Franchised passenger services and ‘excessive’ prices

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Price rises – an abuse under competition law?

"*20% rise in train fares is cleared*." [Metro, 1 June 2007.]

"*Expect…eye-watering rises in the cost of unregulated tickets…The refusal of the rail regulator to intervene … could be seen as a blank cheque for other companies to do the same*." [David Millward, The Daily Telegraph, 14 June 2007.]

"*If the ORR will not reopen the case, we may have to go for a judicial review," … "We have to protect passengers from being exploited by monopolies." [The Guardian quoting Passenger Focus, 1 June 2007.]*

Context – rail franchising

Franchising – aims?

“To secure appropriate rail passenger services at an acceptable price through effective specification and procurement.” [*About the DfT rail group*, http://www.dft.gov.uk/pgr/rail/rail/.]

“Maintain control of the rail franchise specification…whilst allowing for innovation and private sector commercial judgement.” [*Rail franchise replacement process manual, July 2006.*]

“To deliver an efficient service within public expenditure constraints that represents value for money for **passengers and taxpayers**.” [*East Midlands franchise objectives*, emphasis added.]

DfT railways expenditure, 2002/03 to 2008/09 (£m)

	2002-03	2006-07	2007-08*	2008-09*
Direct support to TOCs (net)	930	847	713	766
Other	2,838	3,602	3,704	3,514
Total	**3,768**	**4,449**	**4,417**	**4,280**

Source: DFT Annual Report, May 2007.

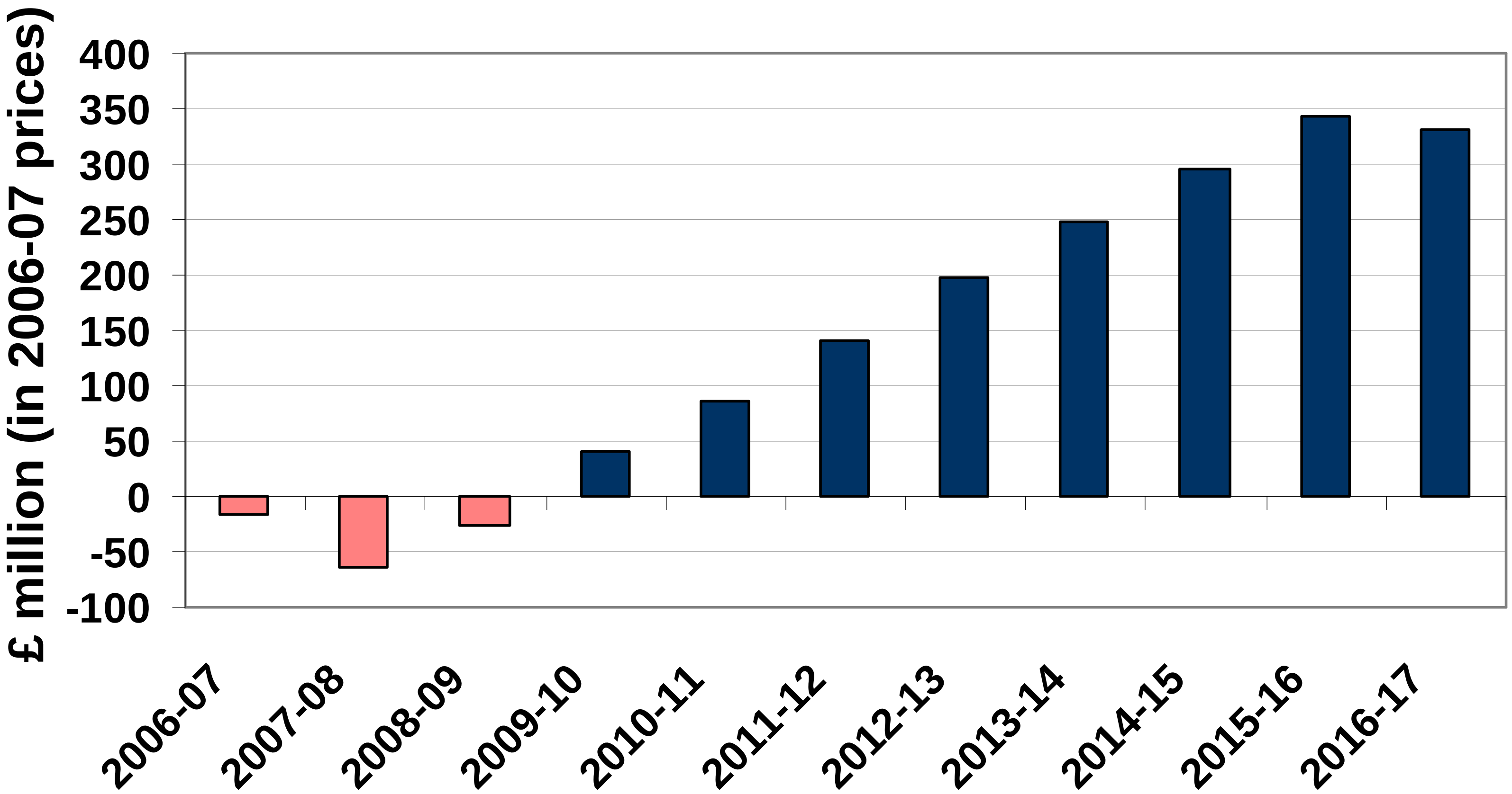
* - Forecasts

Subsidy v. premium, 2000-02 to 2005-06

	2000-01	2005-06
Franchises paying a premium	4	7
Franchises in receipt of subsidy	21	14
Total number of Franchises	25	21
% of Franchises paying premia	16	33

Source: Evidence provided by ATOC to the HOC Transport Select Committee on Franchising, 14th Report, published October 2006.

