
DRAFT STATUTORY INSTRUMENTS

2023 No.

The Transport (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2023

PART 3

Bus Services and Ticketing Arrangements and Schemes

CHAPTER 1

Enforcement of the Competition Test

Interpretation

4. In this Chapter—

“the CMA” means the Competition and Markets Authority⁽¹⁾,

“the competition test” means the test specified in section 37 of the 2001 Act⁽²⁾ (competition test for exercise of bus functions),

“relevant function” means—

- (a) making and varying partnership schemes⁽³⁾,
- (b) making ticketing schemes⁽⁴⁾ on or after the date on which this Part comes into force,
- (c) varying ticketing schemes made on or after that date,

and any reference in this Chapter to a proposed exercise of a relevant function is to be construed in accordance with section 37(2) of the 2001 Act.

Investigation by the CMA

5. If at any time the CMA considers that the exercise or proposed exercise of a relevant function may not meet the competition test, the CMA may conduct an investigation.

Provision of information

6.—(1) For the purposes of an investigation under article 5 the CMA may require any person other than a Minister of the Crown within the meaning of the Ministers of the Crown Act 1975⁽⁵⁾—

- (a) to produce to the CMA or to a person appointed by the CMA, at a specified time and place, any specified document,

⁽¹⁾ Established by the Enterprise and Regulatory Reform Act 2013 (c. 24), section 25.

⁽²⁾ Section 37 has been relevantly amended by the Transport (Scotland) Act 2019, the schedule, paragraph 3(3).

⁽³⁾ See section 3B, with section 82(1), of the Transport (Scotland) Act 2001 for the meaning of “partnership scheme”. Section 3B was inserted by the Transport (Scotland) Act 2019, section 35. Section 82(1) is relevantly amended by the Transport (Scotland) Act 2019, the schedule, paragraph 3(9)(a)(iii).

⁽⁴⁾ See section 29(3), with section 82(1), of the Transport (Scotland) Act 2001 for the meaning of “ticketing schemes”. Section 29 was relevantly amended by the Transport (Scotland) Act 2019 (asp 17), section 44. There are amendments to section 82(1) which are not relevant to this definition.

⁽⁵⁾ 1975 c. 26. See section 8(1) for the meaning of “Minister of the Crown”.

- (b) to provide the CMA or such a person, at such a time and place, with any specified information,

which the CMA considers relates to any matter relevant to the investigation.

(2) The power conferred by paragraph (1) is to be exercised by a notice in writing indicating the subject matter and purpose of the investigation, and in this article “specified” means—

- (a) specified, or described, in the notice, or
- (b) falling within a category which is specified, or described, in the notice.

(3) Information required to be provided under paragraph (1) must be provided in the specified manner and form.

(4) The power conferred by paragraph (1) to require a person to produce a document includes power—

- (a) to require that person to provide an explanation of the document, or
- (b) if the document is not produced, to require that person to state, to the best of that person’s knowledge and belief, where it is.

(5) A notice does not have effect to the extent that complying with the notice would involve the disclosure of information which would contravene the data protection legislation or any other enactment relating to the disclosure of information, or give rise to the commission of an offence (but the duty or power is to be taken into account in determining whether the disclosure or use would contravene that legislation).

(6) In this article “information” includes estimates and forecasts.

Failure to comply with a notice

7.—(1) If a person, without reasonable excuse, refuses or fails to comply with a notice under article 6, the CMA may apply to the Court of Session for an order requiring the person to comply with the notice within a time specified in the order.

(2) An order under paragraph (1) may provide for all of the expenses of, or incidental to, the application to be borne by that person.

Privileged communications

8.—(1) A person is not required by article 6 to produce or disclose a privileged communication.

(2) In paragraph (1) “privileged communication” means—

- (a) communications between a professional legal adviser and a client of that adviser, or
- (b) communications made in connection with or in contemplation of legal proceedings and for the purposes of those proceedings,

being communications which would in legal proceedings be protected from disclosure by virtue of any rule of law relating to the confidentiality of communications.

