EN

Case No COMP/M.2694 - METRONET / INFRACO

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REGULATION (EEC) No 4064/89 MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 21/06/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21/06/2002

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No COMP/M.2694 – Metronet / Infraco
Notification of 17.05.2002 pursuant to Article 4 of Council Regulation No 4064/89

1. On 17 May 2002, the Commission was notified a proposed transaction pursuant to Article 4 of Council Regulation No 4064/89, as amended[1], by which the undertakings Metronet SSL and Metronet BCV (collectively "Metronet"), controlled jointly by WS Atkins plc ("WS Atkins"), Balfour Beatty plc ("Balfour Beatty"), RWE Aktiengesellschaft ("RWE"), and SEEBOARD Group plc ("Seeboard") acquire within the meaning of Article 3(1)(b) of the Council Regulation control of Infraco SSL and Infraco BCV by means of purchase of shares. These acquisitions arise as a result of the Public-Private Partnership ("PPP") arrangements being put in place by the UK Government.

2. After examination of the notification, the Commission has concluded that the notified operation falls within the Merger Regulation and does not raise serious doubts as to its compatibility with the common market.

I. THE PARTIES

3. **WS Atkins** provides professional, technologically based consultancy and support services. It also provides traditional engineering, management consultancy, property services and related technological consultancy and the management of outsourced facilities. **Balfour Beatty** is in the field of building, building management and services, civil and specialist engineering services, rail and engineering services and investments and developments. **RWE** provides energy, environmental and industrial services and

[1] OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

printing systems. It owns Thames Water which is the participant in Metronet. **SEEBOARD** is in the field of distribution and supply of electricity to domestic, commercial and industrial customers and gas supply. It is part of American Electric Power Company, Inc ("AEP"). **Bombardier** is engaged in the design, development, manufacturing in the aerospace, rail transportation equipment and recreational product industries. It is also engaged in financial services and in the development of real estate interests in Canada.

4. In total there are three infrastructure companies under the ownership of London Underground Limited ("LUL"), Infraco SSL, Infraco BCV and Infraco JNP. These three companies provide infrastructure services on their respective set of lines[2]. They were created as shadow companies within LUL to test the PPP's proposed operating environment. Each Infraco operates under a Service Contract with LUL which sets out the performance targets which the Infracos are required to meet for the services they provide to LUL. One of the principles that underlies the PPP is that once the terms of the Service Contracts have been agreed between LUL and the Infracos, it will be entirely up to the Infracos how they achieve the performance standards set out in them.

5. In return for fulfilling the terms of the Service Contract, the Infracos will receive a fixed payment every four weeks, the Infrastructure Service Charge ("ISC"). If the performance standards set out in the Service Contract are not met, then the ISC will be reduced according to the formulas set out in the Service Contract, thereby transferring risk to the Infracos.

6. The terms of the Service Contract are initially set for the first 7½ years. At that point, the terms will be renegotiated, new performance targets set and a new ISC and incentive regime set for the subsequent 7½ years.

7. A Statutory Arbiter will be appointed (in effect as a form of Regulator) with a variety of roles. These include dispute resolution between LUL and the Infracos at the time of the reviews of the Service Contract, and in determining whether the Infracos have acted in an economic and efficient manner in carrying out their business.

8. The Infracos will lease the existing assets from LUL for the 30 year period of the PPP. At the end of the 30 year period, it is envisaged that the respective consortia will hand over the leased assets plus any upgrades and enhancements they have procured throughout that period to LUL. The Infracos themselves will then be liquidated.

9. Once the PPP arrangements have been implemented, overall responsibility for London Underground will be transferred from Central Government to Transport for London ("TfL")[3]. However, this transfer will not take place until the PPP arrangements have been put in place.

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[2] Infraco SSL covers the Sub Service Lines (Metropolitan, District, Circle, Hammersmith and City and East London); Infraco BCV covers the Bakerloo, Central, Victoria and the Waterloo and City lines. A third Infraco, Infraco JNP, has been acquired by Tube Lines (Holdings) Limited in an operation approved on 14.06.2002 by the UK Secretary of State for Trade and Industry under the UK's Fair Trading Act 1973.

