

Stagecoach and Scottish Citylink: notice of the Competition Commission's decision pursuant to public consultation on the final undertakings

Introduction and background

1. In its report *Stagecoach and Scottish Citylink: a report on the completed joint venture between Stagecoach Bus Holdings Limited and Braddell PLC in relation to megabus.com, Motorvator and Scottish Citylink* (the report) published on 23 October 2006, the Competition Commission (CC) concluded that the joint venture between Stagecoach Bus Holdings Limited and Braddell PLC (the joint venture) had resulted in a substantial lessening of competition (SLC) in the supply of scheduled coach services on the Glasgow–Aberdeen and Edinburgh–Inverness coach routes crossing at Perth. These routes are termed the Saltire Cross route group in the report and in this notice.
2. A sale of either the megabus or Citylink services on the Saltire Cross route group had first been identified by the CC as one possible solution to an SLC at 'Option 2(a): Simple divestiture' of the CC's 'Notice of possible remedies under Rule 11 of the Competition Commission's Rules of Procedure' (the remedies notice) of 11 August 2006. Other possible solutions to the SLC identified in the remedies notice included a franchising remedy and the imposition of fare and service level obligations on the joint venture.
3. In paragraph 18 of the remedies notice, the CC identified a number of 'relevant customer benefits' that had been claimed for the joint venture. These included, among other things, the simplification and consolidation of timetables, more easily-remembered service times, the interavailability of services, and the more efficient use of capacity. The CC indicated that it would welcome views on the nature, scale and likelihood of relevant customer benefits flowing from the joint venture. The remedies notice remains on the CC's website at www.competition-commission.org.uk/inquiries/ref2006/citylink/index.htm. Interested parties were invited to respond to the remedies notice by 4 September 2006.
4. The CC received submissions, some very extensive, from Stagecoach, Braddell and others in response to the remedies notice. The CC held hearings with Stagecoach and Braddell at which the merits of different remedies, as well as the scope and nature of relevant customer benefits, were considered.
5. In part 8 of its report, the CC considered at length the merits of different remedies. In paragraphs 8.58 and 8.59 of the report, the CC observed that both the imposition of fare and service level obligations and a remedy by way of sale would address the adverse effects stemming from the SLC caused by the joint venture. However, the CC also noted that only a sale would actually remedy the SLC itself. In addition to failing to address the SLC, the imposition of fare and service level obligations would have other disadvantages: they would risk a distortion of the market in the longer term as well as requiring continuing monitoring and enforcement.
6. The CC then considered whether the relevant customer benefits flowing from the joint venture would be put at risk by a sale and, if so, whether that was reason to prefer the imposition of fare and service level obligations to a sale. These matters are considered in paragraph 8.62 and the following paragraphs and in Appendix O of the report. The CC accepted that some relevant customer benefits arose from the joint venture but concluded that they were insufficient to outweigh the benefits that would follow from a sale and the ensuing restoration of competition.

7. The remedy identified for the SLC in the report was the sale by the joint venture either of its Citylink services on the Saltire Cross route group or of its megabus services on the Saltire Cross route group. The CC has not required the joint venture to be broken up. The routes to be disposed of account for a small number of those operated by the joint venture
8. Following publication of the report, Stagecoach told the CC that it did not wish to challenge the report in the Competition Appeal Tribunal. Stagecoach, Braddell and Scottish Citylink have since worked with the CC to agree a set of draft undertakings to give effect to the CC's decision to require a sale of either the megabus or Citylink services on the Saltire Cross route group.
9. On 31 January 2007 the CC published for consultation draft undertakings agreed with Stagecoach Group plc, Braddell PLC and Scottish Citylink Coaches Limited. If such undertakings were offered and accepted they would establish a legal framework for the implementation of the sale.

The responses to public consultation

10. The CC received 67 responses to the consultation. Of these, only four commented on the undertakings themselves. The majority of respondents expressed disagreement with the CC's remedy and other decisions in the report. Overall, four responses came from MPs, 14 came from MSPs, 11 came from Scottish local authorities, 17 came from members of the public and 21 came from other bodies, most of which have some involvement in the transport industry. All but three of the 67 responses are published on the CC's website.
11. The majority of those who disagreed with the remedy asked the CC to accept behavioural undertakings—the imposition of fare and service level agreements, along the lines of those considered but rejected by the CC in the report.