Notice of decision

9. Before the CMA, as the result of an investigation under article 5, makes a decision that the exercise or proposed exercise of a relevant function does not meet the competition test, the CMA must—

- (a) give written notice to the person or persons likely to be affected by the proposed decision, and
- (b) give that person or those persons an opportunity to make representations.

Publication of decision

10. When the CMA makes a decision after conducting an investigation under article 5, the CMA must publish that decision, together with the reasons for making it.

Enforcement of decisions

11.—(1) If the CMA has made a decision that the exercise or proposed exercise of a relevant function does not meet the competition test, the CMA may give to the local transport authority⁽⁶⁾ or authorities by which it was or was to be exercised such directions as the CMA considers appropriate.

(2) A direction under paragraph (1) may (in particular)—

- (a) in the case of a proposed exercise of a relevant function, include provision prohibiting the exercise of the function in the manner proposed,
- (b) in the case of the exercise of a relevant function, include provision requiring the variation or revocation of the scheme made in exercise of that function.

(3) A direction under paragraph (1) must be given in writing.

(4) If a local transport authority fail without reasonable excuse, to comply with a direction under paragraph (1), the CMA may apply to the Court of Session for an order requiring the authority to comply with the direction within a time specified in the order.

(5) An order under paragraph (4) may provide for all of the expense of, or incidental to, the application for the order to be borne by the local transport authority.

Disclosure of information

12.—(1) No information which—

- (a) has been obtained by the CMA in connection with the CMA's functions under this Chapter, and
- (b) relates to the affairs of any individual or to any particular business,

is to be disclosed during the lifetime of that individual or while that business continues to be carried on, unless the condition mentioned in paragraph (2) is satisfied.

(2) The condition is that consent to the disclosure has been obtained from—

- (a) the person from whom the information was obtained, and
- (b) if different, the individual to whose affairs the information relates or the person for the time being carrying on the business to which the information relates.

(3) Paragraph (1) does not apply to a disclosure of information—

- (a) made for the purpose of facilitating the performance of any function of—
 - (i) the CMA,
 - (ii) the traffic commissioner⁽⁷⁾,
 - (iii) the Office of Rail and Road⁽⁸⁾,
- (b) made for the purpose of criminal proceedings in any part of the United Kingdom or in connection with the investigation of a criminal offence triable in any part of the United Kingdom, or

⁽⁶⁾ See section 82(1) of the Transport (Scotland) Act 2001 ([asp 2](#)) for the meaning of “local transport authority”. There are amendments to section 82 which are not relevant to this definition.

⁽⁷⁾ See section 48 of the Transport (Scotland) Act 2001 ([asp 2](#)) for the meaning of “the traffic commissioner”. There are amendments to section 48 which are not relevant to this definition.

⁽⁸⁾ Established by the Railways and Transport Safety Act 2003 ([c. 20](#)), section 15. Section 15 was relevantly amended by [S.I. 2015/1682](#).

(c) made in compliance with the order of a court or tribunal.

(4) If information is disclosed to the public in circumstances in which the disclosure does not contravene paragraph (1), that paragraph does not prevent its further disclosure by any person.

(5) A person who contravenes this article is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale⁽⁹⁾.

(6) Nothing in this article authorises the making of a disclosure which would contravene the data protection legislation or any other enactment relating to the disclosure of information, or give rise to the commission of an offence (but the power is to be taken into account in determining whether the disclosure or use would contravene that legislation).

False or misleading information

13.—(1) If information is provided by a person to the CMA in connection with the CMA's functions under this Chapter, the person is guilty of an offence if—

- (a) the information is false or misleading in a material particular, and
- (b) the person knows that it is or is reckless as to whether it is.

(2) If a person—

- (a) provides any information to another person, knowing the information to be false or misleading in a material particular, or
- (b) recklessly provides to another person any information which is false or misleading in a material particular,

knowing that the information is to be used for the purpose of providing information to the CMA in connection with the CMA's functions under this Chapter, the person is guilty of an offence.