[3] TfL is an executive body of the Greater London Authority (GLA) reporting to the Mayor of London who is also Chair of TfL's Board. It is responsible for delivering the Mayor's integrated transport strategy, in close working partnership with the London boroughs and the Strategic Rail Authority. TfL currently

II. THE OPERATION

10. The operation is the acquisition by WS Atkins, Balfour Beatty, Thames Water, SEEBOARD and Bombardier (collectively the "Metronet shareholders") of Infraco BCV and Infraco SSL from LUL.

11. These acquisitions arise as a result of the Public-Private Partnership ("PPP") arrangements being put in place by the UK Government to solve funding and under-investment problems currently faced by the LUL. As well as acquiring the Infracos, Metronet will also lease the infrastructure for the BCV and SSL lines[4] for the 30 year period of the PPP and take over the existing contracts.

III. CONCENTRATION

12. Four shareholders (WS Atkins, Balfour Beatty, Thames Water and SEEBOARD) all have veto rights over the business plans and budgets of the Infracos. These veto rights give these four shareholders *de jure* joint control over the Infracos.

13. The veto rights allocated to the fifth shareholder, Bombardier, do not give it *de jure* joint control over the Infracos. [...] However, it is not necessary for the Commission to reach a decision on the precise nature of Bombardier's control over the Infracos, since the jurisdiction of the case and the substantive analysis of the operation would be unaffected by the nature of Bombardier's control.

14. As the operation involves the creation of a joint venture, in order to establish the appropriate jurisdiction for the case, it has been necessary for the Commission to assess whether or not the joint venture is fully functional in the sense of the ECMR. Central to this assessment has been the relationship between the Infracos and LUL and whether the joint venture is an autonomous economic entity which operates on a market.

The relationship between the Infracos and LUL

15. LUL has one special share in each of the Infracos (the "Special Share") which enables LUL to appoint a "Partnership Director" to the board of the Infracos. This Partnership Director will have no veto rights in relation to the activities of the Infracos. In addition, there is an agreement ("LUL Shareholders' Agreement") between LUL, Metronet and each Infraco. The LUL Shareholders' Agreement prohibits the Infracos from engaging in specified activities without the prior approval of LUL. It also prohibits the Infracos declaring or paying a dividend or distribution other than in accordance with the Infraco's Articles of Association. The Commission considers that these veto rights are not sufficient to enable LUL to retain control over the Infracos. There will therefore be no parent-subsidiary relationship between LUL and the Infracos.

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includes London Buses, London River Services, Tramlink, Docklands Light Railway, Public Carriage Office (responsible for taxi and private hire vehicle licensing), Street Management and Victoria Coach Station. London Underground will become part of TfL in due course.

4 See footnote 2 above.

Autonomous economic entity

16. The Notice on full functionality highlights that the joint venture must operate on a market and must have a management dedicated to its day-to-day operations and access to sufficient resources in order to conduct its business on a lasting basis.

17. The Infracos are already in existence as distinct entities, […] within LUL. They therefore already operate with a defined business scope and are already equipped with the management and personnel needed to carry on their business. There are in excess of 2500 employees, consultants and agency staff in each of Infraco BCV and SSL. The PPP is to run for a period of 30 years which can be considered as on a lasting basis.

18. The Infracos will lease the existing assets from LUL for the 30 year period of the PPP, or for the remainder of their economic life if that is less than 30 years. These leases enable the Infracos to treat these assets as if they were owned by the Infracos. That the assets are leased as opposed to owned by the Infracos is irrelevant for an assessment of full functionality.

19. The finance for the Infracos is essentially project finance, obtained against the security of future income rather than against collateral provided by the Metronet shareholders. The Metronet shareholders [will invest] a total of £350 million equity into the business, but will not underwrite, guarantee or secure any of the debt finance provided to the Infracos. The Infracos therefore have sufficient finance to carry out their business.

