

SCHEDULES

SCHEDULE 10

Section 153.

COMPETITION TEST FOR EXERCISE OF BUS FUNCTIONS

Functions to which Schedule applies

- 1 (1) The functions to which this Schedule applies are those of—
- (a) making and varying quality partnership schemes,
 - (b) making and varying ticketing schemes, and
 - (c) inviting and accepting tenders under section 89 or 91 of the Transport Act 1985 (subsidised services).
- (2) For the purposes of this Schedule an authority proposes (or authorities propose) to exercise a function to which this Schedule applies—
- (a) in the case of the function of making or varying a quality partnership scheme, once notice of a proposal to make or vary it has been given under section 115(1),
 - (b) in the case of the function of making or varying a ticketing scheme, once notice of a proposal to make or vary it has been given under section 136(1), and
 - (c) in the case of the function of inviting or accepting tenders under section 89 or 91 of the Transport Act 1985, once it is proposed to invite tenders under section 89(2) or 91(3) of that Act or to accept or not to accept a tender under section 89 of that Act.

Competition test

- 2 (1) For the purposes of this Schedule the exercise or proposed exercise of a function to which this Schedule applies meets the competition test unless it—
- (a) has or is likely to have a significantly adverse effect on competition, and
 - (b) is not justified by sub-paragraph (2).
- (2) The exercise or proposed exercise of a function is justified if—
- (a) it is with a view to achieving one or more of the purposes specified in sub-paragraph (3), and
 - (b) its effect on competition is or is likely to be proportionate to the achievement of that purpose or any of those purposes.
- (3) The purposes referred to in sub-paragraph (2) 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 substantial benefit to users of local services, and
 - (c) reducing or limiting traffic congestion, noise or air pollution.

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Applications to Director for decision

- 3 (1) An application may be made to the Director General of Fair Trading (in this Schedule referred to as “the Director”) for him to decide whether the exercise or proposed exercise of a function to which this Schedule applies meets the competition test.
- (2) An application may be made under this paragraph by—
- (a) the authority or authorities by whom the function has been exercised or is proposed to be exercised, or
 - (b) any operator of local services who is, or is likely to be, affected by the exercise of the function.
- 4 (1) If an application is made under paragraph 3 by the authority or authorities by whom a function has been exercised or is proposed to be exercised, it or they must inform any operators of local services who, in the opinion of the authority or authorities, are or are likely to be affected by the exercise of the function that the application has been made.
- (2) If an application is made under paragraph 3 by an operator of local services, he must inform the authority or authorities by whom the function has been exercised or is proposed to be exercised that the application has been made.
- (3) The Director must arrange for an application made under paragraph 3 to be published in such a way as he thinks most suitable for bringing it to the attention of those likely to be affected by it, unless he is satisfied that it will be sufficient for him to seek information from one or more particular persons.
- (4) The Director may at any time decide not to consider, or further consider, an application made under paragraph 3 if—
- (a) he is of the opinion that he has not been provided with sufficient information to do so by the person or persons by whom the application was made, or
 - (b) sub-paragraph (1) or (2) has not been complied with.
- (5) In determining an application made under paragraph 3, the Director must take into account any representations made to him about the application.

Investigations by Director

- 5 If at any time the Director considers that the exercise or proposed exercise of a function to which this Schedule applies may not meet the competition test, he may conduct an investigation.
- 6 (1) For the purposes of an investigation under paragraph 5 the Director may require any person—
- (a) to produce to him or to a person appointed by him, at a specified time and place, any specified document, or
 - (b) to provide him or such a person, at such a time and place, any specified information,
- which he considers relates to any matter relevant to the investigation.
- (2) The power conferred by sub-paragraph (1) is to be exercised by a notice in writing indicating the subject matter and purpose of the investigation; and in this paragraph “specified” means—
- (a) specified, or described, in the notice, or
 - (b) falling within a category which is specified, or described, in the notice.