(3) A person guilty of an offence under this article is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Advice and Information

14.—(1) The CMA must prepare and publish advice and information about—

- (a) the application of the competition test to the making and varying of partnership schemes and ticketing schemes, and
- (b) the enforcement of decisions regarding that test.

(2) The CMA may at any time publish revised, or new, advice or information.

(3) Advice and information published under this article must be prepared with a view to—

- (a) explaining the provisions of this Chapter to persons who are likely to be affected by them, and
- (b) indicating how the CMA expects such provisions to operate.

(4) Advice or information published by virtue of paragraph (3)(b) may include advice or information about the factors which the CMA may take into account in considering whether, and if so how, to exercise a power conferred on it by this Chapter.

(5) Any advice or information published by the CMA under this article is to be published in such form and in such manner as it considers appropriate.

(6) If the CMA is preparing any advice or information under this article it must consult such persons as it considers appropriate.

⁽⁹⁾ See section 113(9A) to (10) of the Scotland Act 1998 (c. 46) for the limits on criminal penalties. Section 113 was relevantly amended by section 39(2) of the Scotland Act 2012 (c. 11).

Defamation

15. For the purposes of the law relating to defamation, absolute privilege attaches to any decision made or notice given by the CMA in the exercise of any of the CMA’s functions under this Chapter.

Fees

16.—(1) The CMA may charge fees in connection with the exercise by it of any of its functions under this Chapter.

(2) Different fees may be charged in connection with different functions and in different circumstances.

CHAPTER 2

Test for Certain Agreements, Decisions and Practices

Interpretation

17.—(1) In this Chapter—

“the 1998 Act” means the Competition Act 1998⁽¹⁰⁾,

“the Chapter 1 prohibition” means the prohibition imposed by section 2(1) of the 1998 Act (agreements etc. preventing, restricting or distorting competition),

“a qualifying agreement” is an agreement between bus undertakings only,

“a qualifying decision” is so much of any decision by an association of undertakings as relates to the operation of local services,

“a qualifying practice” is a concerted practice by bus undertakings only.

(2) For the purposes of paragraph (1)—

(a) a “bus undertaking” is an undertaking which is the operator of a local service,

(b) the involvement of a local transport authority which is not a bus undertaking is to be disregarded,

(c) a partnership scheme is not to be regarded as a qualifying agreement, qualifying decision or qualifying practice.

(3) A provision of this Chapter which is expressed to apply to, or in relation to, a qualifying agreement is to be read as applying equally to, or in relation to, a qualifying decision or a qualifying practice (but with any necessary modifications).

(4) A reference in this Chapter to the area of an authority is a reference to the area of a local transport authority in whose area the agreement is, or is to be, implemented.

(5) For the purposes of this Chapter the “bus improvement objectives” are—

(a) securing improvements in the quality of vehicles or facilities used for or in connection with the provision of local services,

(b) securing other improvements in local services of benefit to users of local services, and

(c) reducing or limiting traffic congestion, noise or air pollution.

⁽¹⁰⁾ 1998 c. 41.

Agreements, decisions and practices to which this Chapter applies

18.—(1) This Chapter applies to a qualifying agreement falling within paragraph (2), unless that agreement (or any of its provisions) constitutes a price-fixing agreement within the meaning given by section 39(9)(11) of the 1998 Act (limited immunity in relation to the Chapter 1 prohibition).

(2) A qualifying agreement falls within this paragraph if—

- (a) it has as its object or effect the prevention, restriction or distortion of competition in the area of the authority, or the combined area of the authorities, but
- (b) the local transport authority, or any of the authorities, have certified that they have considered all the terms and effects (or likely effects) of the agreement and that in their opinion the requirements mentioned in paragraph (3) are satisfied.

(3) The requirements are that the agreement—

- (a) is in the interests of persons using local services within the area of the authority, or the combined area of the authorities, and
- (b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the bus improvement objectives.

(4) For the purposes of paragraph (2) the object or effect of a qualifying agreement may be considered either on its own or together with one or more other qualifying agreements.

The prohibition

19.—(1) Any qualifying agreement to which this Chapter applies is prohibited unless it is exempt in accordance with article 21.