20. Paragraph 14 of the Notice on full functionality states that "[i]n relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself." In the current case, the Infracos will not simply be acting as sales agents for the parents but will add significant value to the products and services that it buys from its parents (and other parties) through the coordination, management and delivery of a composite set of services designed to meet the service standards set by LUL.

21. Finally, for a joint venture to be full function it needs to operate on a market. In this case the Infracos will be active in the market for the provision of composite infrastructure services to LUL. LUL is the only customer in this market. Each Infraco is remunerated for providing services under the Service Contract through an Infrastructure Service Charge ("ISC") which is paid in relation to each four week period and adjusted for performance. The ISC is set for 7½ year periods, and the first ISC was set following the final bid in the procurement process. After this there are periodic reviews to determine the level of the ISC for the next period. The Periodic Review resets the level of the ISC to allow the Infraco to recover its costs for that period based on an "economic and efficient" performance (and the recovery of an agreed level of debt service and equity return). In determining what is an "economic and efficient" performance, regard will be had to the comparative performance of the Infraco in the previous period.

22. In the light of the foregoing, the notified operation is a concentration within the meaning of Article 3(2) of the ECMR.

IV. ARTICLE 2(4) ISSUES

23. This operation raises no issues of concern in relation to Article 2(4), as the creation of the Metronet joint venture does not have as its object or effect the coordination of the competitive behaviour of the parents. The parties highlighted that although the Metronet shareholders are substantial companies with wide-ranging activities, there are no significant overlaps between their activities. Furthermore, the market investigation has not highlighted any areas of concern in relation to coordination outside the scope of the directly affected markets.

V. COMPETITIVE ASSESSMENT

A. Relevant Product Markets

24. It is necessary to examine markets where there are horizontal overlaps between the parties to the concentration, and markets where the Metronet shareholders are active and which are upstream of the activities of the Infracos, in other words where the Metronet shareholders produce or supply products and services which the Infracos will or could purchase.

Markets with horizontal relationships

25. The Infracos are responsible for coordinating, managing and delivering the necessary infrastructure to LUL. The parties have defined this market as the *supply of composite infrastructure services*. The vast majority of respondents to the Commission's questionnaires were satisfied that this is a relevant product market.

Markets with vertical relationships

- *Supply of underground rolling stock*

26. The notifying parties have argued that there is a relevant market definition for the supply of underground (metro) vehicles. In reaching this decision, they rely almost entirely on the arguments the Commission accepted in its decision in case COMP/M.2139 - Bombardier/ADtranz[5]. For example, they argue that metros are heavier and sturdier than light rail vehicles and trams and are classified as 'heavy rail'. To distinguish between metros and mainline/regional vehicles, the parties highlight that metros: need to accommodate very high passenger flows and will have about 60% standing room; are fixed formation rather than combinable units; have lower power outputs and top speeds than mainline/regional trains; are built to accelerate and decelerate quickly and will use dedicated infrastructure.

27. The Commission's market investigation was not conclusive on whether or not the supply of underground railway vehicles should be considered as a separate relevant market from the supply of mainline vehicles. Respondents recognised that there are different product standards and specifications, but emphasized that supply-side factors – in particular the fact that the vehicle suppliers are frequently the same companies – point towards a unified market.

[5] Decision dated 03/04/2001. Published in OJ L69, Volume 45, L69/50 to L69/68, 12 March 2002

28. For the purposes of this case, the boundaries of the rolling stock markets can be left open because however they are examined, the operation does not threaten to create or strengthen a dominant position as a result of which effective competition will be significantly impeded.

- *Maintenance of rolling stock*

29. The notifying parties have distinguished between light and heavy maintenance and between these and refurbishment. Light maintenance is carried out at the train's depot and involves day-to-day repairs, component exchanges and safety checks. Heavy maintenance involves the use of heavy machinery and is usually carried out in a factory environment. Refurbishment involves the modernisation and adaptation of rolling stock. Commission has previously looked at light and heavy maintenance markets separately from supply of the equipment.