The CC's decision

12. The CC considers that the responses to the undertakings have to be divided into two groups: those responses that comment on the provisions of the undertakings, and those responses that comment on the decisions of the CC in the report. While the CC must, as it has in this case, consider very carefully all the responses that it receives to public consultation on undertakings, the CC is subject to very specific constraints in relation to its ability to depart from the decisions in the report.

Responses on the undertakings

13. Four respondents commented on the undertakings themselves. Two expressed concern that the commitment imposed on the joint venture to honour existing arrangements would last only 12 months. They asked what would happen at the end of that period and whether undertakings would be required of the purchaser so that both parties would be required to maintain all existing timetable frequencies, service levels and journey connections. One asked what action the CC would take if the divestiture failed to result in a similar level of service provision to that currently offered by the joint venture, and what service level commitments would be required of the purchaser. One respondent specifically suggested that the purchaser should be required to provide a minimum service level, including integrated ticketing, for a period of three to five years.
14. [✂]

The CC's decisions on the responses to the undertakings

15. In considering the points raised in relation to the undertakings, the CC has borne in mind that its aim in requiring the divestiture of Citylink or megabus services on the Saltire Cross is to restore effective competition in coach services on the flows in question. Remedies that restore effective competition have significant advantages over behavioural remedies as they do not require ongoing intervention in the market, but rather rely on the process of competition to ensure the provision of services that customers want at a reasonable price. In choosing a sale, the CC took account of the fact that the purchaser of the divestiture package would need a window of stability in which to establish itself in the market. However, the CC did not wish to place restrictions on the market for longer than was necessary to achieve this. On balance, the CC considered that a requirement on the vendor to honour existing arrangements for 12 months after divestiture would provide a sufficient period of stability for purchaser, without unduly restricting the market.
16. Similarly, the CC did not consider that a requirement on the vendor or the purchaser to maintain timetable frequencies, service levels and connections would be in line with its aim of restoring effective competition. Rather, it considered that the introduction of such restrictions on the market would negate the benefits that competition would bring.
17. [✂]
18. [✂]

Responses on the decisions in the report

19. The CC does not propose to examine the responses concerning the report in individual detail in this notice. The responses are, with three exceptions, to be found on the CC's website at www.competition-commission.org.uk/inquiries/ref2006/citylink/index.htm.
20. Broadly, disagreement with the CC's remedy was based on:
 - (a) disagreement with the CC's analysis of the market and its conclusion that the joint venture would lead to an SLC ;
 - (b) concern about the policy implications of the report; and
 - (c) concern that the remedies would undo the benefits perceived to have resulted from the joint venture.

Disagreement with the SLC finding

21. Twenty respondents disagreed with the CC's analysis of the market. These disagreements were generally based on the view that the relevant market for the coach services in question is wider than that defined by the CC, with competition coming from rail, private car and/or other modes of transport.

Concern about policy implications

22. Twenty respondents, including six MSPs and two MPs, expressed the view that the divestiture remedy was incompatible with government or Scottish Executive policies on transport, which aim to encourage greater use of public transport and less use of

private cars. Some also believed that, through this, the remedy would threaten social and environmental policy objectives.

Harm to benefits from the joint venture

23. Fifty-eight responses argued that the joint venture was popular with passengers and had brought benefits through timetable coordination, through-ticketing, flexibility and improved service. Respondents believed that a sale would be damaging in a variety of ways, including by the loss of those benefits listed above, the threat to Stagecoach's planned investment in new vehicles and also through the reduction or removal of stopping services to outlying areas as operators concentrated on more profitable fast end-to-end services. One local councillor suggested that the divestiture would adversely affect employment opportunities for skilled workers in Perth. The Transport and General Workers' Union expressed concern about whether the remedy would harm drivers' terms and conditions.

