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***Case No COMP/M.4797
– GOVIA / WEST
MIDLANDS
PASSENGER RAIL
FRANCHISE***

Only the English text is authentic and available

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 4 (4)
Date: 20/09/2007



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.09.2007

SG-Greffe(2007) D/205601

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 4(4) DECISION

To the notifying parties:
To Office of Fair Trading:

Dear Sirs,

Subject: Case No COMP/M.4797 – GOVIA / WEST MIDLANDS PASSENGER RAIL FRANCHISE
Reasoned submission pursuant to article 4(4) of Regulation No 139/2004 for referral of the case to the United Kingdom.

Date of filing: 16/08/2007

Legal deadline for response of Member States: 06/09/2007

Legal deadline for the Commission decision under Article 4(4): 20/09/2007

I. INTRODUCTION

1. On 16 August 2007, the Commission received by means of a Reasoned Submission a referral request pursuant to Article 4(4) of the Council Regulation (EC) No 139/2004 (“EC Merger Regulation”) with respect to the transaction cited above. The parties request the operation to be examined in its entirety by the competent authorities of the United Kingdom.
2. According to Article 4(4) of the EC Merger Regulation, before a formal notification has been made to the Commission, the parties to the transaction may request that their transaction be referred in whole or in part from the Commission to the Member State where the concentration may significantly affect competition and which present all the characteristics of a distinct market.
3. A copy of this Reasoned Submission was transmitted to all Member States on 17 August 2007.

4. By fax of 21 August 2007, the Office of Fair Trading (OFT) as the competent authority of the United Kingdom informed the Commission that the United Kingdom agrees with the proposed referral.

II. THE PARTIES

5. Go-Ahead is a UK based transport group. It provides passenger transport services mainly train, coach and bus services in various locations throughout England. It only operates train services, through its joint ownership of Govia (which it jointly controls with Keolis), which is currently running the Southeastern Franchise and the New Southern Railway Franchise. It also operates bus services, primarily in urban locations such as Oxford, Brighton, London and the Tyne and Wear conurbation. In recent years Go-Ahead has acquired a ground handling business, which is run through its subsidiary Aviance UK Limited. It also has acquired a parking business, Meteor Parking Limited.
6. Keolis is a leading European multimodal transport operator. It is active primarily in France, and also has interests in the UK rail industry¹, Scandinavia, Germany and Canada.
7. Govia Ltd is a shell joint venture company whose sole purpose is to acquire train operating companies ("TOC"s, companies which run train franchises in the United Kingdom) on behalf of its parents, Go-Ahead and Keolis which have joint control over Govia. Keolis (UK) Limited (a subsidiary of Keolis SA) holds 35% and Go-Ahead holds 65%.

III. THE OPERATION AND CONCENTRATION

8. The undertaking to be acquired is a passenger rail Franchise which has been created by the UK Department of Transport ("DfT") by amalgamating the Silverlink and Central Trains passenger rail Franchises. It has been awarded to Govia following a competitive bidding process. Govia, as the Franchisee acquires the right to operate passenger rail services within the Franchise area.
9. The proposed concentration concerns the award of the West Midlands Passenger Rail Franchise ("the Franchise") to London & Birmingham Railway Limited (LBR), a wholly owned subsidiary of Govia Limited ("Govia"). LBR will gain sole control over the Franchise.

IV. COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregated world-wide turnover² of more than EUR 5 billion³. Each of them has a Community-wide turnover in excess of EUR 250 million⁴. The undertakings do not achieve more than two-thirds of their Community-wide turnover within one and the same Member State. The notified

¹ Through its participations in Govia and in First/Keolis Holdings Limited, a joint venture between FirstGroup PLC and Keolis (UK) Limited, running the Transpennine Express.

² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice of 10/07/2007.

³ Keolis 2,594 million EUR, Go-Ahead 2,140 million EUR, the Franchise 493 million EUR.

⁴ Keolis 2,337 million EUR, Go-Ahead 2,140 million EUR, the Franchise 493 million EUR.

operation therefore has a Community dimension within Article 1(2) of the EC Merger Regulation.

V. ASSESSMENT

A. Relevant product markets

11. On the basis of the information submitted in the Reasoned Submission, the parties provide passenger transportation services. The relevant product market could be as wide as all passenger transport services (including buses, taxis etc) or it could be as narrow as solely rail services. The parties are of the opinion that the relevant market is solely that for rail and bus services.
12. In previous cases (M.748 – *CGEA / Networks South Central*, M.816 - *CGEA / South Eastern Train Co Ltd* and M.901 *GoAhead / Via / Thameslink*), the European Commission considered that the relevant product market in relation to the award of a franchise of a railway service was the supply of public passenger transport services by railway. In *CGEA / South Eastern Train Co Ltd* the Commission recognised that competitive pressure might be exerted on a railway franchise by other types of public transport, including buses. The principles applied in those decisions can be applied also in the present case.
13. In some previous cases, the Commission has held that the grant of a licence for the exploitation of a particular State-regulated activity is distinguishable from the running of that particular activity⁵. In present case, it is not necessary to operate a distinction between a possible market for the award of railway franchises and the markets for the supply of public passenger transport services transport by rail, since the target is not a participant to tenders for railway franchises and the concentration thus does not have any effects in this area.

