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***Case No COMP/M.3273 -  
FIRST / KEOLIS / TPE  
JV***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 08/12/2003

*Also available in the CELEX database  
Document No 303M3273*



# COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 08/12/2003

SG (2003) D/233293-D/233294

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

## To the notifying parties

Dear Sir/Madam,

**Subject:** Case No COMP/M.3273 – First / Keolis / TPE JV  
Notification of 06/11/2003 pursuant to Article 4 of Council Regulation  
No 4064/89<sup>1</sup>

1. On 6 November the Commission received the notification of a proposed transaction by which FirstGroup plc ("First") and Via GTI UK ("Keolis") will create a jointly controlled full-function company Trans-Pennine Express JV ("TPE JV"), by way of purchase of assets. TPE JV is to act as a train operating company ("TOC") charged with providing regulated passenger services on specified routes in the north of England, under the terms of a public service contract effective from early 2004. The contract will run for eight years with the option to extend for a further five years.

## I. THE PARTIES

2. **Keolis** is ultimately owned and controlled by SNCF<sup>2</sup> and provides passenger transport services in the bus, rail and light rail sectors in France, Germany, Denmark, Sweden,

<sup>1</sup> 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).

<sup>2</sup> SNCF, via other subsidiaries, has a controlling interest in the Eurostar Group, and a minority interest in Eurostar UK Ltd, the UK arm of the Eurostar train service that is provided under the terms of a management contract with London & Continental Railways Ltd, the concessionaire chosen to design, build, finance and operate the Channel Tunnel Rail Link between London and in which SNCF also has a minority stake. In addition, SNCF also owns the entire interest in the ticket agencies in the UK and Ireland for the distribution of Eurostar tickets

UK and Canada. Within the UK, Keolis has a 35% stake in two other TOCs, Thameslink<sup>3</sup> and South Central, both of which provide regulated passenger services under public service contracts [...]. Keolis also has a minority interest in Eastbourne Buses Ltd.

3. **First** is a UK-based bus and rail passenger transport operator which also operates services in the USA. Within the UK, it currently operates three TOCs: First Great Western, First Great Eastern and First North Western and also has a majority stake in GB Railways Group plc, which currently operates two other TOCs, namely Anglia and Hull Trains. First has also been selected as preferred bidder for the new Thames Trains contract. In addition, First operates the Croydon Tramlink, as well as local bus services in various places throughout the UK, including the north of England.
4. **JVCo** is First/Keolis Holdings Ltd, a shell joint venture company whose sole purpose is to acquire TOCs on behalf of its parents, First and Keolis. **Franchisee** is First/Keolis TransPennine Holdings Ltd, a wholly owned subsidiary of JVCo, and incorporated solely for the purpose of bidding for TPE. **FKTL** is First/Keolis TransPennine Ltd (= TPE JV), a wholly owned subsidiary of the Franchisee that will acquire the necessary assets to operate the TPE franchise. TPE franchise is created by the UK Strategic Rail Authority ("SRA") for the provision of inter-urban railway passenger services linking Liverpool and Manchester with Sheffield, Leeds, York and Newcastle and other key towns and cities in the region.

## **II. COMMUNITY DIMENSION**

5. The undertakings concerned have a combined aggregated turnover of more than 5 billion<sup>4</sup> (First: € 3,814 million, SNCF/Keolis: €22,176 million). Each of them has a Community-wide turn-over in excess of 250 million. Furthermore, the parties to the concentration do not achieve more than two thirds of their aggregated Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

## **III. THE OPERATION**

6. The SRA, the competent national authority for the procurement of Services of a general economic interests in the railway passenger services market in Great Britain, sought bids for the TPE franchise in March 2000. On 31 July 2003, the SRA announced that the joint venture which had been formed by the parties for the purpose of bidding for the TPE franchise, had been selected as the preferred bidder. The TPE agreement between the SRA and the Franchisee was signed on 23 September 2003. It is conditional on competition clearance. The TPE franchise is planned to commence service on 1 February 2004 and will run for eight years with the option to be extended for up to a

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<sup>3</sup> Case IV/M.901, 24.04.1997

<sup>4</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

further 5 years. The transfer of the franchise will be achieved through a combination of a statutory transfer scheme and an asset purchase. Following this, FKTL(=TPE JV) will be in the position to operate the TPE Franchise. The direct buyer will be FKTL, which has been created for that purpose by the parties, and will become full function after the completion of the transfers. Joint control of FKTL by the notifying parties is secured through the requirement of unanimous decisions on strategical matters in the joint venture agreement.

