mergers to the CMA. Given that the winning bidder is expected to be announced after 1 April 2014, both of these reforms will apply to the rail franchise cases.

General guidance on the CMA’s procedures and a template Merger Notice for parties to complete are available for download on the CMA’s website: www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure.

The ERRA13 also makes changes to the powers for imposing interim measures to prevent integration of businesses, in both completed and anticipated mergers (see further Question 8 below on the expected application in rail franchise cases), and to the process for remedies (see further Question 7 below).

4. Are bidders also expected to notify the European Commission of its rail franchise bid?

In some cases, bidders for rail franchises will also meet the jurisdictional thresholds for notification to the European Commission under the EU Merger Regulation (‘EUMR’). It is the responsibility of bidders to individually consider whether the EUMR applies in their respective cases and to contact the European Commission for pre-notification discussions where appropriate.

As stated in the OFT’s jurisdictional and procedural guidance,⁶ mergers with an EU dimension that might be considered to have a particular impact on competition in the UK should be brought directly to the attention of the OFT at the earliest possible stage, in addition to the mandatory notification to the European Commission. The OFT considers this to apply to UK rail franchises and requests that bidders engage with the OFT as soon as possible.

⁶ Mergers: Jurisdictional and procedural guidance (OFT527, June 2009), paragraph 11.11. Similarly, see the CMA’s Mergers: Guidance on the CMA’s jurisdiction and procedure (CMA2, January 2014), paragraph 18.12.
The OFT expects that there will be strong reasons for a referral of rail franchise mergers back to the UK where they may have a significant impact on competition, since rail franchises concern only the UK and remedies may not be open to the European Commission given that the affected markets may not be a substantial part of the common market. Bidders may therefore wish to consider making a pre-notification request under Article 4(4) EUMR for referral back to the OFT, in cases where the appropriate tests are satisfied. The OFT is willing to discuss the possibility of such a request in more detail on an individual basis.

5. What information should bidders provide to the OFT?

The winning bidder will be expected to notify the OFT using the Merger Notice template (see Question 3 above). The template sets out the categories of information required for the purposes of a merger investigation. Parties are free to supply the required information using the Merger Notice template or to provide a submission in a written format of their choosing, accompanied by a completed Merger Notice indicating clearly where in that submission the required information can be found.  

In regards specifically to rail franchise cases, the OFT will use the Competition Commission’s Review of Methodologies in Transport Inquiries publication (2007) as a starting point for its competitive assessment, available here: [www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/our_role/analysis/review_of_methodologies_in_transport_inquiries](http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/our_role/analysis/review_of_methodologies_in_transport_inquiries). The OFT will also take account of the assessment used in previous rail franchise decisions of the OFT and the Competition Commission. Bidders should therefore seek to provide the OFT with the information required for the OFT to conduct this assessment.

However, the information required for the OFT to conduct its assessment may vary depending on the case. The OFT therefore welcomes informal discussions on an individual basis in pre-notification to determine the information required in order to conduct its assessment.

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7 See paragraph 17 of the preamble to the Merger Notice.
6. How relevant is the Competition Commission’s 2011 local bus services market investigation?

The OFT’s assessment of rail franchise awards will focus on the impact of the award on competition between the winning bidder’s existing bus, coach and train services and the rail franchise route(s). The Competition Commission’s 2011 local bus services market investigation\(^8\) focused on competition between local bus services but also included some information on competition with train services.

Although the market investigation provides some indication of how the competition authorities assess competition between train and bus services, a market investigation has a different focus and purpose to that of a merger assessment and therefore it may not be appropriate to apply the same methodology used in a market investigation to a merger investigation. In particular, the focus of a market investigation is on competition in a sector as a whole, rather than examining particular overlap areas. Nevertheless, the OFT will take account of the Competition Commission’s findings in its assessment of rail franchise awards to the extent appropriate, in particular Appendix 11.2 of the Commission’s final report of 20 December 2011.\(^9\)

The OFT invites bidders to discuss, as part of pre-notification, the OFT’s approach in their own individual case.

7. When does the OFT expect to announce its decision on the investigation of the winning bidder?

The OFT intends that the pre-notification process will allow for a complete notification to be submitted as soon as the DfT or TS announces the winning bid.

The OFT will then have 40 working days from acceptance of the winning bidder’s notification to announce its decision (subject to the timetable being


extended should any request for information under section 109 of the Enterprise Act 2002\textsuperscript{10} not be responded to in time)

Additional time may be required to formulate and agree any remedies (that is, undertakings in lieu of a reference) in the event the OFT finds a realistic prospect of a substantial lessening of competition.\textsuperscript{11}

The OFT is fully aware of the tight timescales involved in the rail franchise process, especially between the announcement of the winning bid and the commencement of the services.

8. Will interim measures be put in place?

From 1 April 2014, the CMA will have the power to impose initial enforcement orders in both anticipated and completed mergers under section 72 of the Enterprise Act 2002 (as amended by ERRA\textsuperscript{13}).

The OFT believes it essential to consider the possible need for initial enforcement orders early in the process given the timescales involved in rail franchise cases. The OFT therefore requests that as part of the pre-notification process bidders provide a list of the likely steps required during mobilisation for the franchise (for example the exchange of confidential information, assignment of contracts, registration of routes, transfer of employees and assets) which may require derogations from any order.

The OFT will determine on a case-by-case basis whether an initial enforcement order is appropriate and whether derogations would be necessary. The OFT will take into account that it is necessary for the winning bidder to take certain mobilisation steps to be ready to start operations for the franchise at the time indicated by the DfT or TS. Also, as noted at Question 2 above, the OFT will inform the DfT, or TS as the case may be, before making an initial enforcement order and will take account of their views as to whether this could prejudice the ability of a bidder to commence operations on the proposed start date for the relevant franchise.

\textsuperscript{10} As amended by ERRA\textsuperscript{13}.

\textsuperscript{11} Further information on the CMA’s Phase 1 remedies process is in Chapter 8 of the CMA’s \textit{Mergers: Guidance on the CMA’s jurisdiction and procedure} (CMA\textsuperscript{2}, January 2014).

\textsuperscript{12} Further information on the CMA’s approach to initial enforcement orders is in paragraphs 7.28 to 7.31 and Annex C of the CMA’s \textit{Mergers: Guidance on the CMA’s jurisdiction and procedure} (CMA\textsuperscript{2}, January 2014).
9. **Who should I contact to discuss the OFT’s merger investigation process as it applies to rail franchises?**

Please contact the Merger Unit’s Rail franchise team.

**Until 1 April 2014:**
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London EC4Y 8JX  
Email: mergers@oft.gsi.gov.uk  
Telephone: 020 7211 8499 / 8123 / 8669

**From 1 April 2014:**
Competition and Markets Authority  
Victoria House  
37 Southampton Row  
London WC1B 4AD  
Email: mergers@cma.gsi.gov.uk  
Telephone: 020 7738 6499 / 6223 / 6669