

**REFERENCE RELATING TO THE ANTICIPATED ACQUISITION BY  
FIRSTGROUP PLC OF THE SCOTTISH PASSENGER RAIL FRANCHISE  
CURRENTLY OPERATED BY SCOTRAIL RAILWAYS LIMITED**

**Notice of Possible Remedies under Rule 11 of the  
Competition Commission Rules of Procedure**

**Introduction**

1. On 13 January 2004, the Office of Fair Trading (the OFT), in exercise of its duty under section 33 of the Enterprise Act 2002 (the Act) and its power under section 36(5) of the Act, referred to the Competition Commission (CC) the anticipated acquisition by FirstGroup PLC (FirstGroup) of the Scottish Passenger Rail Franchise (the Scottish rail franchise) currently operated by ScotRail Railways Ltd (ScotRail).
2. In its provisional findings on the reference notified to FirstGroup on 28 April 2004 (the Provisional Findings), the CC inquiry group (the Group) concluded provisionally that the anticipated merger, if carried into effect, would result in the creation of a relevant merger situation; and that the creation of that situation may be expected to result in a substantial lessening of competition within a number of local markets, namely particular markets for point-to-point public transport journeys on a number of routes serving overlap flows specified in Appendix G of the provisional findings and any additional routes which might come into being with these characteristics during the term of the Scottish rail franchise; and in the wider public transport network markets in and around the Strathclyde Passenger Transport Executive (SPTe) area, Edinburgh and the Lothians and elsewhere in Scotland.
3. This notice sets out the actions which the Group considers might be taken by the CC, including any recommendations it might make for action on the part of others, for the

purpose of remedying the substantial lessening of competition and any resulting adverse effects identified in the provisional findings and invites comments on possible remedies (see note (i)).

### **Possible remedies on which views are sought**

4. The Group's current view is that the substantial lessening of competition and any resulting adverse effects identified can be remedied effectively by a number of behavioural undertakings; it therefore believes it is unlikely to be necessary for the proposed acquisition by FirstGroup of the Scottish rail franchise to be prohibited, or to require divestment of any of the bus operations (routes, or facilities such as depots) of FirstGroup.
  
5. The CC therefore invites views on the following possible remedies:
  - (a) action to restrict FirstGroup's ability to raise prices, reduce frequencies, reduce number of services, reduce service quality, change last/first bus times, and reconfigure the route. Such restrictions could be applied to routes which currently comprise those specified in Appendix G of the provisional findings or to any additional routes which might come into being with these characteristics during the term of the Scottish rail franchise and/or to wider networks. Such restrictions might include, for example:
    - (i) not permitting fare increases on certain routes or networks beyond increases on other routes or networks, or the countrywide average fare increase, or the rate of inflation without approval;
    - (ii) not permitting changes to the validity of fares (for example, off-peak fares or day tickets) without approval;

- (iii) not permitting changes to fare stages without approval;
  - (iv) not permitting changes to the service (for example, timetables, service frequencies, quality of buses, routings) without approval; and
  - (v) not permitting reductions in the annual bus or seat mileage on particular routes or across a particular network.
- (b) action to restrict FirstGroup's ability unfairly to disadvantage other established players or new entrants by reducing fares, increasing frequency, and increasing number of services on routes which currently comprise those specified in Appendix G of the provisional findings or to any additional routes which might come into being with these characteristics during the term of the Scottish rail franchise and/or on wider networks. Such action might include:
- (i) setting maximum permitted reductions in fares on particular routes and/or particular networks;
  - (ii) permitting fare reductions only where they are applied across a group of routes or a network, rather than on an individual route;
  - (iii) permitting fare reductions only where the reduced fare will remain in place for a specified minimum period (for example, three years);
  - (iv) setting maximum service frequency or minimum spacing between buses; and
  - (v) not permitting changes to the service (timetable, service frequency) without approval and/or unless such service changes will remain in place for a specified minimum period (for example, three years).
- (c) action to restrict FirstGroup's ability to damage competition through the introduction and/or administration of a multi-modal ticket; this might include:
- (i) prohibition on the introduction of a FirstGroup-exclusive multi-modal ticket;

