EXPLANATORY MEMORANDUM TO

THE COMPETITION ACT 1998 (PUBLIC TRANSPORT TICKETING SCHEMES BLOCK EXEMPTION) (AMENDMENT) ORDER 2016

2016 No. 126

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This order extends for a further ten years an existing block exemption under section 6 of the Competition Act 1998. This exemption was first established in 2001 by the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (S.I. 2001/319). This provides that agreements between public transport operators relating to certain ticketing schemes falling within the terms of the block exemption are exempt from the prohibition in Chapter I of the Competition Act 1998 (which prohibits anti-competitive agreements and arrangements).

2.2 This order also makes two changes to the block exemption: it simplifies the definition of a multi-operator travel card and amends the descriptions of the permitted ticketing schemes to ensure that they can include tickets sold using "Smart" technology.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Chapter 1 of the Competition Act 1998 (the Act) prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect, the prevention, restriction or distortion of competition within the United Kingdom (or any substantial part of it).

4.2 Section 9(1) of the Act sets out the conditions under which a restrictive agreement is exempt from the Chapter I prohibition.

4.3 Section 6 of the Act empowers the Secretary of State, acting on the recommendation of the Competition and Markets Authority (CMA), to make a block exemption order exempting from the Chapter I prohibition agreements that fall within a category the CMA considers are likely to satisfy the conditions for exemption set out in section 9(1) of the Act.

4.4 On 8 February 2001, the Secretary of State exercised his power by making the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (S.I. 2001/319). The Secretary of State made two further orders in 2006 (S.I. 2005/3347) and 2011 (S.I. 2011/227) which extended the 2001 Order for two further periods of five years, the most recent of which expires on 29 February 2016.

4.5 As required under section 8(4) of the Act, the CMA has consulted on its proposals for extending the duration of the existing order before making a recommendation to that effect to the Secretary of State under section 8(3) of the Act.

5. Extent and Territorial Application

5.1 This instrument extends to all of the United Kingdom.

5.2 This instrument applies throughout the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 In 2001, the then Director General of Fair Trading concluded that agreements between public transport operators relating to certain types of integrated public transport ticketing schemes were likely to satisfy the conditions for exemption set out in section 9 of the Act. Ticketing schemes were considered to deliver benefits for passengers, transport operators and other consumers by increasing the quality and flexibility of transport services for passengers or by improving the viability of public transport networks. The Director General recommended that the Secretary of State make a block exemption order for such agreements, providing greater legal clarity for transport operators in circumstances where otherwise such agreements might not take place. In 2005 the Office of Fair Trading (OFT), which had succeeded the Director General of Fair Trading, recommended that the Secretary of State vary and extend that order for a five-year period. In 2010 the OFT recommended that the Secretary of State extend the order for a further five-year period.

7.2 The CMA (which began operating in 2014 and took on the competition functions of the OFT and Competition Commission) continues to consider that the benefits that the ticketing schemes covered by the block exemption bring to the consumer outweigh any negative effects such schemes have on competition. Consumer benefits are mainly in the form of improvements in the quality and flexibility of public transport ticketing services, for example allowing a consumer to use one ticket for a journey involving travel on more than one operator's services.

7.3 Following a public consultation – the overwhelming majority of respondents to which supported the CMA's proposal – the CMA considered that the block exemption for such agreements should be extended. In the view of the CMA, the ticketing schemes covered by the block exemption continue to constitute clearly identifiable categories of public transport ticketing schemes that deliver efficiencies and benefits to consumers, without eliminating competition on public transport or allowing restrictions that are not indispensable to obtaining the benefits from the agreement.

7.4 The CMA considers that there is a significant and real risk that the ticketing schemes may not be entered into, and that existing agreements may be terminated, to the detriment of consumers, if the block exemption is not extended. In the CMA's view, this is owing to the fact that benefits to consumers from ticketing agreements are typically substantial but benefits, in particular revenues to some transport operators, may in some instances be relatively small. Also, transport operators may be concerned about the risk of sanction under competition legislation in the absence of the block exemption. Additionally, the need for cooperation in relation to public transport ticketing schemes is considered greater than the need for cooperation in relation to agreements in other sectors.

7.5 The ticketing schemes covered by the block exemption are multi-operator travel cards (MTCs), through tickets (TTs), multi-operator individual tickets (MITs), and short and long distance add-ons.

7.6 This order extends the block exemption for the longer period of ten years, so as to give greater legal certainty and reduce burdens on businesses. In addition, it also varies the block exemption in two ways. The first variation is to simplify the definition of the MTC, by redrafting it to make it easier to understand and to apply in practice; and to ensure that efficient schemes with fewer than three operators can take place as long as they are intended to operate as schemes for MTCs and not multi-operator individual tickets. The second variation is to remove all the references to "in a single transaction" from Article 4, where the ticketing schemes covered by the block exemption are listed. This is designed to accommodate some new "Smart" ticket products, which are not always bought in a single transaction.

8. Consultation outcome

8.1 In reviewing whether or not to recommend extending the block exemption, the CMA undertook a public consultation. It received 31 responses which were mostly from transport operators and local authorities. There was widespread agreement from respondees that the block exemption should be extended and that there was no other alternative to regulation that was reasonable and practicable.

8.2 Taking account of the responses received, the CMA also considered whether any changes were needed, and decided to make the two changes outlined above.

8.3 The CMA's response to the consultation can be viewed at the following link: https://assets.digital.cabinet-office.gov.uk/media/56695090ed915d0362000006/Public_transport_ticketing_schemes_block_exemption_review_-_final_report.pdf

9. Guidance

9.1 The OFT published guidance for transport operators which covers an overview and application of the existing block exemption. The guidance can be found at the following link: http://www.oft.gov.uk/news-andupdates/press/2006/169-06

9.2 The CMA plans to produce updated guidance shortly after implementation. It will seek to improve the clarity of the guidance so as to make it easier for local transport authorities, operators and others to develop ticketing schemes.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared.

10.4 Ticketing schemes permitted under the block exemption provide economic benefits for passengers, operators and other consumers. Extending the exemption for a further 10 years will ensure that additional extra burdens on business are avoided.

10.5 The exemption qualifies as a 'fast track' low cost measure under the Better Regulation Framework, and so the impact on business will be validated by the Regulatory Policy Committee.

11. Regulating small business

11.1 The exemption covers activities that are undertaken by small businesses.

11.2 No particular negative impacts on small businesses have been identified.

12. Monitoring & review

12.1 As with other SIs, the Department will carry out a review of the block exemption and publish a report setting out the conclusions of the review within 5 years of 29th February 2016. This will ensure that whilst the block exemption has been extended for 10 years rather than 5 years as previously, there will be an opportunity for the appropriateness of the terms of the exemption to be considered by the Department at the 5 year stage and any changes in circumstances which might warrant amendment to its terms to be assessed.

12.2 The CMA has a duty to review the block exemption before recommending any further extension when this order expires in 2026. The next review, which will include a public consultation, is planned for 2025. The CMA also has a role in monitoring the use of the block exemption which includes ensuring that agreements between transport operators to provide ticketing schemes meet its criteria.

13. Contact

13.1 Tony Monblat at the Department for Business, Innovation and Skills Tel: 0207 215 6982 or e-mail tony.monblat@bis.gsi.gov.uk can answer queries regarding this instrument.