The CC's decisions on responses concerning the report

24. Where, as in this case, a report of the CC is published within the period allowed and finds that there is an SLC, the CC is under a duty to take action to 'remedy, mitigate or prevent' both the SLC and any adverse effects that follow from it.¹ The duty to act is qualified only by the requirement that the action taken should be 'reasonable and practicable'.¹ The CC may take relevant customer benefits into account.² In addition to the duty to act, the CC is also under a duty to ensure that its action is consistent with the decisions of the CC set out in the report.³ The duty of consistency is subject to two exceptions. These are, first, where there has been a **material change of circumstances** since the preparation of the report;³ and secondly, where the CC has some other **special reason** for acting differently.³
25. These provisions reflect a strong public interest in the finality of the decisions in CC reports. In this case, the report was published after an extensive, highly transparent and far-reaching inquiry into the facts, lasting more than seven months. The inquiry process included considerable public consultation, including consultation on the CC's findings on the SLC as well as on possible remedies. The report contains detailed analysis of the markets for scheduled coach services on the Saltire Cross route group and of the respective merits of different remedies. The report also contains detailed consideration of the significance of relevant customer benefits. These analyses are based on a thorough examination of the facts. It is notable that at the end of this inquiry Stagecoach, Braddell and Scottish Citylink have not challenged the report in the Competition Appeal Tribunal. Instead, they have cooperated with the CC in the preparation of draft undertakings to bring about a sale of the Citylink or megabus business on the Saltire Cross route group. The CC's final decision on remedies has been designed to help a purchaser offer competitive and attractive services to passengers.
26. In these circumstances, the CC does not consider that it would be either unreasonable or impracticable to pursue undertakings to facilitate a sale to remedy the SLC and the adverse effects flowing from the joint venture unless there has been a material change of circumstances since the preparation of the report or there are special reasons. It is with these considerations in mind that the CC has considered the responses to the undertakings that comment on the decisions in the report.

¹Enterprise Act 2002 section 41(2).

²Enterprise Act 2002 section 41(5).

³Enterprise Act 2002 section 41(3).

27. In considering whether there has been a material change of circumstances, or whether there are special reasons, the CC has, while recognizing the public interest in the finality of its reports, not sought to apply those terms unduly narrowly. Rather, the CC has read the responses with a view to deciding whether they or their contents could be said to constitute or disclose a material change of circumstances or special reasons that would justify a departure by the CC from its duty of consistency. However, in considering whether there has been a material change of circumstances the CC has concentrated on:
- (a) whether there has been any change in the relevant facts since the report; or
 - (b) whether any matter has come to light that suggests that the CC has been provided with false or misleading information.
28. Although many of the 67 respondents to the consultation have expressed disagreement with its decision, either on the SLC or on an appropriate remedy, which the CC regrets, such disagreement does not in itself constitute a change of circumstance or special reason to depart from the duty of consistency.

The SLC finding

29. During the course of the CC's inquiry, submissions were received from members of the public and other interested parties on a number of issues of concern to the inquiry including the competitive constraints and customer benefits. As with the responses to the undertakings, we considered those submissions very carefully. The CC considered the views of individual coach users to be a significant source of information in this inquiry. However, the CC has to consider all the evidence that it receives and has to base its decisions on the balance of that evidence. One notable source of evidence was the substantial passenger survey carried out on behalf of the CC by Synovate: this interviewed 3,900 passengers on Citylink and megabus services between 7 and 28 April 2006. As part of this survey, around 1,200 of those passengers completed on-coach questionnaires. Follow-up interviews by telephone were carried out by Synovate with 351 passengers until 9 May 2006. Among the questions that were answered by passengers in the telephone interviews were those of the alternative modes of transport open to them and of the significance of price increases to them. The majority of passengers interviewed by telephone said that they would use the train as their preferred alternative mode of transport with the private car a second-best alternative to a coach. However, the majority of those passengers indicated that they would not switch to their alternative mode of transport even if the price of coach travel increased by 50 per cent.
30. The question of whether, for example, the private car or the train competes with scheduled coach services was a matter to which considerable time was devoted by the CC during its inquiry. The CC was presented with submissions, from individuals as well as organizations, suggesting that they were. In addition to such submissions, the CC based its decision on its own analyses of the various constraints on scheduled coach services based on extensive data gathered during the inquiry. This included analysis of fares and generalized costs of each type of transport, a comparison of rail and coach passengers and numbers, an analysis of car ownership, and assessments of the fare-setting practices of the joint venture, Stagecoach, and others. The CC also relied on the passenger survey referred to in paragraph 29 above.
31. Where in its examination of specific routes the CC found that the evidence taken as a whole showed that trains were an effective constraint on scheduled coach services, that constraint was recognized in the report and was one of the factors that

determined the scope of the SLC. For example, the CC found that rail imposes a sufficient competitive constraint on scheduled coach services between Edinburgh and Dundee that the joint venture does not give rise to an SLC on those services.