(2) The prohibition in paragraph (1) applies in place of the Chapter 1 prohibition.

Agreements and decisions void

20. Any agreement or decision which is prohibited by article 19 is void.

Exempt agreements

21.—(1) A qualifying agreement to which this Chapter applies is exempt if—

- (a) it contributes to the attainment of one or more of the bus improvement objectives,
- (b) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, and
- (c) it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the services in question.

(2) In any proceedings in which it is alleged that the prohibition in article 19 is being or has been infringed by a qualifying agreement any undertaking or association of undertakings claiming the benefit of paragraph (1) must bear the burden of proving that the conditions in that paragraph are satisfied.

Application of provisions of the Competition Act 1998

22.—(1) The provisions of Part 1 of the 1998 Act specified in paragraph (2) apply in relation to the prohibition in article 19 (and a qualifying agreement to which this Chapter applies) as those provisions apply in relation to the Chapter 1 prohibition (and an agreement to which the provisions of the Chapter 1 prohibition applies).

(11) Section 39 was amended by [S.I. 2004/1261](#).

- (2) The provisions are—
- (a) in Chapter 1, sections 3, 6, 8, 10 and 10A**(12)** (excluded agreements and exemptions),
 - (b) Chapter 3**(13)** (investigations and enforcement), except sections 36 to 39 (penalties),
 - (c) in Chapter 4**(14)**, sections 46 to 49 (appeals), except section 47F and Schedule 8A,
 - (d) Chapter 5**(15)** (miscellaneous), except section 54 (regulators).

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- (12)** Section 3 was amended by the Enterprise Act 2002 (c. 40), section 207, Schedule 25, paragraph 38(2) and Schedule 26. Section 6 was amended by the Enterprise Act 2002, Schedule 25, paragraph 38(5); the Enterprise and Regulatory Reform Act 2013 (c. 24), Schedule 5, paragraph 2; and S.I. 2004/1261. Section 8 was amended by the Enterprise Act 2002, Schedule 25, paragraph 38(7); and the Enterprise and Regulatory Reform Act 2013, Schedule 5, paragraph 3. Section 10 was amended by the Enterprise Act 2002, Schedule 25, paragraph 38(8); the Enterprise and Regulatory Reform Act 2013, Schedule 5, paragraph 4; and S.I. 2019/93. Section 10A was inserted by S.I. 2019/93.
- (13)** Chapter 3 was relevantly amended by the Criminal Justice and Police Act 2001 (c. 16), Schedule 2, paragraph 21; the Enterprise Act 2002, sections 198 and 203(2) and Schedule 25, paragraph 38(19) to (27) and (32) to (34); the Enterprise and Regulatory Reform Act 2013, sections 39, 40, 42(2), 43 and 45, Schedule 5, paragraphs 5 to 19 and 24 to 25, Schedule 13, paragraphs 2 and 3 and Schedule 15, paragraph 9; S.I. 2004/1261; and S.I. 2019/93, as amended by S.I. 2020/1343.
- (14)** Chapter 4 was relevantly amended by the Enterprise Act 2002, section 17, 18 and 19 and Schedule 5, paragraphs 2 to 4 and Schedule 26; the Enterprise and Regulatory Reform Act 2013, Schedule 5, paragraphs 26 to 28; the Consumer Rights Act 2015 (c. 15) Schedule 8, paragraphs 3 to 9; S.I. 2004/1261; S.I. 2017/385; and S.I. 2019/93.
- (15)** Chapter 5 was relevantly amended by the Enterprise Act 2002, section 20 and Schedule 5, paragraphs 5 and 6, Schedule 25, paragraphs 38(37) to (40) and (42) to (45) and Schedule 26; the Communications Act 2003 (c. 21) section 371(5) and (7); the Enterprise and Regulatory Reform Act 2013, Schedule 5, paragraphs 29 to 32 and 34 to 39; the Consumer Rights Act 2015, Schedule 8, paragraphs 13 to 15; S.I. 2004/1261; S.I. 2017/385; and S.I. 2019/93, as amended by S.I. 2020/1343.