30. In the context of defining relevant maintenance markets, the use of design, build, operate and maintain contracts is now commonplace as a means of managing risks. Where it was once customary for rail owners to maintain their own rolling stock directly, rolling stock orders are now frequently accompanied by long-term maintenance contracts. The notifying parties have indicated that the vast majority (over 80%) of the railway vehicles ordered in the UK since rail privatisation have ongoing maintenance contracts. The results of the Commission's market investigation supported the view that the supply of new rolling stock could be analysed together with the maintenance of that rolling stock. However, for the purposes of this case it is not necessary to decide whether supply and maintenance should be considered as complementary services within a single market, as the analysis is unaffected by the manner in which the market is drawn.

- *Signalling*

31. Signalling consists of all components, systems and sub-systems required to protect the traffic flow of trains and to guarantee their safe operation. This can be extended to include automatic operation of trains, so that functions such as accelerating, decelerating and stopping are managed by the system. The provision of signalling constitutes a distinct product market, although there is a question as to whether this should be divided further into high-tech and low-tech markets as was done in a previous decision in 1996 (M.685 – Siemens/Lagardère). For the purposes of this case it is not necessary to decide precisely where the boundaries of the market should be drawn, as the analysis would be unaffected.

- *Supply of track and rail services*

32. The Infracos will be responsible for the supply of track and rail services[6]. This includes the renewal of track as well as its maintenance and day-to-day repair work to the track-side facilities such as signalling and power systems. The notifying parties consider that

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[6] The notification uses the terminology of "fixed rail infrastructure services", which could also include signalling systems and the power systems. Signalling is discussed separately in this decision, and the power systems were the subject of a separate Private Finance Initiative ("PFI") project in 1998 covering the renewal, operation, upgrade and maintenance of the high voltage electricity supply across the Underground network. This will be unaffected by the PPP. Therefore this section focuses on the supply of track services.

the maintenance and renewal of the track belong in the same relevant market, on the basis that the operators all need to possess the necessary skills to provide track that is available for safe operation as soon as it is handed to the customer. The customers for these services in the UK are Railtrack, LUL and operators of other independent transit systems. This view of the relevant market has been supported by the Commission's market investigation.

B. Relevant Geographic Markets

- *Composite infrastructure services*

33. Each of the Infracos provides a set of infrastructure services to LUL as provided for in the relevant Service Contract. The notifying parties have therefore argued that the geographic scope of this market is limited to London Underground. The Commission concurs.

- *Supply of underground rolling stock*

34. In its Bombardier/ADtranz decision the Commission found that the geographic market for the supply of underground vehicles was largely national for those Member States with a strong national rail industry. The notifying parties in the current case have argued (as Bombardier did in the previous case) that the obligation to comply with EC procurement law for tendering for rolling stock means that the geographic market may be EU wide rather than national.

35. For the purposes of this case, the boundaries of the rolling stock markets can be left open because however they are examined, the operation does not threaten to create or strengthen a dominant position as a result of which effective competition will be significantly impeded.

- *Maintenance of rolling stock*

36. The parties consider that the maintenance of rolling stock markets are national as the markets are limited to those operators able to access depots (for light maintenance) and because there are significant costs involved in transporting rolling stock to the factories (for heavy maintenance and refurbishment). This is in accordance with the definition in the Commission's Bombardier/Adtranz decision and has been supported by the results of the Commission's market investigation.

- *Signalling*

37. The parties have indicated that there is some debate as to whether the market for signalling should be regarded as national or whether it should now be considered EU-wide on the basis that there are several major companies competing for contracts across Europe. The Commission's market investigation has also proved inconclusive on this point, some respondents arguing that it is national, some that it is European and others that it is worldwide.

38. For the purposes of this assessment it is not necessary to reach a definitive conclusion on this point.

- *Supply of track services*

39. The notifying parties argue that the relevant geographic market for the supply of track services is UK-wide. This has been largely confirmed by the Commission's market investigation.

C. Competitive Impact

40. This operation results from a tendering procedure in which the UK Government considers complies fully with the procurement requirements of the relevant European procurement legislation, notably Directive 93/38/EEC ("The Utilities Directive").