32. The CC found that rail transport constrains Citylink and megabus differently according to the particular service. It also found that rail fares were a greater constraint on some Citylink fares than others, and, depending on the service being considered, could be a greater constraint on Citylink than megabus. However, the CC found that private cars imposed no significant competitive constraint on scheduled coach services. As the report states at paragraph 4.32, this finding is consistent with the CC's findings in previous inquiries. It should be noted that the issue of concern to the CC is not whether a journey by scheduled coach might also be taken by car or train. Rather, the issue is whether the availability of those alternative modes of transport is sufficient to constrain the prices of scheduled coach services. In considering the views of passengers as to the scope of the market, the CC has to consider whether passengers appear to have this distinction in mind.
33. Few, if any, of the responses to the draft undertakings engage to any real degree with the evidential basis for the findings in the report in relation to the competitive constraints on scheduled coach services on the Saltire Cross. Rather, they tend to reflect the individual views and experiences of the respondents. The experiences of individual users of transport and other similar representations were carefully considered by the CC during the inquiry, but are only a small part of the material considered by the CC. The responses do not amount to a change in the facts or indicate that the CC was misled in any way during the inquiry, and do not otherwise constitute a material change of circumstances. Where representations about factual matters such as competitive constraints do not constitute a material change of circumstances, they are unlikely to constitute a special reason. There is no reason to conclude that they constitute a special reason in this case.

Concerns about transport, social and environmental policies

34. Concerns about transport policy or about social and environmental policy objectives, whether the latter arise in themselves or out of the broader context of transport policy in Scotland, are matters that the CC can take into account in considering a remedy. However, there is very limited scope for it to do so. The CC is an independent public body specifically constituted to be free from ministerial control. Moreover the CC's obligations to identify and remedy an SLC and its adverse effects are statutory and are subject to limited qualifications. Those qualifications do not easily admit general policy considerations. The CC's guidelines on merger references⁴ reflect the priorities of the Act in stating '... environmental costs or the social costs of unemployment will not be assessed by the Commission in its consideration of remedies, which are intended to address the SLC or other adverse effects'.
35. However, this does not mean that the CC was not fully apprised of the position of the Scottish Executive. The Scottish Executive made a submission to the CC at an early stage in the inquiry, and also attended a hearing with the CC in Glasgow on 13 April 2006. In its submission, the Scottish Executive addressed the CC on the goals of its transport policy both generally and in relation to coach travel, on benefits to customers, and on matters relevant to a remedy should the CC find an SLC. At its hearing, the Scottish Executive asked the CC to consider, should the CC find an SLC, some sort of behavioural undertakings rather than a 'blanket ban' on the merger. As noted in paragraph 2 above, the CC did this, and in particular considered

⁴CC2: *Merger References: Competition Commission Guidelines*, June 2003.

fare and service level obligations in the remedies notice. However, as noted in paragraph 5 above, the CC concluded that its statutory obligations to remedy the SLC outweighed the more limited benefits of such an approach.

36. Neither the Department for Transport nor the Scottish Executive made a submission to the CC in response to the remedies notice.
37. Even assuming that the policy considerations raised by respondents are matters that the CC might legitimately consider in deciding on a remedy, the general policy concerns raised by a number of respondents to the draft undertakings cannot be said to constitute a material change of circumstances or special reason to depart from the duty of consistency.

The significance of the benefits of the joint venture

38. The overwhelming majority of the responses to the undertakings were concerned with the loss of benefits that arise on a sale. The CC considered the significance of the benefits of the joint venture at length in Appendix O of the report and in the report itself in paragraphs 8.62 to 8.66. In paragraph 8.67 the CC concluded that:

... some relevant customer benefits did arise from the joint venture, for example easier timetable coordination and improved connectivity. We noted that these benefits were not in all cases particularly significant, although they were more likely to be preserved by behavioural remedies rather than a divestment remedy. However, we saw no reason to conclude on balance that these relevant customer benefits outweighed the benefits that result from competition; for example, competitive levels of fares and service frequencies rather than fares and frequencies determined by behavioural remedies.

