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***Case No COMP/M.7483 -  
ABELLIO TRANSPORT /  
SCOTRAIL***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 18/03/2015

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EUROPEAN COMMISSION

Brussels, 18.3.2015  
C(2015) 1950 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

**To the notifying party:**

Dear Sir/Madam,

**Subject: Case M.7483 – ABELLIO TRANSPORT / SCOTRAIL  
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004<sup>1</sup> and Article 57 of the Agreement on the European Economic Area<sup>2</sup>**

- (1) On 11 February 2015, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004, by which Abellio Scotrail Limited ("Abellio Scotrail", UK) acquires within the meaning of Article 3(1)(b) of the Merger Regulation the Scotrail franchise ("the Franchise", UK) by way of public bid (the "Transaction"). Abellio Scotrail and the Franchise will hereinafter be referred to as "the Parties".

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> OJ L 1, 3.1.1994, p.3 ("the EEA Agreement").

## **1. THE PARTIES**

- (2) Abellio Scotrail is a subsidiary of Abellio Transport Holding BV ("Abellio", the Netherlands), a wholly owned subsidiary of the Dutch Railways, Nederlandse Spoorwegen ("NS", the Netherlands), ultimately controlled by the State of Netherlands. Abellio Scotrail is established to bid for and operate the Franchise.
- (3) Abellio was created to tender for and commercially operate a number of passenger railway concessions or franchise contracts outside the Netherlands. It is active in the UK, Germany and Sweden. In the UK, Abellio's subsidiaries currently operate the Merseyrail concession and the Northern Franchise, both jointly with Serco Group plc, as well as the Greater Anglia Franchise.
- (4) The Franchise, currently operated by a subsidiary of First Group, First Scotrail Limited, consists in the provision of inter-city, regional and suburban passenger rail services throughout Scotland, serving the cities of Glasgow, Edinburgh, Inverness, Aberdeen Stirling, Dundee and Perth along with the rest of Scotland.

## **2. THE OPERATION**

- (5) Following a competitive bidding procedure, the Scottish Ministers awarded the Franchise to Abellio Scotrail. Under the Franchise agreement, the Scottish Ministers appoint Abellio Scotrail as franchisee to provide railway passengers services on the rail network in Scotland.<sup>3</sup> Abellio Scotrail is scheduled to take over the operation of the Franchise on 1 April 2015 for a minimum period of seven years, extendable upon decision of the Scottish Ministers to ten years.<sup>4</sup>
- (6) The operation of the Franchise is an activity directed towards passengers, who will contract directly with Abellio Scotrail when using the Scotrail network. As a result, revenue will be generated by the collection of passenger fees through the operation of the Franchise.
- (7) Moreover, Abellio Scotrail will employ approximately 4 700 staff and lease approximately 300 rail vehicles for the operation of the Franchise. Abellio Scotrail will also take all commercial decisions in relation to the operation of the Franchise going beyond the general constraints imposed by the Scottish Ministers<sup>5</sup> and will retain the

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<sup>3</sup> The Franchise includes a requirement to utilise Scotrail rolling stock to run a small number of through services to and from Glasgow to Carlisle and Newcastle in the North of England. This is achieved through an arrangement with Northern Rail Limited, the train operating company holding the franchise for the North of England. This arrangement, which predates the Transaction, does not include any reciprocal arrangements and the services offered beyond the Scotrail network are offered by and on the terms of Northern Rail Limited. Therefore, this arrangement does not lead to any competitive overlap and will not be discussed further.

<sup>4</sup> Clause 3 of the Franchise Agreement.

<sup>5</sup> For example, although the minimum scope of the Franchise activities is pre-defined in the franchise agreement, Abellio Scotrail may carry out ancillary activities, some of which require the consent of the Scottish Ministers; regulated fares must be respected, but Abellio Scotrail will decide on the discounts it will offer; minimum service levels are set in the franchise agreement, but Abellio Scotrail will decide how to meet them; Abellio Scotrail may introduce changes to rolling stock, timetables or the running of additional services, subject to the consent of the Scottish Ministers; Abellio Scotrail is free to market and advertise its services.

generated ticket revenue and bear part of the commercial risk.<sup>6</sup> As a consequence, the franchise agreement will confer Abellio the rights to influence strategic decisions of the Franchise.

- (8) Therefore, the Franchise constitutes an undertaking in light of paragraphs 24 et seq. of the Consolidated Jurisdictional Notice and cannot be considered as amounting to an outsourcing or service contract.
- (9) On the basis of the above, the Commission concludes that the award of the Franchise constitutes a change of control over an undertaking on a lasting basis and therefore is a concentration within the meaning of paragraph 62 and seq. of the Commission Consolidated Jurisdictional Notice.

### **3. EU DIMENSION**

- (10) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>7</sup>. Each of them has an EU-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension pursuant to Article 1(2) of the EU Merger regulation.

### **4. COMPETITIVE ASSESSMENT**

#### **4.1. Market Definition**

##### *4.1.1. Product market*

- (11) According to Abellio, the market in which the Parties are active is the market for public passenger transportation services. The relevant product market could be as wide as all passenger transport services or as narrow as solely rail services.
- (12) In previous cases, the 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 rail.<sup>8</sup> The Commission also indicated that competitive pressure might be exerted on a railway franchise by other types of public transport, including buses.<sup>9</sup>
- (13) In more recent cases, the Commission considered that in countries where the provision of passenger rail services is tendered or franchised by the relevant state authorities, as in the United Kingdom, it may be appropriate to make a distinction between competition to be awarded a franchise or concession to operate passenger railway

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<sup>6</sup> Abellio Scotrail will bear the commercial risk within 5% of an agreed target. For any greater deviation from the agreed target, the commercial risk will be equally shared by Abellio Scotrail and the Scottish Ministers.