- (ii) commitment to participate in, for example, SPTE or local authority supported multi-modal multi-operator tickets and to use best endeavours to encourage their success; and
    - (iii) prohibition on exerting any voting rights or equivalent influence as operator of the Scottish rail franchise on the pricing of, revenue allocation within, or admission of new operators to, any multi-modal multi-operator ticketing schemes, including the current ZoneCard in Strathclyde;
  - (d) action to ensure the provision of information to the public about services of other bus and rail operators serving its stations. Such action might include a requirement to provide such information to the reasonable satisfaction of, for example, the SPTE or local authorities in other areas, perhaps building on such information requirements as already exist.
- 6. It will also be necessary to make provision for supply by FirstGroup of such information to the monitoring authority as is required for the effective and timely monitoring of compliance. There may also be scope for involvement of the SPTE, local authorities, the Strategic Rail Authority (the SRA) and/or the Office of the Rail Regulator (the ORR) in the monitoring of such action.
- 7. Various means might be used to give effect to these possible remedies. These include:
  - (a) obtaining a new set of undertakings from FirstGroup, further to the current undertakings given by FirstGroup following the FirstBus: SBH MMC Inquiry in 1997 relating to parts of central and south-east Scotland, outside Edinburgh, details of which are set out in Appendix J of the Provisional Findings (the current undertakings);

- (b) a recommendation to the OFT to advise the Secretary of State for Trade and Industry to retain or vary the current undertakings;
  - (c) a recommendation to FirstGroup and the SRA that provisions be included in the Scottish rail franchise agreements; and
  - (d) a recommendation to the ORR that provisions be included in FirstGroup's passenger train operating licence.
8. The Group would, of course, also be willing to consider any practical alternative remedies, structural or behavioural, that FirstGroup or other persons would like to propose to address the expected substantial lessening of competition and/or any resulting adverse effects (a number of parties have already proposed possible remedies, as included in the material on our web site): and would welcome any comment on the specific routes listed in Appendix G to which remedies such as those in paragraph 5(a) and (b) above would apply.

## **Criteria**

9. In choosing appropriate remedial action, the Group will have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the substantial lessening of competition and any adverse effects resulting from it. When deciding what is an appropriate remedy, the Group will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies which the Group considers equally effective, it will choose that which imposes the least cost or restriction.

## **Relevant customer benefits**

10. The Group will also have regard to the effects of any remedial action on any relevant customer benefits within the meaning of Section 30 of the Act arising from the merger situation. During the course of the inquiry, two possible customer benefits have been raised with us:

- (a) that the merger between a main bus operator and the predominant rail operator in Scotland may assist transport integration. A number of third parties, however, have argued that transport integration does not require common ownership of bus and rail operations, and in this respect no benefits may be expected as a result of the merger. We also note that requirements to promote transport integration are specified in the invitation to tender for the Scottish rail franchise, and would apply to any successful franchisee. Our current view is that no relevant customer benefits may be expected as a result of the merger; and
- (b) that, on the basis that public sector bodies can also be regarded as customers, should FirstGroup be the successful bidder for the franchise, we should take into account any better terms offered by FirstGroup for operation of the franchise. Although such benefits may be relevant were we to consider preventing the merger, our current view is that the possible remedies we have put forward above would not call such benefits into question.

## **The next steps**

11. FirstGroup is requested to provide any views in writing, including any alternative remedies it wishes the Group to consider, by 13 May 2004.

12. A copy of this notice will be posted on the CC's web site. Other interested parties are invited to give their views on possible remedies, in writing, by 13 May 2004.

Signed

Professor Paul Geroski  
Group Chairman  
28 April 2004

*Notes*

- (i) This Notice of possible actions to remedy the substantial lessening of competition and any resulting adverse effects is given having regard to the Group's provisional findings notified to FirstGroup on 28 April 2004. FirstGroup has 21 days in which to respond to those provisional findings. In the light of any responses by FirstGroup, or by other interested or affected third parties, the Group's findings may alter, in which case the Group may consider other possible remedies, if appropriate.