41. TfL has argued that the award of the PPP followed a tendering procedure which was not fully competitive. In particular TfL has argued that after Metronet was selected as the preferred bidder there were major modifications made to the contracts which invalidated the procurement procedure and which may amount to State aid (see paragraphs 63 to 71 below). TfL has also argued that the selection of the preferred bidders took place too soon in the procurement process and that this effectively excluded other potential competitors from the opportunity to compete on fair terms with Metronet.

42. Had the procurement process been different, it is entirely possible that the current operation would not have existed. However, this is not relevant for the current assessment as the Commission is only required to examine the operation notified to it and to assess its competitive impact. It is not required to assess the impact of an operation which does not exist.

43. Other than the markets specifically discussed below, the Infracos will also procure a number of services such as construction, mechanical and electrical services, civil engineering and railway consultancy services. In none of these areas do the Metronet shareholders have levels of activity which give rise to affected markets in the sense of the ECMR. These activities are therefore not addressed any further in this decision.

Markets with horizontal relationships

- *Composite infrastructure services*

44. In a market for the supply of composite infrastructure services to LUL, there are clearly no overlaps between the activities of the Metronet Shareholders and the activities of the Infracos as this is a new line of business for the Metronet Shareholders.

Markets with vertical relationships

- *Supply of underground rolling stock*

45. A contract for the supply of all the new rolling stock that is to be delivered in the first 15 years of the PPP will be awarded to Bombardier. This contract is for the supply of 237 new trains. 255 trains are not expected to reach the end of their economic life within the 30 year period of the PPP but the Infracos will be under a contractual obligation to undertake a tendering exercise for a further 146 trains which will need to be replaced [...](see paragraph 50 below).

46. Over the period 1995-2001, Bombardier estimates its market share of new underground vehicles to be nil in the UK and [between 50% to 60%] in the EU. In the UK only Alstom has supplied new underground vehicles to LUL in that period. This supply entailed 165 trains for the Northern and Jubilee Lines, representing 29% of London Underground's fleet. As a result of the contract awarded to Bombardier, its market share (based on number of new vehicles) in the UK will increase from nil to [between 60% to 70%] and in terms of value from nil to [between 70% to 80%].[7] Bombardier is therefore a new entrant to the UK market. On an EU basis, Bombardier's share will rise from [50-60]% to [55-65]%.

47. The increase in Bombardier's market share results from a tendering procedure in which other competitors were able to (and did) participate. As was noted by the Commission in the Bombardier/ADtranz decision (paragraph 39), in markets where contracts are awarded through bidding procedures, it is insufficient to examine market share figures alone. This is because market shares in bidding markets are by their nature, lumpy, and they only take into account the activity of the winners of a given contract but do not show how many credible competitors actually participated as bidders and thus created competitive constraints.

48. The Commission has examined whether or not the rolling stock sub-contracts implicit in the Metronet bid have the effect of foreclosing others from the market. Contracts for new rolling stock are by their nature, lumpy. Due to under-investment in the past, it has become necessary to replace the trains of a number of different lines within a relatively short period. It is normal practice that all the rolling stock for a particular line is supplied by one company to avoid duplication of costs by the producers and to ensure uniformity and ease of operation for the train operators. Of the trains which Bombardier will supply, 80% are for the sub-surface lines contained in Infraco SSL. This is an integrated network and the rolling stock for one line can be used on any of the other lines. Metronet claims that due to the economies of scale involved it would be able to reduce the aggregate level of the ISC and to bring forward the introduction of new rolling stock on SSL.

49. TfL have indicated that they would prefer smaller and shorter contracts. Given the arguments above, it would appear that there are certain advantages in the rolling stock for Infraco SSL being supplied under a single contract. Therefore the concerns expressed by TfL would have arisen whichever company supplied the rolling stock and are not related to the participation of Bombardier in Metronet.

50. In terms of future requirements for rolling stock, there will be new trains required for the Bakerloo line. The Service contract requires Metronet to undertake a competitive tendering procedure around the year 2012 for the procurement of this additional rolling stock. TfL has claimed that Metronet will be able to design the tendering procedures in such a way that they will favour Bombardier, as a shareholder in Metronet, at the expense of other potential suppliers. However, the vast majority of respondents to the Commission's investigation believed that the requirements to undertake competitive tendering would be either reasonably or very effective in enabling companies which are not shareholders to provide services to LUL.