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- (3) Information required to be provided under sub-paragraph (1) shall be provided in the specified manner and form.
- (4) The power conferred by sub-paragraph (1) to require a person to produce a document includes power—
- (a) to require him to provide an explanation of the document, or
 - (b) if the document is not produced, to require him to state, to the best of his knowledge and belief, where it is.
- (5) In this paragraph “information” includes estimates and forecasts.
- 7 (1) If a person refuses or fails to comply with a notice under paragraph 6, the Director may certify that fact in writing to the High Court which may enquire into the case.
- (2) If after hearing—
- (a) any witness who may be produced against or on behalf of the person, and
 - (b) any statement which may be offered in defence,
- the High Court is satisfied that the person did not have a reasonable excuse for refusing or failing to comply with the notice, the High Court may punish him as if he had been guilty of contempt of court.
- 8 (1) A person shall not be required under paragraph 6 to produce or disclose a privileged communication.
- (2) In sub-paragraph (1) “privileged communication” means a communication—
- (a) between a professional legal adviser and his client, or
 - (b) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings,
- which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege.
- 9 Before the Director, as the result of an investigation under paragraph 5, makes a decision that the exercise or proposed exercise of a function does not meet the competition test, he 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.

Decisions

- 10 When the Director makes a decision—
- (a) on an application under paragraph 3, or
 - (b) after an investigation under paragraph 5,
- he must publish his decision, together with his reasons for making it.
- 11 If the Director has determined an application under paragraph 3 by making a decision that the exercise or proposed exercise of a function to which this Schedule applies meets the competition test, he is to take no further action under this Schedule with respect to it unless—
- (a) he has reasonable grounds for believing that there has been a material change of circumstance since he made his decision, or
 - (b) he has a reasonable suspicion that the information on which he based his decision was incomplete, false or misleading in a material particular.

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Enforcement of decisions

- 12 (1) If the Director has made a decision that the exercise or proposed exercise of a function to which this Schedule applies does not meet the competition test, he may give to the authority or authorities by which it was or was to be exercised such directions as he considers appropriate.
- (2) A direction under sub-paragraph (1) may (in particular)—
- (a) in the case of a proposal to exercise a function, include provision prohibiting the exercise of the function in the manner proposed,
 - (b) in the case of the exercise of the function of making or varying a quality partnership scheme or a ticketing scheme, include provision requiring the variation or revocation of the scheme,
 - (c) in the case of the exercise of the function of inviting tenders under section 89(2) or 91(3) of the Transport Act 1985, include provision requiring the variation or withdrawal of the invitation, and
 - (d) in the case of the exercise of the function of accepting or not accepting a tender under section 89 or 91 of that Act, include provision requiring the variation or termination of any agreement entered into by accepting the tender or requiring the acceptance of any tender.
- (3) A direction under sub-paragraph (1) must be given in writing.
- (4) If an authority fails, without reasonable excuse, to comply with a direction under sub-paragraph (1), the Director may apply to the High Court for an order requiring the authority to comply with the direction within a time specified in the order.
- (5) An order under sub-paragraph (4) may provide for all of the costs of, or incidental to, the application for the order to be borne by the authority.

Information

- 13 (1) No information which—
- (a) has been obtained by the Director in connection with his functions under this Schedule, 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 sub-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) Sub-paragraph (1) does not apply to a disclosure of information—
- (a) made for the purpose of facilitating the performance of any function of the Director, a traffic commissioner or the Rail Regulator,
 - (b) made for the purpose of facilitating the performance of any function of the European Commission in respect of Community law about competition,

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- (c) 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
 - (d) 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 sub-paragraph (1), that sub-paragraph does not prevent its further disclosure by any person.
 - (5) A person who contravenes this paragraph is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- 14 (1) If information is provided by a person to the Director in connection with his functions under this Schedule, 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 Director in connection with his functions under this Schedule, the person is guilty of an offence.
- (3) A person guilty of an offence under this paragraph is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Defamation

- 15 For the purposes of the law relating to defamation, absolute privilege attaches to any decision made or notice given by the Director in the exercise of any of his functions under this Schedule.

Fees

- 16 (1) The Director may charge fees in connection with the exercise by him of any of his functions under this Schedule.
- (2) Different fees may be charged in connection with different functions and in different circumstances.
- (3) An application under paragraph 3 is not to be regarded as duly made unless any appropriate fee is paid.