



EUROPEAN COMMISSION
DG Competition

*Case 9407 – First Trenitalia West Coast Rail/ West Coast
Partnership Rail
Franchise*

Only the English text is available and authentic.

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

Article 4(4)
Date: 18.09.2019



EUROPEAN COMMISSION

Brussels, 18.09.2019
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 parties

To the Competition and Markets Authority in United Kingdom

Subject: Case M.9407 – First Trenitalia West Coast Rail/ West Coast Partnership 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: 14.08.2019

Legal deadline for response of Member States: 5.09.2019

Legal deadline for the Commission decision under Article 4(4): 19.09.2019

Dear Sir or Madam,

1. INTRODUCTION

- (1) On 14 August 2019, the Commission received by means of a reasoned submission a referral request pursuant to Article 4(4) of the Merger Regulation (the “**Reasoned**

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').

Submission”) with respect to a concentration which would result from the proposed acquisition of the West Coast Partnership franchise (the “Franchise”, United Kingdom) by First Trenitalia West Coast Rail Limited (“FTWCRL”, United Kingdom) within the meaning of Article 3(1)(b) of the Merger Regulation (the “**Transaction**”). FTWCRL is a joint venture between First Rail Holdings Limited (“FRH”, United Kingdom), part of FirstGroup plc (“FirstGroup”, United Kingdom) and Trenitalia UK Limited (“TUKL”, United Kingdom), which is part of Ferrovie dello Stato Italiane (“FS Group”, Italy).

- (2) The Transaction is to be achieved further to a process conducted by the United Kingdom Department for Transport (“DfT”) by means of which FTWCRL was appointed as operator for the Franchise from 8 December 2019 to 1 April 2031 (subject to extension by up to 3 years).
- (3) FRH and TUKL have requested that the proposed concentration should be examined in its entirety by the competent authorities of the United Kingdom.
- (4) On 14 August 2019, the Commission transmitted a copy of the Reasoned Submission to all Member States.
- (5) On 22 August 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

- (6) **FTWCRL** is a private limited company incorporated in England and Wales. As previously stated, FTWCRL is jointly controlled by FRH and TUKL.
- (7) **FRH** is ultimately owned by FirstGroup. First Group operates public transport services in Europe, primarily in the United Kingdom as well as in Northern and Latin America.
- (8) **TUKL** is wholly owned by Trenitalia SpA (“Trenitalia”, Italy), which is itself ultimately owned by FS Group. Trenitalia provides rail transportation services within Italy and internationally, including in Switzerland, Austria, Germany, France, Greece and the United Kingdom.
- (9) FirstGroup and Trenitalia are referred to collectively as the “Parties”.
- (10) The **Franchise** combines operations of existing intercity services on the West Coast Mainline with the design and launch of services on High Speed 2 (“HS2”) infrastructure (see paragraphs (13) to (15) below).

3. THE OPERATION AND CONCENTRATION

- (11) The Transaction involves FTWCRL’s acquisition of the Franchise. 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, the DfT and FTWCRL on the other hand.
- (12) The agreement to award FTWCRL the franchise agreement was announced by the DfT on 14 August 2019. FTWCRL will operate the Franchise from 8 December

2019 until 1 April 2031 (subject to extension up to three years) although on different terms (see paragraphs 13 and 14 below). The franchise agreement combines the operation of existing intercity services on the West Coast Mainline (the “ICWC Services”) with the design and launch of services on HS2 infrastructure.

- (13) From 8 December 2019 until 1 April 2026, FTWCRL will operate the ICWC Services under terms similar to a traditional franchise arrangement. The ICWC Services comprise long-distance intercity services between London, Birmingham, Manchester, Liverpool, North Wales, Glasgow and Edinburgh. During that period of time, FTWCRL will operate the ICWC services by taking a significant part of the commercial risks (see paragraph (19) below).
- (14) It is then expected that, as from 1 April 2026 until the expiry of the franchise agreement, the Franchise will move from a traditional revenue risk contract onto a management contract under which FTWCRL will be responsible for operating the initial phases of High Speed Services (“HSS”) operating on HS2 and reconfigured and restructured ICWC operations on the existing network providing intercity services largely to destinations not served by HSS. At that point in time, the franchise agreement will move from a traditional revenue risk contract onto a management contract or concession.
- (15) Based on the information provided by the Parties, the Commission considers that the operation of the ICWC Services for the period 8 December 2019-1 April 2026 constitutes a business with a market presence, capable of generating a turnover in light of paragraphs 24 et seq. of the Consolidated Jurisdictional Notice.³ In particular, passengers would contract directly with FTWCRL for the use of the infrastructure. Revenues would then be generated by the collection of passenger fees through the operation of the Franchise. FTWCRL 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. The franchise agreement would therefore confer FTWCRL the rights to influence the strategic decisions of the Franchise.
- (16) It follows that the Transaction would result in a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

4. EU DIMENSION

- (17) The Parties have a combined aggregate worldwide turnover of more than EUR 5 000 million.⁴ FirstGroup had a worldwide turnover of EUR 8 083 million for FY 2018. Trenitalia is part of the FS Group, which had a worldwide turnover of EUR 12 078 million for FY 2018. The Franchise had a turnover of EUR 1365 million for FY 2018. Each of the Parties also has an EU-wide turnover in excess of EUR 250 million (FirstGroup: EUR 4 037 million; FS Group: EUR [...] million; the Franchise: 1 365 million for FY 2018). Last, not each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

³ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1.

