



EUROPEAN COMMISSION

DG Competition

***Case M.9356 - ABELLIO / EAST MIDLANDS  
PASSENGER RAIL  
FRANCHISE***

Only the English text is available and authentic.

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

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Article 4(4)

Date: 21.06.2019



EUROPEAN COMMISSION

Brussels, 21.6.2019  
C(2019) 4885 final

## **PUBLIC VERSION**

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

**To the notifying party  
To the Competition and Markets  
Authority**

**Subject: Case M.9356 – Abellio/East Midlands Passenger Rail Franchise Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004<sup>1</sup> for referral of the case to the United Kingdom and Article 57 of the Agreement on the European Economic Area<sup>2</sup>.**

**Date of filing: 23.05.2019**

**Legal deadline for response of Member States: 18.06.2019**

**Legal deadline for the Commission decision under Article 4(4): 02.07.2019**

Dear Sir or Madam,

### **1. INTRODUCTION**

- (1) On 23 May 2019, the Commission received by means of a reasoned submission a referral request pursuant to Article 4(4) of the Merger Regulation (“the Reasoned

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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').

Submission”) with respect to a concentration which would result from the proposed acquisition by Abellio Transport Group Limited (“Abellio”, United Kingdom) through its subsidiary Abellio East Midlands Limited (“AEML”, United Kingdom) of sole control over the East Midlands rail passenger franchise (the “Franchise”, United Kingdom) within the meaning of Article 3(1)(b) of the Merger Regulation (“the Transaction”).

- (2) The Transaction is to be achieved as a result of a process conducted by the United Kingdom Department for Transport (“DfT”) to identify an operator for the Franchise from 18 August 2019 to 22 August 2027. The legal form of the Transaction is constituted by the coming into full force of a rail franchise agreement between Abellio/AEML and the Secretary of State, which would confer on Abellio/AEML control of the Franchise within the meaning of Article 3(2) of the Merger Regulation.
- (3) Abellio has requested that the proposed concentration be examined in its entirety by the competent authorities of the United Kingdom.
- (4) According to Article 4(4) of the Merger Regulation, prior to the notification of a concentration to the Commission, the parties may request that the transaction be referred in whole or in part from the Commission to a Member State to be examined by the competent national authorities, where the concentration significantly affects competition in a market within that Member State, which presents all the characteristics of a distinct market.
- (5) A copy of the Reasoned Submission was transmitted to all Member States on 23 May 2019.
- (6) By e-mail of 29 May 2019, 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**

- (7) **Abellio** operates rail and bus services in the United Kingdom. Abellio is owned by Abellio Transport Holding BV and ultimately owned by NV Nederlands Spoorwegen (“NS Groep”, the Netherlands), which is the Dutch state-owned holding company of a multinational passenger transport group operating in the Netherlands, Germany and the United Kingdom. **AEML** is a subsidiary of Abellio and was established as a vehicle to bid for the Franchise.

**The Franchise** is a passenger rail franchise principally serving the East Midlands area of England. The Franchise includes the Midland Main Line, with its terminus at London St Pancras running services to Derby, Leicester, Sheffield and Nottingham. It also includes a network of local lines serving destinations such as Grantham, Lincoln and Mansfield. The routes included also provide services to Luton Airport and East Midlands Parkway. The Franchise is currently operated by East Midlands Trains Limited, a subsidiary of Stagecoach plc.

### **3. THE TRANSACTION**

- (8) The Transaction involves the acquisition by Abellio of sole control over the Franchise (the “Transaction”). The Transaction would take place as a result of a process conducted by the DfT and is to be achieved by means of the execution of a rail franchise agreement (“the Franchise Agreement”) between, on the one hand, Abellio, through AEML and, on the other hand, the Secretary of State.
- (9) On 7 June 2018, the DfT published an invitation to tender in respect of a service concession contract to operate the Franchise. This contract is due to run from 18 August 2019 to 22 August 2027. The contract was awarded to Abellio through AEML.
- (10) According to the Franchise Agreement, passengers would contract directly with Abellio for the use of the infrastructure. Revenues would then be generated by the collection of passenger fees through the operation of the Franchise. Abellio would have the power to set prices for certain fare categories and grant discounts on regulated fares; it would also bear part of the commercial risks linked to the operation of the service and take commercial decisions beyond the constraints imposed by the Franchise.<sup>3</sup> The Franchise Agreement would therefore confer Abellio the rights to influence the strategic decisions of the Franchise.
- (11) The Franchise therefore constitutes a business with a market presence, capable of generating turnover in light of paragraphs 24 et seq. of the Consolidated Jurisdictional Notice.
- (12) It follows that the Transaction would result in a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

### **4. UNION DIMENSION**

- (13) The Parties have a combined aggregate worldwide turnover of more than EUR 5 000 million.<sup>4</sup> Abellio is part of the NS Groep, whose worldwide turnover amounted to EUR 5,926 million for FY 2018; the Franchise had a worldwide turnover of EUR 474.77 million for FY 2018. The aggregate Union-wide turnover of the Parties is more than EUR 250 million (Abellio/NS Groep: EUR 5,926 million and the Franchise EUR 474.77 million). Neither Parties achieves more than two-thirds of their aggregate Union-wide turnover within one and the same Member State.
- (14) The concentration therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

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<sup>3</sup> The holder of the Franchise determines unregulated fares and may grant discounts against regulated fares except in the last 13 months of the Franchise where it needs to obtain the DfT consent. Abellio will bear the commercial risk within 4 per cent of an agreed target. For any greater deviation, it will be entitled to receive a Revenue Support Adjustment from the DfT.