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7 Parties e-mail to the Commission of 14/06/2002. This table shows the impact on market shares of contracts for which awards are pending this year (i.e. the contracts to be awarded to Bombardier for SSL and Victoria Line trains and other contracts to be awarded elsewhere in the EU).

51. In the light of the above, the Commission does not consider that the operation creates or strengthens a dominant position on the rolling stock markets, however defined, as a result of which effective competition will be significantly impeded.

- *Maintenance of rolling stock*

52. As indicated above, the maintenance of the rolling stock was awarded as a central part of the bidding process for the PPP which led to the contract for the supply of new rolling stock. The significance of the maintenance elements can be seen by comparing the anticipated expenditure on maintenance of £[…] with the £[…] to be spent on new rolling stock over the 30 year period of the PPP[8].

53. Data presented by the parties show that (prior to the PPP) in 2001 Bombardier was one of four significant players on the UK market, with a market share of [between 20% to 30%] (compared to 30-40% in 2000). The other players are EWS ([between 30% to 40%]), Alstom ([between 1% to 10%]), Maintrain ([between 1% to 10%]) and the Train Operating Companies who together carry out some of the heavy maintenance on their own vehicles ([between 20% to 30%] in total).

54. TfL have argued that the increase in market share for Bombardier brought about by the operation will create or strengthen a dominant position for Bombardier on the market for heavy maintenance in the UK. However, given that the contract for the maintenance of the new rolling stock is tied together with the supply of maintenance of that rolling stock, the same arguments presented in paragraphs 45 to 51 above in relation to the supply of rolling stock apply here.

55. The Commission therefore considers that the award of the maintenance business to Bombardier will not create a dominant position on these maintenance markets (however defined) as a result of which competition will be significantly impeded.

- *Signalling*

56. Bombardier is a significant player in the supply of signalling systems in Europe and elsewhere in the world. While investment in new signalling will be an important component in the overall package of composite infrastructure services, it is of note that much of the signalling work for the Infracos will be sub-contracted by Bombardier to the Invensys subsidiary Westinghouse Rail Systems Limited.

57. That the signalling work will be sub-contracted by Bombardier is evidence that the vertical connections between the Infracos and the Metronet Shareholders has not foreclosed other suppliers from supplying the Infracos. There are therefore no competition concerns in relation to signalling which arise from Metronet's acquisition of the Infracos.

58. It should also be noted that Balfour Beatty undertakes some (low technology) signalling work, installing signals for Railtrack. The signals that Balfour Beatty installs are manufactured by others such as Westinghouse and Alstom.

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8 These figures are based on prices fixed for the first two review periods, and indicative prices for the final two periods.

- *Supply of track services*

59. The UK market for the supply of track services is primarily represented by Railtrack's maintenance and investment programme. The parties cite Railtrack's Network Management Statement (issued prior to it going into administration) which stated that spending on maintenance and renewals was £2.5 billion in 2001 and is expected to amount to £3.0 billion per year over the next five years. They also estimate that work available from other rail utilities (including LUL) represented a further £100 million per year. This gives a total market size of approximately £2.6 billion for 2001. Balfour Beatty is active in this market with a market share in 2001 of just under [10-20]%.

60. Balfour Beatty will be awarded an initial sub-contract by Metronet to co-ordinate the supply of track services to the Infracos. The estimated value of total fixed rail infrastructure services for the first 7½ years is estimated to be just over £[…] According to the parties, Balfour Beatty will have around £[…] per annum of the estimated £[…] of track renewal works which would increase Balfour Beatty's market share to [10-20]%[9].

61. In the light of the above, the Commission does not consider that the operation creates or strengthens a dominant position on the market for the supply of track services as a result of which effective competition will be significantly impeded.

- *Conclusion*

62. In the light of the above, the Commission does not consider that the notified operation creates or strengthens any dominant positions as a result of which effective competition would be significantly impeded.

