

***Case No COMP/M.4806 -
DSB/FIRST/ÖRESUNDS
TÅG***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 24/09/2007

***In electronic form on the EUR-Lex website under document
number 32007M4806***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24/09/2007

SG-Greffe(2007) D/205653-205654

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 6(1)(b)

To the notifying party (ies):

Dear Sir/Madam,

**Subject: Case No COMP/M.4806 – DSB/FIRST/ÖRESUNDSTÅG
Notification of 20.08.2007 pursuant to Article 4 of Council Regulation
No 139/2004¹**

I. INTRODUCTION

1. On 20 August 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertakings DSB ("DSB", Denmark) and FirstGroup plc ("First", United Kingdom) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the undertaking ÖRESUNDSTÅG ApS ("ÖRESUNDSTÅG", Denmark), by way of purchase of shares in a newly created company constituting a joint venture.
2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

II. THE PARTIES

¹ OJ L 24, 29.1.2004 p. 1.

3. DSB is a company incorporated under the laws of Denmark and fully owned by the Danish Ministry of Transport. DSB is primarily engaged in regional and interregional railroad transport in Denmark. Through its subsidiary DSBS-Tog, DSB also operates the S-tog passenger rail network connecting the Greater Copenhagen area with high-frequency services. DSB also operates a service from Copenhagen to the ferry terminal in Ystad in Southern Sweden. DSB is also active in Sweden, in the Stockholm area, through its participation in Roslagståg AB, operating the Roslagsbanan train franchise in the Stockholm area, and through its fully-owned subsidiary Tågvärdsbolaget AB, which is operating the on-board control of tickets and related services on routes covered by the Swedish Franchise. The contracts for the provision of such services will expire at the end of 2008 when the parties commence operations of the Swedish Franchise. [...]
4. First Rail Holdings Limited, a subsidiary of FirstGroup plc ("FIRST"), is incorporated in Scotland and is listed on the London Stock Exchange. FIRST's European activities are mainly in the UK where it operates a number of rail passenger franchises, bus services and some freight activities. FIRST also has bus and transport management operations in the USA and is active to a more limited extent in the provision of bus services in Ireland and Germany.
5. ÖRESUNDSTÅG is a company incorporated under the laws of Denmark jointly controlled by DSB and FIRST. ÖRESUNDSTÅG will function as holding company for two operating companies: Kystbanen A/S ("KYSTBANEN") and Öresundstrafiken AB ("ÖRESUNDSTRAFIKEN"). KYSTBANEN is a public limited company incorporated under the laws of Denmark. ÖRESUNDSTRAFIKEN is a public limited company incorporated under the laws of Sweden. (ÖRESUNDSTÅG, KYSTBANEN and ÖRESUNDSTRAFIKEN are hereinafter referred to as the "Joint Venture").

II. THE OPERATION

6. ÖRESUNDSTÅG is a joint venture set up by DSB and FIRST with the purpose of submitting separate bids for a Danish and a Swedish passenger rail services franchise in the Øresund region (the "Danish Franchise" and the "Swedish Franchise" respectively, jointly the "Franchises") put out for tender by the competent Danish and Swedish rail authorities. On 27 June 2007, the Danish Franchise was awarded to KYSTBANEN and the Swedish Franchise was awarded to ÖRESUNDSTRAFIKEN.
7. As of 2009 and for a duration of five years KYSTBANEN will be operating, under the terms of the Danish Franchise, the management of the railway services from Helsingør via Copenhagen Central to Kastrup (Copenhagen Airport) and the Danish part of the Øresund Bridge, whereas ÖRESUNDSTRAFIKEN will be operating, under the terms of the Swedish Franchise, the railway services from the Swedish part of the Øresund Bridge to Malmö Central and from Malmö Central to (i) Lund - Landskrona – Helsingborg – the county border to Halland; (ii) Lund – Hässleholm – the county border to Kronoberg, and (iii) Lund – Hässleholm- Kristiansstad – the county border to Blekinge.

III. THE CONCENTRATION

8. Given that the joint venture will have its own management and resources to operate independently on the market on a lasting basis, it can be considered full function under the terms of the Merger Regulation.
9. DSB and First will have respectively [...] % and [...] % of the shares in ÖRESUNDSTÅG. However, given that First will have a veto right on the relevant strategic decisions of the joint ventures, in particular on the drafting and approval of the joint venture's budget and business plan, it is to be concluded that the joint venture will be jointly controlled by First and DSB.
10. By the proposed operation DSB and First will therefore acquire joint control over an undertaking which is considered a full function joint venture. The proposed operation constitutes therefore a concentration under the terms of Article 3(4) and 3(1) of the Merger Regulation.