<sup>4</sup> Turnover calculated in accordance with Article 5 of the Merger Regulation.

## 5. ASSESSMENT OF THE RELEVANT MARKETS AND THE REFERRAL REQUEST

- (15) Abellio and the Franchise both operate rail passenger services in the United Kingdom. They do not have other activities in any market that is downstream or upstream from the relevant activities. Therefore, the Transaction would not give rise to any vertical relationships.
- (16) In terms of horizontal overlaps, the Transaction may have an impact on a limited number of distinct markets that are entirely within the United Kingdom. Those markets are intra-UK rail passenger flows that are served by the Franchise and on which Abellio already operates services via the West Midlands and East Anglia franchises and the Merseyrail concession (as part of a joint venture in each case).

### 5.1. Relevant product markets

- (17) According to Abellio, the relevant product market could potentially encompass all passenger transport services, including transport by rail, bus and other forms of public transport as well as private transport. Abellio also submits that it could be narrowed to include public passenger rail transport only.
- (18) In previous cases, the Commission considered that the relevant product market in relation to the award of a railway service franchise was the supply of public passenger transport services by rail. The Commission also indicated that competitive pressure might be exerted on a railway franchise by other types of public transport, including buses.<sup>5</sup>

### 5.2. Relevant geographic markets

- (19) In the Reasoned Submission, Abellio does not commit to any specific geographic market definition but submits that the narrowest possible geographic market definition would consist of flows between individual stations (point-to-point flows).
- (20) 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 was the subject of the franchise agreement.<sup>6</sup>
- (21) However, in case M.2446 - *Govia/Connex South Central*, the Commission considered that the relevant geographic market could be defined as individual point-to-point routes, 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.
- (22) For the purpose of assessing the referral request, the exact product and geographic market definition can be left open. The Franchise only operates in England. On that basis, even on the widest plausible geographic market definition, the Transaction would not affect any market outside the United Kingdom. The following assessment focuses on the narrowest possible market definition, i.e. the

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<sup>5</sup> See cases M.7483 – *Abellio Transport/Scotrail*, M.4797 – *Govia/West Midlands Passenger Rail Franchise*, and M.816 – *CGEA/South Eastern Train Company Limited*.

<sup>6</sup> See cases M.7483 – *Abellio Transport/Scotrail*, M.3273 – *First/Keolis/TPE JV*, and M.2446 - *Govia/Connex South Central*.

supply of public passenger transport services by rail on individual point-to-point routes.

### **5.3. Assessment of the referral request**

#### *Legal requirements*

- (23) Pursuant to Article 4(4) of the Merger Regulation, and to points 16 to 18 of the Commission Notice on case referral in respect of concentrations (“the Notice on case referral”)<sup>7</sup>, the assessment of a concentration may be referred to a Member State provided that:
- (i) the concentration may significantly affect competition in a market or markets within a Member State,<sup>8</sup> and
  - (ii) such market presents all the characteristics of a distinct market.<sup>9</sup>
- (24) Furthermore, pursuant to point 20 of the Notice on case referral, concentrations whose effects 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.
- (25) Based on the narrowest possible market definition, as noted above, the Transaction would give rise to affected markets on those flows where the Franchise’s services overlap with one or more of the other UK rail franchises and concessions operated by companies in which Abellio has a decisive influence.
- (26) The individual point-to-point flows on which the services provided by the Franchise overlap with one or more of Abellio’s services, would result in combined market shares in excess of 20% on 40 point-to-point routes, which are part of the routes connecting:
- (a) Norwich and Peterborough (33 affected routes, leading to a total combined market share of 86.2 % in revenues and of 82.8 % in passenger journeys),
  - (b) Stoke-on-Trent and Cewe (6 affected routes, leading to a total combined market share of 93.9 % in revenues and of 92.5 % in passenger journeys), and
  - (c) Liverpool South Parkway and “Liverpool BR” (four rail stations in Liverpool city centre; 1 affected route, leading to a combined market share of 81.7 % in revenues and of 81.8 % in passenger journeys).
- (27) Based on the above analysis of the information submitted in the Reasoned Submission, the Commission considers that the legal requirements for referral are met, given that (i) the concentration may significantly affect competition within a Member State, (ii) the affected market presents all the characteristics of a distinct market, and (iii) the principal impact on competition of the concentration would be limited to the United Kingdom.

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<sup>7</sup> Commission Notice on Case Referral in respect of concentrations, O.J. C 56, .5.3.2005, p.2.

<sup>8</sup> Further developed in point 17 of the Commission Notice on Case Referral.

<sup>9</sup> Further developed in point 18 of the Commission Notice on Case Referral.

*Additional factors*

- (28) Finally, the Commission has considered as an additional factor supporting the referral, the fact that the CMA would be best placed to examine the effects of the Transaction for the following reasons:
- (a) the CMA has extensive and specific expertise in examining the markets at hand. By way of example, the CMA has already dealt with similar cases in the past, in particular in case M.4797 – *Govia/West Midlands Passenger Rail Franchise*.<sup>10</sup>
  - (b) the handling of the Transaction by a single competition authority in a “one-stop-shop” would increase administrative efficiency.

**6. CONCLUSION**

- (29) In light of the information provided by Abellio in the Reasoned Submission and on the basis of the above considerations, the Commission considers that the present case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the proposed concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market. Furthermore, the requested referral would be consistent with paragraphs 19-23 of the Notice on case referrals, in particular because the CMA appears to be the most appropriate authority to examine the Transaction.
- (30) 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*

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<sup>10</sup> See also case M. 7897 – *Arriva Rail North / Northern Franchise*, and M. 8441 – *FirstGroup / MTR Corporation South Western Rail Franchise*.