VI. STATE AID ISSUES

63. The UK Government has made a notification to the Commission on the basis that the proposed LUL PPP does not involve any grant of aid within the meaning of Article 87(1) of the EC Treaty. The Commission has received a complaint to the Commission arguing that State aid pursuant to Article 87(1) is involved in the PPP process and that such aid is difficult to justify.

64. At the date of this decision, the Commission has not reached a formal position on whether or not there is aid, and if so whether or not such aid would be permissible. However, following the Court of First Instance's judgement in case N° T-156/98 RJB Mining v Commission[10], the Commission cannot refrain from assessing whether, and if so to what extent, the financial and thus the commercial strength of the parties to the operation is strengthened by the financial support provided by that supposed aid in its analysis of the competitive situation.

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9 Source, Parties' e-mail to the Commission of 14.06.2002

10 Case T-156/98 [2001] ECR II-337.

65. For the purposes of this decision it is not necessary or appropriate to determine whether or not the PPP arrangements involve the payment of State aid. Indeed, it is important to emphasize that this assessment is entirely without prejudice to the Commission's eventual position on the existence and, if relevant, the legality of any such State aid.

66. The Commission has therefore taken the figures presented by the complainant and has assessed whether those payments would be likely to increase the financial and commercial strength of the parties to the operation, and if so, whether such a strengthening raises competition policy problems under the ECMR. For such problems to arise, the Commission needs to assess whether any financial strengthening has a direct impact in markets directly affected by the operation such that the impact of the operation, combined with any increase in the financial strength of the companies involved, threatens to create or strengthen any dominant positions as a result of which competition would be significantly impeded.

67. As has been shown in paragraphs 40 to 62 above, the Commission does not consider that the notified operation creates or strengthens any dominant positions, in the horizontally and vertically affected markets examined, as a result of which effective competition would be significantly impeded.

68. Neither Balfour Beatty nor WS Atkins have significant market shares in any of the markets related to the operation. The three other Metronet shareholders could be considered as having market positions sufficiently strong for the Commission to consider them dominant. Two of these are in markets which are entirely unrelated to the activities of the Infracos. RWE, via Thames Water, has a statutory monopoly for the supply of water and wastewater services in the south east of England. AEP, via Seeboard, has a statutory monopoly on electricity distribution in its area in the south of England. Neither of these markets are affected by the operation, and in any case they are regulated monopolies where any increase in financial strength is unlikely to affect the parties' competitive position. Bombardier is therefore the only one of the Metronet shareholders which has a strong position in any related markets.

69. The value suggested by the complainant of possible State aid is £2,200 million in net present value terms over the 30 year period of the PPP[11]. This would represent £450 million for each of the Metronet shareholders over the course of the PPP. For the reasons in paragraph 68 above, the Commission has only examined the impact of such finance on Bombardier.

70. Bombardier is active in markets across the world. According to its latest Annual Report, it has an equity value of £1,792 million, with worldwide turnover of £9,480 million[12]. Bombardier's closest competitors are Alstom and Siemens. In terms of turnover, Alstom is of a similar size to Bombardier, while Siemens is several times larger. In terms of shareholders' equity, Alstom's net shareholders' equity is EUR 7,200 million (£4,600 million) and Siemens' is EUR 25,068 million (£16,069 million). An increase of £450 million in Bombardier's shareholder equity would not substantially change its position

11 This figure is from data in a report dated 31 May 2002 prepared for the complainant, estimating the value of changes that took place after Metronet was selected as preferred bidder.

12 In US Dollars, these figures are: turnover (revenue) US $13,614.2 and total equity US $ 2,573.8

in relation to either of its major competitors in such a way that it would enable Bombardier to obtain or strengthen any dominant positions. Neither would it enable Bombardier to buy any of its competitors.

71. It can therefore be excluded that even if Bombardier's financial position were improved to the extent described above, this would not have any significant impact on the commercial strength of Bombardier as a result of which Bombardier would either obtain or strengthen any dominant positions.

VII. CONCLUSION

72. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission

Signed by Mario MONTI
Member of the Commission