



EUROPEAN COMMISSION
DG Competition

*Case M.8441 -
FIRSTGROUP / MTR
CORPORATION /
SOUTH WESTERN
RAIL FRANCHISE*

Only the English text is available and authentic.

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

Article 4(4)
Date: 05/05/2017



EUROPEAN COMMISSION

Brussels, 5.5.2017
C(2017) 3136

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying parties:

**To the Competition and Markets
Authority:**

**Subject: Case M.8441 - FIRSTGROUP / MTR CORPORATION / SOUTH WESTERN RAIL FRANCHISE
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004¹ for referral of the case to the United Kingdom and Article 57 of the Agreement on the European Economic Area².**

Date of filing: 27.03.2017

Legal deadline for response of Member States: 20.04.2017

Legal deadline for the Commission decision under Article 4(4): 05.05.2017

Dear Sir or Madam,

1. INTRODUCTION

- (1) On 27 March 2017, 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 (the “Merger Regulation”) with respect to the proposed acquisition of the South Western rail franchise (the “Franchise”) by First MTR South Western Trains Limited

¹ 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.

² OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

("FMSWTL"), a joint venture between FirstGroup plc ("FirstGroup") and MTR Corporation (UK) Limited ("MTR") (the "Transaction").

- (2) According to Article 4(4) of the 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 28 March 2017.
- (4) By letter of 5 April 2017, the Competition and Markets Authority ("CMA") as the competent authority of the United Kingdom, informed the Commission that the United Kingdom agrees with the proposed referral.

2. THE PARTIES

- (5) **FirstGroup** (United Kingdom) operates public transport services in the UK, Ireland, India and North and Latin America. In the UK, FirstGroup's divisions operate passenger rail services ("First Rail")³ and local bus services ("First Bus").⁴
- (6) **MTR** (China) is a Hong Kong company⁵ that operates transport services in Hong Kong, mainland China, Sweden, Australia and the UK. In the UK, MTR operates TfL Rail (the first phase of the future Crossrail service, which will be renamed the Elizabeth Line in 2018).
- (7) **FMSWTL** will operate the Franchise from 20 August 2017 for an initial period of seven years, until 18 August 2024, following a competitive bidding procedure by the UK Department for Transport (the "DfT").⁶ The Franchise will be responsible for delivering rail services between London Waterloo, the south west of London and towns and cities in the counties to the south and west of the UK. The previous South Western franchise is currently operated by Stagecoach South Western Trains Limited, a subsidiary of Stagecoach Group plc ("Stagecoach").
- (8) FirstGroup and MTR are referred to collectively as the "**Parties**".

3. THE OPERATION AND THE CONCENTRATION

- (9) Pursuant to the Transaction, FirstGroup will have 70% of the shares in FMSWTL and MTR will have 30%. MTR will have a material veto right as regards *[details about the governance of FMSWTL to conclude that it will be jointly controlled by FirstGroup and MTR]*.⁷

³ Within the area covered by the Franchise, FirstGroup operates the First Great Western ("GWR") franchise which provides rail services from London, and across Berkshire, Surrey, Hampshire, Wiltshire, Devon, Dorset and Somerset.

⁴ Within the area covered by the Franchise, FirstGroup currently operates passenger bus services provided by First Hampshire, Dorset and Berkshire ("First HDB") and First West of England ("First West").

⁵ Approximately 75% of MTR is owned by the Hong Kong Government.

⁶ See DfT's press release of 27 March 2017: <https://www.gov.uk/government/news/first-mtr-south-western-trains-limited-wins-south-western-franchise>.

⁷ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C95 of 16.04.2008, paragraph 82.

- (10) The Franchise constitutes a business with a market presence to which a turnover can be clearly attributed under paragraph 24 of the Commission Jurisdictional Notice.
- (11) The Transaction therefore leads to the acquisition of joint control of FMSWTL by FirstGroup and MTR pursuant to Article 3(1)(b) of the Merger Regulation.

4. EU DIMENSION

- (12) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (FirstGroup: EUR 7 193 million; MTR: EUR 4 850 million; FMSWTL: EUR [...]). Each of them has a Union-wide turnover in excess of EUR 250 million (FirstGroup: EUR [...]; MTR: EUR [...]; FMSWTL: EUR [...]), but the undertakings concerned do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State.
- (13) The notified Transaction has therefore an EU dimension within Article 1(2) of the Merger Regulation.

5. ASSESSMENT OF THE REFERRAL REQUEST

- (14) On the basis of the information provided by the Parties in the Reasoned Submission, the Transaction will lead to horizontal overlaps on the markets for (i) the award of franchises or concessions to operate passenger transport services, and (ii) the supply of public passenger transport services.

A. Relevant product markets

Product market

- (15) The relevant product market could be as wide as all passenger transport services or as narrow as solely rail services. 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.⁸ The Commission also indicated that competitive pressure might be exerted on a railway franchise by other types of public transport, including buses.⁹
- (16) 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 services ("*competition for the market*") and competition within the market for the supply of public passenger transport services by rail ("*competition in the market*").¹⁰

⁸ See Commission Decision of 7 October 1996 in Case M.816 – *CGEA/South Eastern Train Company Limited*, paragraph 13; and Commission Decision of 20 September 2007 in Case M.4797 – *Govia/West Midlands Passenger Rail Franchise*, paragraph 12.

⁹ See Commission Decision of 7 October 1996 in Case M.816 – *CGEA/South Eastern Train Company Limited*, paragraph 15; and Commission Decision of 20 September 2007 in Case M.4797 – *Govia/West Midlands Passenger Rail Franchise*, paragraph 12.

¹⁰ See Commission Decision of 11 August 2010 in Case M.5855 – *DB/Arriva*, paragraph 64; and Commission Decision of 20 September 2007 in Case M.4797 – *Govia/West Midlands Passenger Rail Franchise*, paragraph 13.