IV. COMMUNITY DIMENSION

11. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (First: EUR 5.471 billion, DSB: EUR 1,430 billion). Each of them have a Community-wide turnover in excess of EUR 250 million [...], but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

12. The joint venture will be and its parent companies currently are active on the market for the provision of railways passenger services. DSB is also active on the vertically related markets for the leasing of rolling stocks and for the provision of maintenance services for such rolling stocks. The parent companies (DSB and FIRST) will remain active on a possible market for the granting of franchises for railway passenger transport services.

A. Market Definition

(a) provision of railway services

13. The notifying parties submit that the supply of passenger railway transport services in the area covered by the Franchises constitutes a separate product market since no other means of transportation exert material competitive pressure on the railway services offered by the joint ventures. The question of whether other type of services (such as for instance bus services) are able to exercise competitive pressure over the public passenger railway services is not relevant in the present case since the parties to the present transaction do not provide any of these services in the relevant geographic area as described below. Therefore the Commission considers the relevant product market to be constituted by the provision of public passenger services by rail.
14. Geographically, the relevant markets may be defined by reference to the extent of the network comprising the railway routes covered by the Franchises² or, alternatively, as

² Case No Comp/M. 748 CGEA/NSC, Case No Comp/M.816 CGEA/South Eastern TrainCompany Limited, Case No Comp/M. 901 Go-Ahead/Via/Thameslink and Case No Comp/M.3273 First/Keolis/TPE JV.

point to point markets.³In the present case, however, it is not necessary to conclude on the definition of the relevant geographic market since the proposed transaction is not likely to create competition concerns irrespectively of the product and geographic market definition retained.

(b) market for leasing of rolling stocks

15. The parties identify a possible market for the leasing of rolling stocks. DSB, as the Danish railway incumbent operator, is obliged by the Danish railway authorities to provide rolling stocks to all the companies which operate railway services in Denmark. The rolling stock in question has been purpose-built to comply with both Danish and Swedish standards in order to be able to be used on the route covering both countries' railway systems. However, for the purposes of this decision the precise product market definition can be left open, as – in any event – the transaction does not give rise to competitive concerns.
16. The notifying parties consider the geographic dimension of such a market to be national. However the precise geographic definition can be left open given that DSB is providing these services only in Denmark, and on the basis of the considerations below, the concentration will not have any anticompetitive effect.

(c) market for maintenance services

17. The parties have identified a possible market for the provision of maintenance services and consider this market to be of a national or regional dimension. However the precise definition of the relevant market may be left open since the proposed operation will not have negative effects on any reasonable definitions thereof.

(d) market for the granting of franchises for passenger railway transport services

18. In line with previous decisions relating to motorway services, where the Commission has recently considered the possibility to distinguish the market for the granting of toll motorway concessions from the market for transport on toll motorways⁴, the notifying parties have provided the relevant data also on a hypothetical segment for the granting of franchises for passenger railway transport. The parties provided such data at EEA level, given that, as in the motorway sector, the same companies are participating in the bids for the award of franchising to operate passenger railway services all over the EEA.
19. However, the exact definition of the relevant product and geographic market may be left open since, in the light of the consideration expressed below, the transaction would not create competition concerns irrespectively of the market definition retained.

³ Case No Comp/M.2446 *Govia/Connex South Central*.

⁴ Case No COMP/M.4087 *Eiffage/Macquarie/APRR*., COMP M: 4249 *Abertis/Autostrade*

B. Competitive Assessment

Horizontal overlaps

(a) provision of railway services

20. First does not have any other activity in the railway passenger transport sector in Denmark or Sweden. If the relevant geographic market were to be defined as point to point, there would be no overlaps between the joint venture's and DSB's activities.
21. If the relevant geographic market were to be defined as the network comprising the railway routes in the area covered by the Franchises, some of the services provided by DSB in Denmark, namely the passenger high-frequency rail network connecting the Greater Copenhagen area, the Ystad connection service and some regional railway passenger services, would overlap to a minimal extent with the railway line operated by the JV. However, in light of the differences existing between these different lines in terms of both services offered and geographic area covered, these services cannot be considered substitutable with the ones provided by the joint venture. Moreover, given that DSB is already operating the service covered by the Danish franchise, the transaction will not bring about any change. In Sweden, the transaction would not give rise to any overlap between DSB's and the joint venture's activities given that the joint ventures' activities will be limited to the Southern part of Sweden, whereas DSB's activities are focused in the Stockholm area.