B. Relevant geographic market

14. On the basis of the information submitted in the Reasoned Submission, the geographic focus of the proposed concentration would be not larger than the United Kingdom. All of the potential affected markets are point to point routes. Each of these routes begins and ends in the United Kingdom, not passing through other Member States and being geographically confined to areas of the West Midlands, including Birmingham and the London commuter market. It is estimated that over 95% of the total passenger business in the LBR franchise area is local in scope (commuting, local transportation needs).
15. Given that the interest of customers is to travel between one or more points, the markets could be local or regional in scope. Therefore, local and regions markets could be defined along the routes on which LBR will provide passenger transport service.

⁵ See cases M.567 – *Lyonnaise des Eaux / Northumbrian Water*, M.4087 – *Eiffage / Macquarie / APRR* or M.4249 – *Abertis / Autostrade*.

C. Assessment

16. On the basis of the information provided by the parties in the Reasoned Submission, the proposed transaction is an appropriate candidate for pre-filing referral from the Commission to the OFT in accordance with Article 4(4) of the EC Merger Regulation.
17. The transaction meets the legal requirements set out in Article 4(4) of the EC Merger Regulation. The transaction is a concentration within the meaning of Article 3 of the EC Merger Regulation, it has a Community dimension and it may significantly affect competition in distinct markets in the United Kingdom.
18. The relevant geographic markets present all the characteristics of a distinct market. LBR will only be active in the West Midlands, including Birmingham and the London commuter market. The parties estimate that the LBR franchise's part only represents around 4% of UK rail services based on passenger kilometres.
19. Both Go-Ahead and Keolis are active in the provision of passenger transport services and in the provision of passenger rail services in particular. The parties submit that following the transaction, Govia will have 16% of the UK passenger rail. Accordingly, the proposed concentration could affect competition due to the nature of train franchising in the United Kingdom. At present competition takes place at the time of bidding for a franchise. Once a franchise is awarded, there is little competition. The company awarded a train franchise has a virtual monopoly on running train services in its area of operation. There is some scope for competition within franchises, but a franchise is largely a monopoly right. Accordingly, the awarding of a franchise effectively prevents competition in rail services developing in the franchise area. Competition is for the market rather than within the market.
20. Since some of Go-Ahead's bus services overlap with the Franchise and some of the Franchise services overlap with services operated by Govia's Southern Franchise, it could be perceived that any actual or potential competition between these services will be reduced.
21. In view of the foregoing, the principal effects of the proposed operation would be restricted to the UK. Further, the markets in question present all the characteristics of a distinct market.

Additional factors

22. Given that the likely focus of the competitive effects of the proposed transaction is confined to the UK, the UK Competition Authorities (OFT and the Competition Commission) are well placed to examine the case, since they have extensive experience in assessing the impact of rail franchising.
23. In the previous cases on rail franchising in the UK that Govia referred to the Commission⁶, the Commission took the step of referring the matters to the OFT.

⁶ Case No. COMP/M.4070 London South Eastern Railway/The integrated Kent Rail Franchise, Decision 30.01.2006 and Case No. COMP/M.4409 North London Orbital Railway/The London Rail Concession, Decision 31.10.2006

VI. REFERRAL

24. On the basis of the information provided by the parties in the Reasoned Submission, the case meets the legal requirements set out in Article 4(4) of the EC Merger Regulation in that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market. The Commission notice on case referral in respect of concentrations⁷ (point 17) indicates that, in seeking a referral under Article 4(4), *“the merging parties are ... required to demonstrate that the transaction is liable to have a potential impact on competition in a distinct market within a Member State, which may prove to be significant, thus deserving close scrutiny”, and that “such indications may be no more than preliminary in nature...”*. The Commission considers, on the basis of the information submitted in the Reasoned Submission, that the principal impact on competition of the concentration is liable to take place on distinct markets in the United Kingdom, and that the requested referral would be consistent with point 20 of the notice.

VII. CONCLUSION

25. For the above reasons, and given that the United Kingdom has expressed its agreement, the Commission has decided to refer the transaction in its entirety to be examined by the United Kingdom. This decision is adopted in application of Article 4(4) of Council Regulation (EC) No 139/2004.

For the Commission
signed
Philip LOWE
Director General

⁷ OJ C 56, 05.03.2005, p.2.