#### **IV. THE RELEVANT MARKETS**

7. The parties note that the Commission has previously considered the relevant service market in relation to a British rail franchise to be the provision of public passenger transport services by rail and that the relevant geographic market has been defined by reference to the extent of the network comprising the routes, stations and depots to be operated under the terms of the public service contract. [...]. [...] the parties have submitted information on the rail/rail overlap and [...] on the overlap between rail and bus services operated by them.
8. The Commission in previous decisions has defined the product market as the supply of public passenger services by rail. The geographic market has been defined as the extent of the network comprising the railway routes, stations and depots subject to the franchise. However, in case M.2446 - Govia/Connex South Central of 20 July 2001, which also concerned the acquisition of franchise TOCs in the UK, the Commission has held that the relevant market may be defined as an individual point-to-point route, since rail travellers, especially business travellers and commuters do not regard an indirect journey as an acceptable substitute for the direct route.
9. However, for the purposes of this decision the precise market definition can be left open, as - in any event - the transaction does not give rise to competitive concerns.

#### **V. COMPETITIVE ASSESSMENT**

10. There is almost no overlap between the rail activities of First and Keolis and the TPE franchise. Keolis operates 2 TOCs out of 25 existing TOCs in the UK. First operates 5 TOCs. Only one of First's TOCs - Hull Trains - partly overlaps with the TPE franchise - however, only to a very minor extent. The overlap is limited to the route between Hull and Selby. The competitors Arriva and GNER are also serving the same route.
11. The TPE franchise overlaps with First's bus operations at various points in and around Sheffield, Doncaster, Huddersfield, Leeds, Warrington and Manchester. However, the parties point out that the TPE franchise is geared towards providing fast, limited stop services between these and other towns in the regions, whereas the relevant bus services are devoted essentially to local traffic: for the majority of passengers, such partially overlapping bus services could not realistically be considered to be substitutable for rail. Therefore, the parties submit that First's existing bus services are unlikely to exert a competition restraint on TPE, or vice versa; rather, the two modes are complementary to one another. This is in line with findings in earlier Commission decisions.
12. On many routes constituting the TPE franchise, the parties will be the only operators. This is because railway passenger services in Great Britain are provided under contract to the SRA with special rights to operate services on specified routes. There is some overlap with

other TOCs but typically each TOC enjoys a degree of protection from competition. However, in order to ensure the most efficient operation and, at the same time, to minimise public subsidies the right to provide these services is subject to a competitive bidding process. It is at this point where market discipline is brought to bear. Consequently, while on-rail competition is necessarily limited, there is competition in the market for bidding for the right to provide these services. The other short-listed bidders for TPE were Arriva, Connex, and Serco Rail. These, together with the other major players already active on the market for operating railway passenger franchises in Britain, account for 75% of the total market in terms of both passenger kilometres and volume. The bidding process is, in principle, open to any natural or legal person and is not restricted to those already active on the downstream market.

13. Both parents remain active on the market for the acquisition of TOC/franchise. There has been already an agreement between the parents to co-ordinate their activities on this market, which has resulted in the creation of JVC Co (see paragraph 4). FKTL, as the consequence of this co-operation, does not, in itself, constitute an incentive or requirement for further co-operation between the parties with respect to other franchise bidding. Therefore, it does not have the effect of coordinating the competitive behaviour of its parents in the sense of Art. 2 (4).

## **VI. CONCLUSION**

14. 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 Articles 6(1)(b) of Council Regulation (EEC) No 4064/89.

For the Commission

**Signed by Franz FISCHLER  
Member of the Commission**