Vertical relationships

(b) market for leasing of rolling stocks

22. Only DSB is active on this market. However the procurement and subsequent leasing of rolling stocks for the specific route in question by DSB does not amount to a permanent presence in possible upstream markets for leasing of rolling stock. DSB provides these services on a mandatory basis only on requests of the competent public authorities. The existence of this obligation leads to exclude any risks of foreclosure of access to the rolling stocks for the joint venture possible competitors. Moreover, the transaction would not bring about any change to the competitive scenario since the vertical links between DSB and the Joint Venture will only replace internal links which currently already exist between the different divisions of DSB.

(c) market for maintenance services

23. FIRST is not active in this market in Sweden and/or Denmark. DSB provides these services to third parties in Denmark and to the current operator of the Swedish Franchise. The parties submit that in Denmark DSB had a market share of [40 – 50]% in 2004, according to a survey conducted by the Danish Competition Authority in 2006, and that such market share did not increase, in their best estimates, in the last three years. The parties estimate that on any possible regional market within Denmark DSB covers less than [20 – 30]% of the requirements for third party maintenance services.
24. According to a survey conducted by the Danish Competition Authority in 2006, a large part (around 78%) of the maintenance services are procured internally by railway operators in Denmark. Furthermore DSB is already providing maintenance services to the current operator (an entity belonging to the DSB group) of the railway services covered by the Danish Franchise. Moreover the joint venture will acquire maintenance

services from DSB only to a very limited extent since, according to the tender framework KYSTBANEN has gained control over maintenance facilities in Eastern Denmark.

25. In light of the fact that i) most of these services are supplied internally and that ii) the transaction will only bring about positive changes if any since it will limit the dependence on DSB of the operator of the services covered by the Danish Franchise, the transaction is not likely to increase anyhow the risk of foreclosure to i) the supply of maintenance services for other railway operators or ii) customers foreclosure for suppliers of maintenance services.
26. With regard to Sweden, the parties submit that on a regional market defined along the geographical area covered by the Swedish Franchise, DSB – which services already the rolling stock used for the current operator of the railway services covered by the Swedish Franchise – has a market share of [20 -30]% while the rest of the maintenance services in this area are covered by EuroMaint Rail AB, whose maintenance activities in this area are much larger than DSB's. The parties estimate that DSB does not hold a market share above 25% in Sweden considered in its entirety.
27. Moreover, the joint venture has concluded a maintenance agreement with the independent contractor EuroMaint Rail AB and therefore would not acquire these services anymore from DSB in the future.
28. On this basis, the transaction will not cause any competition concerns. The pre-existing link between DSB and the current operators of the Swedish Franchise and the fact that the joint venture is not going to buy these services from DSB in the future, on one hand exclude any risk of customer foreclosure as a result of the operation and on the other hand do not strengthen the incentives of DSB to foreclose access to the supply of maintenance services to the jv's competitors.

Possible risks of coordination between the parent companies

(d) market for the granting of franchises for passenger railway transport services

29. The joint venture will not participate in the future in other bids but both parent companies will be active as bidders on the market for franchises for passenger railway transport services. On this possible market, the parent companies have a combined market share of around [20 – 25]% at EEA level. In light of the small size of the joint venture in question compared to the overall size activities of the parties, it is unlikely that the joint venture will create any risk of coordination between the parent companies' activities.

State aid

30. The Commission is examining a complaint of Branchforeningen Dansk Kollektiv Trafik (Trade Association Danish Public Transport Operators) alleging that Denmark granted state aid to DSB in violation with the state aid rules of the EC Treaty. It is not alleged, however, that the financial terms of the operation leading to the present concentration or the award of the Danish and Swedish Franchise would involve the granting of state aid. Furthermore, there are no indications that the alleged state aid would have a material influence on the competitive assessment in the present case. The present decision under

the EC Merger Regulation is without prejudice to the outcome of the procedure under the state aid rules.

VI. CONCLUSION

31. 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 (EC) No 139/2004.

For the Commission
signed
Neelie KROES
Member of the Commission