Thus, in the report the significance of the relevant customer benefits that flow from the joint venture were, in accordance with the Enterprise Act 2002 and with the CC's guidelines, considered against the desirability of restoring competition on the Saltire Cross route group. The restoration of competition was considered more important for the reasons identified in the report. It is important to bear in mind that the CC is under a duty to remedy the SLC and any adverse effects that flow from it.

39. The CC appreciates the significance of the many responses that it has received from MPs, MSPs and local authorities in connection with the benefits of the joint venture. The views of passengers and their elected representatives are a matter that the CC takes very seriously, particularly in considering relevant customer benefits. Bodies such as the Scottish Executive and local authorities are able to tell the CC about the wider benefits that may flow from a merger. In reaching its decision on the appropriate remedy, the CC had regard to the views of local authorities, Stagecoach, Braddell and Scottish Citylink of the benefits arising from the joint venture. Those views, like the views of the respondents to the undertakings, have to be tested against the facts of the case, as they were when the CC considered relevant customer benefits in the report. It should be noted that during the inquiry the views of local authorities were divided on whether the benefits claimed for the joint venture were genuinely the product of the joint venture or whether they would have arisen in any event—a distinction which the CC is required to draw. While the CC does not in any way wish to suggest that the views expressed to it in the responses to the draft undertakings are insubstantial, they do not, in the CC's view, raise new matters of fact about relevant customer benefits or demonstrate that the CC has in any way overlooked the nature of the relevant customer benefits.

40. Consequently, while recognizing that the responses to the draft undertakings are matters that might have been taken into account in considering the evidence in favour of relevant customer benefits during the inquiry, the CC does not consider that the responses suggest that it in any way underestimated or overlooked the nature or importance of those benefits in reaching its decisions on the remedy (including in the weighing of the relevant customer benefits against the sale). On the contrary, the issues raised in the responses are effectively the same as those considered during the inquiry and in the report: as such, they do not constitute new evidence which might cause the CC to change its conclusions either on the scale of customer benefits or the proposed divestment remedy. Consequently, the CC does not consider that the responses concerned with the benefits of the joint venture represent a material change of circumstances.
41. Nor does the CC consider that there are special reasons for departing from the duty of consistency. Like the competitive constraints on scheduled coach services, the nature, scale and scope of relevant customer benefits are essentially matters of fact. Neither the substance of the responses on relevant customer benefits, nor the consequences of a sale on them, are matters that the CC overlooked in any way in the report. They are not a special reason.
42. In the CC's view the responses do not individually or collectively show that in the report it was unsighted as to the nature and scope of the relevant customer benefits that flow from the joint venture. While the CC accepted in the report that there were such customer benefits, it was and is the CC's view that the balance of advantage lies in remedying the SLC.

Conclusion

43. The CC has considered the responses to the undertakings very seriously. The main issue that the CC has to decide in relation to those responses that address the report is whether they manifest a material change of circumstances or special reason enabling the CC to derogate from its duty of consistency. In considering these questions, particularly where complex issues of fact are raised, the CC has to consider all the evidence, and not just the matters raised in the responses themselves. For the reasons given above, the CC does not consider that the responses to the undertakings can be said to be, or contain evidence of, a material change of circumstances or special reason. In particular, the responses do not, when taken with all the evidence received by the CC during the inquiry, constitute new facts, or demonstrate that the facts relied upon by the CC were false or misleading.
44. In consequence, the CC does not now have to go on to consider whether it should deviate from its decision as set out in the final report, for example by pursuing a remedy other than the sale identified in the report.
45. In relation to the undertakings themselves, the CC notes the concerns that have been raised but considers that the undertakings as currently drafted strike the right balance between the need to provide a window of stability immediately after the divestiture and the need to allow competition to develop in the market. The CC also notes that its remedy has been designed to help a purchaser offer competitive and attractive services to passengers.
46. For these reasons, the CC has not sought to amend the undertakings as consulted upon.

10 May 2007