- (17) The exact product market definition can however be left open as the outcome of the assessment of the referral request would not be different under any plausible market definition.

B. Relevant geographic market

- (18) With regard to the market for public passenger transport services by rail ("*competition in the market*"), the Commission defined in previous cases 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.¹¹
- (19) However, in *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.¹²
- (20) In line with the Commission's decisional practice whereby the narrowest possible geographic market is a particular flow (i.e. a journey between two points) served by a particular bus or rail route, the Parties have used this frame of reference in identifying affected markets and in assessing the competitive effects of the concentration.
- (21) With regard to the market for the award of a franchise or concession to operate passenger railway services ("*competition for the market*"), the Commission has considered in previous cases that the market for rail franchises in the UK is rather national in scope.¹³
- (22) The exact geographic market definitions can however be left open as the outcome of the assessment of the referral request would not be different under any plausible market definition.

C. Assessment

- (23) According to the Commission Notice on case referral, in order for a referral to be made by the Commission to one or more Member States pursuant to Article 4(4), the following two legal requirements must be fulfilled:¹⁴
- (a) there must be indications that the concentration may significantly affect competition in a market or markets, and
- (b) the market(s) in question must be within a Member State and present all the characteristics of a distinct market
- (24) With regard to the first requirements, the present Transaction gives rise to several potentially affected markets in the United Kingdom. On a point-to-point basis, and

¹¹ See Commission Decision of 8 December 2003 in Case M.3273 – *First/Keolis/TPE JV*, paragraph 7; and Commission Decision of 11 August 2010 in Case M.5855 – *DB/Arriva*, paragraph 73.

¹² See Commission Decision of 20 July 2001 in Case M.2446 – *Govia/Connex South Central*, paragraph 14. See also Commission Decision of 11 August 2010 in Case M.5855 – *DB/Arriva* of 11 August 2010, paragraph 74.

¹³ See Commission Decision of 11 August 2010 in Case M.5855 – *DB/Arriva*, paragraph 72.

¹⁴ Commission Notice on Case Referral in respect of concentrations – Para. 16.

with respect to: (i) FirstGroup's existing rail services that overlap with the Franchise; and (ii) FirstGroup's existing bus services that overlap with the Franchise, the Parties have identified 109 Rail:Rail and 97 Bus:Rail horizontally overlapping flows (totalling 176 horizontally overlapping flows as there are duplicates between these figures) in which the combined share of FirstGroup and the Franchise exceeds 20%.¹⁵

- (25) On a plausible market for the award of franchises to operate passenger railway services ("*competition for the market*") the award of the Franchise to the Parties would increment [10-20]% the Parties' share for rail franchises, reaching a combined market share of [20-30]% in the United Kingdom (in terms of annual revenues).¹⁶
- (26) Therefore, the first legal requirement set forth by article 4(4) of the Merger Regulation appears to be met.
- (27) With regard to the second requirement, and in line with the above, there are strong indications that the distinct markets for the award of franchises to operate passenger transport services and the supply of public passenger transport services would be at most of national dimension. Therefore, also the second legal requirement set forth by article 4(4) of the Merger Regulation appears to be met.
- (28) In view of the foregoing, the preliminary assessment suggests that the Transaction may significantly affect competition within a Member State and that the effects of the Transaction would be restricted to the United Kingdom. Further, the markets in question present all the characteristics of a distinct market.

Additional factors

- (29) Given that the likely focus of the Transaction is confined to the United Kingdom, the CMA is best placed to examine the case.
- (30) The UK competition authorities have substantial experience in examining the market for the provision of passenger transport services. In addition, in previous cases¹⁷ affecting this market in the United Kingdom, the Commission took the step of referring the matter to the UK competition authorities.
- (31) Finally, the requested referral would preserve the principle of "one-stop-shop" to the extent that the case will be referred to a single competition authority, which is an important factor of administrative efficiency.

6. REFERRAL

- (32) 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 Merger

¹⁵ The Parties submit that, while there are limited potential overlaps between MTR's operation of the Crossrail concession (to commence in 2019) and the Franchise, there can be no competitive impact arising from these overlaps as the CMA has found that MTR does not have control over the Crossrail concession for the purposes of a merger control analysis.

¹⁶ Form RS, Table 1 in conjunction with paragraphs 109 and 110.

¹⁷ See Case M.7897 – ARRIVA RAIL NORTH / NORTHERN FRANCHISE; Case M.7146 – Govia/Thameslink, Southern and Great Northern Passenger Rail Franchise; Case M.4797 – Govia/West Midlands Passenger Rail Franchise, Case M.4070 – London South Eastern Railway/The integrated Kent Rail Franchise.

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.

- (33) The Commission notice on case referral in respect of concentrations¹⁸ (point 17) indicates that, in seeking a referral under Article 4(4), *“the requesting 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...”*.
- (34) Point 18 of the notice also indicates that *“the requesting parties are required to show that a geographic market in which competition is affected by the transaction in the manner just described (paragraph 17) is national, or narrower than national in scope”*.
- (35) Moreover, point 20 of the notice provides that *“Concentrations with a Community dimension which are likely to affect competition in markets that have a national or narrower than national scope, and the effects of which are likely to be confined to, or have their main economic impact in, a single Member State, are the most appropriate candidate cases for referral to that Member State. This applies in particular to cases where the impact would occur on a distinct market which does not constitute a substantial part of the common market”*.
- (36) 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 points 17, 18 and 20 of the notice.

7. CONCLUSION

- (37) 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 the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(signed)

Johannes LAITENBERGER

Director-General

¹⁸ OJ C 56, 5.3.2005, p. 2.