South West Trains predicted franchise payment profile



Source: http://www.dft.gov.uk/pgr/rail/passenger/franchises/franchisepaymentprofilesa

Government’s position?

“Government balks at challenging rail ticket price rises.”

[Guardian unlimited, 18 May 2007].

"There is nothing that I can or indeed want to do. Regulating more fares will just increase the subsidy."

[Rail Minister Tom Harris, Rail 2007 conference, Birmingham, May 2007].

The scope of regulation

- ‘*Commuter fare regulation*’ (including Standard Day Singles/Returns and season tickets within the London Travelcard zone and other major suburban areas such as Leeds and Manchester).
- ‘*Protected fares regulation*’ (including Saver tickets (for off-peak leisure travel of about 50 miles and over) where a Saver ticket existed in February 2003 and Standard Returns (for journeys of less than 50 miles) where a Saver did not exist in February 2003.

What does all this mean for competition enforcement?

Where

- we have a franchising policy that seeks to minimise subsidy/maximise premium at a TOC and even national level; and
- even premia-paying franchises are unlikely to be self-sustaining when infrastructure costs are taken into account.

But also where

- investigations of excessive pricing are at route or car park level; and
- the scope for the train operator to raise prices is limited by regulation.

Excessive pricing

Excessive pricing – what Is It?

United Brands

"…charging a price which is excessive because it has no reasonable relation to the **economic value** of the product supplied is…an abuse". [Emphasis added.]

Excessive pricing – what Is It? (cont.)

- The ‘test’ must not be read too literally.
- ‘Economic value’ is not only to be assessed by the cost of production of/profit made from the good or service in question.
- There is a clear distinction between whether the profit margin is ‘excessive’ and, whether the price charged is ‘unfair in itself or when compared to the price of competing products.

Further assistance from case law

Scandlines Sverige AB v Port of Helsingborg [2004]

Victor Chandler v BHB [2005]

"*… assessment of the value of the asset both to the vendor and the purchaser must be a crucial part of the assessment.*"

"..some markets are buyers' markets, some are sellers'."

Attheraces v British Horse racing board [2007]

"*There is nothing in the article or its jurisprudence to suggest that the index of abuse is the extent of the departure from a cost+ criterion*."

Back to United Brands

"…whether a price has been imposed which is either unfair in itself or **when compared to competing products**". [Emphasis added.]

Yardstick comparisons

- Deutsche post AG
- Corinne Bodson v Pompson Funebres

Excessive pricing & the railways

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Questions relevant to the railways

- Is the ‘economic value’ of your rail journey then to be the value you receive from a national railway?
- Should the price of your ticket include a cost for future investment in the national railway system?
- What is the ‘value’ of the journey to the passenger?
- What is the relevant comparator?

And moreover

- Is there a dominant position?

Examples – car parks (1)

- Substitutes
- Yardstick comparisons

  "What we have done is to bring car park prices up to the same prices as city centre/town centre car parking prices. We have looked at what other car parks charge in the vicinity and we have moved our prices in line." [HOC transport committee, July 2006, GNER evidence.]

- Possibility of new entry

Examples – car parks (2)

Grantham

- GNER; July 2006, raised daily charge by 100% to £9.
- Dismissed complaint on the basis that there were several alternative car parks within a 5 min. walk.
- April 2007, a large car park opened directly opposite the station.

Audley End

- One Rail; Price rose from £2.20 in 2003 to £5 in 2006.
- Yardstick comparison used of Cambridge car park (operated by FCC) priced at £6.50 per day.

Examples – ticket prices (1)

- Substitutes
- Existence of regulated fare/yardstick comparisons
- Legal direction

Examples – ticket prices (2)

South West Trains (SWT)

- 20 May 2007, introduced a new super off-peak day for travel into London after noon, raising its prices on the saver off-peak fare for travel into London after 10am and before noon by around 20%.
- Regulated, unrestricted open returns priced between 30-100% higher (depending on route).
- Comparator fares by distance in neighbouring franchises.

Examples – ticket prices (3)

London Zonal Pricing

- January 2007, increases in fares from Surbiton into London Waterloo.
- Standard day return and cheap day return tickets increased in price by £2.40 and £1.50 respectively (an increase of 35%).
- Compliance with a legal requirement (Schedule 3, paragraph 5, CA98).

The practical difficulties

- Cost allocation – High proportion of fixed costs
- "*The timetable requires a number of trains, a number of drivers and a number of staff on trains and at stations so the true variable element of a cost base for a train operating company is very small.*" [NEG, 2005-2006 HOC Transport Select Committee on franchising]
- The treatment of premia/subsidy
- Unintended consequences

"…*for whatever else Article 82 does it does not create a European system for determining prices*." [Attheraces v BHB, 2007]

Conclusion – ‘never say never’?

“*the fact that the exercise may be difficult is not, however, a reason for not attempting it*.” [Napp, Case No. 1001/1/1/01, paragraph 392)

- The frequency and magnitude of price rises over time
- The absence of a regulated price comparator/ceiling
- The fare rises are high relative to available unregulated comparators
- The level or absence of subsidy
- The existence of potentially captive consumers