⁴ Turnover calculated in accordance with Article 5 of the Merger Regulation.

- (18) The Transaction therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

5. ASSESSMENT

- (19) The Franchise operates rail passenger services in the United Kingdom where FirstGroup operates rail and bus passenger services. There are no vertical relationships between either FirstGroup or Trenitalia and the Franchise that would result in any material vertical effects.⁵
- (20) In terms of horizontal overlaps, the Transaction would have an impact on a limited number of distinct markets that are entirely within the United Kingdom. Those markets are primarily intra-UK rail that are served by the Franchise and on which FirstGroup also operates rail transport services (39 affected overlapping flows; see paragraph 39 below). However, previous Commission's decisions indicated that competitive pressure could be exerted on a rail franchise by other types of transport (i.e., buses). Since FirstGroup also operates bus passenger services, the Parties have identified an additional affected market based on an overlapping flow between one FirstGroup's bus route and one Franchise's rail route in the United Kingdom.

5.1. Relevant product markets

- (21) In recent cases, the Commission considered that, in countries where the provision of passenger rail services is tendered or franchised by the relevant state authorities, it may be appropriate to draw 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").⁶
- (22) As regards competition for the market, the Commission in *Arriva Rail North/Northern Franchise* stated that, in the UK, there is competition for the market, i.e., there may be a market for the award of railway franchises.⁷
- (23) As regards "competition in the market", in previous cases, the Commission considered that the relevant product market 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.⁸

⁵ FirstGroup operates at a different level of the supply chain to the Franchise only in exceptional circumstances. Such circumstances include cases in which the Franchise would have to procure rail replacement services from coach and bus operators in case of severe disruptions to rail services. Trenitalia has also launched a ticketing platform (PICO4UK) that supplies services to Trenitalia c2c Limited for use on the Essex Thameside franchise. TUKL will provide a non-exclusive licence on an arm's length basis to FTWCRL during the ICWC period to use the PICO4UK technology for the sale, promotion and distribution of rail related products and services across the ICWC Services.

⁶ See cases M.5855 – *DB/Arriva*, M.4797 – *Govia/West Midlands Passenger Rail Franchise*, M.7897 – *Arriva Rail North/Northern Franchise*, M.8441 – *FirstGroup/MTR Corporation/South Western Rail Franchise*.

⁷ Cases M.7897 – *Arriva Rail North/Northern Franchise*, M.5855 – *DB/Arriva*, at paragraph 64.

⁸ See cases M.7483 – *Abellio Transport/Scotrail*, M.4797 – *Govia/West Midlands Passenger Rail Franchise*, and M.816 – *CGEA/South Eastern Train Company Limited*.

- (24) The Parties submit that the same approach should be taken here and, as mentioned above, have assumed that, as regards competition in the market, the relevant product market definition, for purposes of identifying affected markets, shall include rail to rail overlapping flows as well as rail to bus overlapping flows.

5.2. Relevant geographic market

- (25) In the Reasoned Submission, the Parties refer to existing Commission's precedents in terms of geographic market definition.
- (26) With regard to the market for the award of a franchise to operate passenger railway services ("competition for the market"), in previous decisions, the Commission has found that the market for the award of rail franchises in the United Kingdom "*is rather national in scope*".⁹
- (27) With regard to the market for public passenger transport services by rail ("competition in the market"), the Parties submit that the narrowest possible geographic market definition would consist of flows between individual stations (point-to-point flows) served by a particular rail or bus route. As mentioned above, FirstGroup also operates bus services and, since there is a potential competitive pressure between bus and rail services, for purposes of affected markets, the parties have identified an additional overlapping flow between one FirstGlobal bus route and one Franchise rail route in the Glasgow area.
- (28) As regards competition in the market, 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.¹⁰
- (29) 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.¹¹

5.3. Assessment of the referral request

5.3.1. Legal requirements

- (30) According to the Commission Notice on case referral,¹² in order for a referral to be made by the Commission to one or more Member States pursuant to Article 4(4) of the Merger Regulation, the following two legal requirements must be fulfilled:
- a) there must be indications that the concentration within the meaning of Article 4(1) of the Merger Regulation in conjunction with Annex XIV to the EEA Agreement may significantly affect competition in a market or markets, and

⁹ See cases M.8441 – *FirstGroup/MTR Corporation/South Western Rail Franchise*, M.7897 – *Arriva Rail North/Northern Franchise*.

¹⁰ See cases M.7483 – *Abellio Transport/Scotrail*, M.3273 – *First/Keolis/TPE JV*, and M.2446 - *Govia/Connex South Central*.

¹¹ Case M.2446 – *Govia/Connex South Central*, para. 14.

¹² Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2.