<sup>7</sup> Turnover calculated in accordance with Article 5 of the Merger Regulation.

<sup>8</sup> See cases M.816 - *CGEA/South Eastern Train Company Limited*, of 7 October 1996, paragraph 13; and M.4797 – *Govia/West Midlands Passenger Rail Franchise* of 20 September 2007, paragraph 12.

<sup>9</sup> See cases n° IV/M.816 - *CGEA/South Eastern Train Co Ltd* of 7 October 1996, paragraph 15; and M.4797 – *Govia/West Midlands Passenger Rail Franchise* of 20 September 2007, paragraph 12.

services ("competition for the market") and competition within the market for the supply of public passenger transport services by rail ("competition in the market").<sup>10</sup>

- (14) The Commission concludes that in this case the exact product market definition can be left open, as the outcome of the assessment of the Transaction would be the same under any plausible market definition.

#### 4.1.2. *Geographic market*

- (15) Abellio submits that the geographic scope of the market for the supply of public passenger transport services by rail would not be larger than the Scotrail franchise network.
- (16) In previous cases, the Commission defined the relevant geographic market by reference to the extent of the network comprising the railway routes, stations and depots, the operation of which is the subject of the franchise agreement.<sup>11</sup>
- (17) However, in M.2446 - *Govia/Connex South Central* the Commission considered that the relevant geographic 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 between their point of departure and their intended destination as an acceptable substitute for the direct route.<sup>12</sup>
- (18) The Commission considered in past decisions that a possible market for the award of a franchise or concession to operate passenger railway services would be EEA-wide, ultimately however leaving the market definition open.<sup>13</sup>
- (19) The Commission concludes that in this case the exact geographic market definition may be left open as the assessment of the case would be the same irrespective of the market definition.

## 5. COMPETITIVE ASSESSMENT

- (20) Abellio submits that the Transaction will not give rise to any affected market, as the activities of Abellio do not overlap with the activities of the Franchise that will be acquired by Abellio Scotrail.
- (21) Abellio currently operates three further rail franchises in the UK, the Merseyrail concession and the Northern Franchise, both jointly with Serco Group plc, and the Greater Anglia Franchise. In addition, another subsidiary of Abellio offers bus transport services in the London and Surrey area.

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<sup>10</sup> See cases M.5855 - *DB/Arriva* of 11 August 2010, paragraph 64; and M.4797 – *Govia/West Midlands Passenger Rail Franchise* of 20 September 2007, paragraph 13.

<sup>11</sup> See cases M.3273 - *First/Keolis/TPE JV* of 8 December 2003, paragraph 7; and M.5855 - *DB/Arriva* of 11 August 2010, paragraph 73.

<sup>12</sup> See case M.2446 - *Govia/Connex South Central* of 20 July 2001, paragraph 14. See also case M.5855 - *DB/Arriva* of 11 August 2010, paragraph 74.

<sup>13</sup> See case M.5855 - *DB/Arriva* of 11 August 2010, paragraphs 71-72.

### 5.1.1. *Competition in the market*

- (22) Abellio submits that the scope of its current rail and bus activities does not extend to the geographic area covered by the Franchise. This was also confirmed by the CMA, who monitors closely the UK rail market, in the course of pre-notification contacts.<sup>14</sup>
- (23) There is therefore no overlap on any market for the supply of public passenger transport services on point-to-point routes between Abellio's existing public passenger transport services and the services to be operated under the Franchise. Similarly, there is no overlap between the activities of Abellio and those of the Franchise on the Scottish network.
- (24) Therefore, the Commission concludes that Transaction is unlikely to raise serious doubts as to its compatibility with the internal market on the market for public passenger transport services by rail.

### 5.1.2. *Competition for the market*

- (25) On an EEA-wide market for the award of a franchise or concession to operate passenger railway services, Abellio submits that its market share would be below 20%. This would be the case irrespective of how the market size is calculated, namely both on a market calculated on the basis of train passengers' km and a market calculated on the basis of value (turnover of concessions and franchises).
- (26) If the geographic market for the award of a rail franchise or concession was considered to be national, the Transaction would lead to an affected market. On the UK market for the award of a franchise or concession to operate passenger railway services, Abellio's share will rise from 14% to 22% on the basis of the generated turnover.<sup>15</sup>
- (27) Abellio operates four out of 19 of the total rail franchises and concessions that have been awarded in the UK. Out of the seven rail franchises or concessions that have been tendered in the last two years, Abellio submitted a bid in four. In all cases, five bidders were shortlisted and Abellio was in the end awarded two of the franchise contracts, one jointly with Serco.
- (28) The market for operating rail franchises and concessions in the UK appears to be very competitive. Participating bidders are publically and privately owned, UK and non-UK based companies. Selection takes place on the basis of quality and price. There are currently nine companies, other than Abellio operating rail franchises and concessions in the UK, five of which with a market share exceeding 10% of the UK market for the award of rail franchises and concessions.

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<sup>14</sup> "On the basis of the foregoing, we do not consider that the award of the Scotrail franchise raises any meaningful overlaps and as such could not give rise to competition concerns", e-mail of 24 November of [...] (Legal), Mergers, Competition and Markets Authority.

<sup>15</sup> It should also be noted that if Abellio's share were calculated on the basis of train passengers' km, it would rise from 12% to 17% of the market for the award of a franchise or concession to operate passenger railway services.

- (29) In light of the foregoing, the Commission concludes that the Transaction is unlikely to raise serious doubts as to its compatibility with the internal market in the market for the award of a concession or franchise for the provision of passenger railway services.

## **6. CONCLUSION**

- (30) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission*

*(Signed)*

*Margrethe VESTAGER*

*Member of the Commission*