- b) the market(s) in question must be within a Member State and present all the characteristics of a distinct market.¹³
- (31) Pursuant to point 17 of the Commission Notice on case referral, for there to be indications that the concentration may significantly affect competition in a market or markets, the Parties are in essence required to demonstrate that the Transaction is liable to have a potential impact on competition on a distinct market in a Member State, which may prove to be significant, thus deserving close scrutiny. While the Parties are not required to demonstrate that the effect on competition is likely to be an adverse one, they should point to indicators which are generally suggestive of the existence of some competitive effects stemming from the Transaction. In this context, the existence of ‘affected markets’ within the meaning of Form RS is generally be considered sufficient to meet the requirements of Article 4(4) of the Merger Regulation.¹⁴
- (32) Furthermore, pursuant to point 20 on the Commission Notice on case referral, concentrations 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.
- (33) It follows from paragraphs (16) and (18) above that the Transaction constitutes a concentration within the meaning of Article 4(1) of the Merger Regulation in conjunction with Annex XIV to the EEA Agreement.
- (34) Concerning the second legal requirement set out in paragraph (30) above, for the purpose of assessing the Reasoned Submission, the exact product and geographic market definition can be left open. The Franchise only operates in the United Kingdom. On that basis, even on the widest plausible geographic market definition, the Transaction would not significantly affect any market that is wider than the United Kingdom.
- (35) In fact, there are strong indications that the markets for the award of franchise to operate passenger transport services (competition for the market) and the supply of public passenger transport services (competition in the market) would be at most of national dimension. In addition, there are indications that the supply of passenger transport services by rail where the Parties mostly overlap might be defined as local.
- (36) Irrespective of which potential market definition is applied, the Commission considers that the markets in question are distinct markets within the United Kingdom in accordance with the second requirement set out in paragraph (30) above. Each of the routes operated under the Franchise and each of those who will be affected by the Transaction begins and ends in the United Kingdom and does not cross any other Member State or other EEA contracting party. The activities of the Franchise are therefore limited to the United Kingdom and there are no indications that the Transaction will have significant effects outside the United Kingdom.¹⁵

¹³ Further developed in point 18 of the Commission Notice on Case Referrals.

¹⁴ Footnote 21 of the Commission Notice on case referral.

¹⁵ These conclusions are not put into question by the fact that neighbouring bus routes may impose competitive pressure on the railway services operated by the Franchise and be at the origin of one additional overlapping flow between one bus route operated by FirstGroup and one rail route operated by the Franchise (as identified in paragraph 40 of this decision). There are no indications that the market for public passenger transport services by bus is wider than national. In addition, there are

- (37) On this basis, the Commission considers that the second requirement set forth by Article 4(4) of the Merger Regulation is met.
- (38) Concerning the first legal requirement set out in paragraph (30) above, on the basis of the information submitted in the Reasoned Submission, the Transaction would give rise to an affected market for the award of a franchise to operate passenger railway services in the United Kingdom (“competition for the market”). The Parties estimate that their combined share of rail franchise in the United Kingdom is currently [20-30]% and that, further to the award of the Franchise, the Parties would have a combined share of rail franchise revenues of [30-40]% in the United Kingdom.
- (39) As regards the market for public passenger transport services in the United Kingdom (“competition in the market”), the activities of FirstGroup overlap with the Franchise and the Transaction would result in combined market shares¹⁶ in excess of 20% on 40 point-to-point routes, i.e.:
- (i) 39 Rail:Rail horizontally overlapping flows, which are part of the routes ;
 - (ii) 1 Bus:Rail horizontally overlapping flow.
- (40) Based on this analysis of the information submitted in the Reasoned Submission, the Commission considers that the Transaction is liable to lead to ‘affected markets’ and therefore that the Transaction is liable to have a potential significant impact on competition on distinct markets in the United Kingdom.
- (41) Hence, the Commission considers that the first legal requirement for a case referral is met, given that the Transaction may significantly affect competition within a Member State.

5.3.2. Additional factors

- (42) As an additional factor supporting the referral, the Commission has considered 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*;¹⁷
 - b) the handling of the Transaction by a single competition authority in a “one-stop-shop” would increase administrative efficiency.

indications that passenger transport services by bus would also be defined as local since users and commuters will likely consider that only direct point-to-point destinations constitute substitutable bus routes. In this context, the effect of the Transaction would be limited at most to the United Kingdom and more likely to one potential overlapping route in the Glasgow area.

¹⁶ The 20% market share threshold is based on shares by revenue for Rail:Rail flows and shares by departures for Bus:Rail flows, as the parties do not have access to data on competitors’ bus revenues.

¹⁷ See also case M.7897 – *Arriva Rail North / Northern Franchise*, and M. 8441 – *FirstGroup / MTR Corporation South Western Rail Franchise*.

5.3.3. *Conclusion on referral*

- (43) In light of the information provided by the Parties in the Reasoned Submission and on the basis of the above considerations, the Commission concludes that the present case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the Transaction 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 Commission Notice on case referrals, in particular because the CMA appears to be the most appropriate authority to examine the Transaction.

6. CONCLUSION

- (44) 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)
Cecilio MADERO VILLAREJO
Acting Director-General