

Acquisition by MTR Corporation (Crossrail) Limited of the Crossrail Concession

ME/6498-14

SUMMARY

1. MTR Corporation (Crossrail) Limited (**MTR**) has been awarded the concession to operate Crossrail services (the **Crossrail Concession**) by Rail for London Limited (**RfL**), a subsidiary of Transport for London (**TfL**) (the **Concession Award**).
2. The Competition and Markets Authority (**CMA**) considered whether the Concession Award will result in enterprises ceasing to be distinct and will constitute a relevant merger situation under section 23 of the Enterprise Act 2002 (the **Act**).
3. The Concession Award entails the lease by MTR of key assets, such as rolling stock, stations and brands, from TfL. The Concession Award will further include the transfer of employees through the Transfer of Undertakings (Protection of Employment) regulations to MTR. The CMA could therefore not exclude the possibility that the Crossrail Concession constitutes an enterprise.
4. However, the CMA also found that TfL and RfL retain control over the commercial strategy of the Crossrail Concession, including over price and operational service levels, as well as customer-facing and marketing activities. In addition, MTR will face a comprehensive performance regime that covers regular monitoring by TfL of a range of performance metrics, the non-achievement of which can entail significant financial consequences for MTR.
5. Taking these factors in the round, the CMA decided the Concession Award will not result in enterprises ceasing to be distinct. A relevant merger situation will not, therefore, be created and the Concession Award does not qualify for investigation under the Act.

ASSESSMENT

Parties

6. MTR is a subsidiary of MTR Corporation Limited, which is an international rail operator headquartered in Hong Kong. In the UK a group company of MTR operates TfL's London Overground concession (in a joint venture with Arriva UK Trains, a subsidiary of the German rail operator Deutsche Bahn).
7. The Crossrail Concession is owned by RfL, a subsidiary of TfL. Crossrail services will consist of rail services that currently form part of the Greater Anglia and Great Western franchise agreements as let by the Department for Transport as well as new train and station services operating on the new Crossrail infrastructure through central London. The Crossrail services will connect Canary Wharf, the City, the West End and Heathrow Airport to commuter areas east and west of London.

Transaction

8. On 18 July 2014, TfL announced its intention to award the Crossrail Concession to MTR and the Crossrail Concession Agreement (**CCA**) was entered into by MTR and RfL on 30 July 2014. The Crossrail services will start operating in stages: first, the transfer of some Greater Anglia services (between London Liverpool Street and Shenfield) will take place in May 2015. This will be followed by the transfer of the Heathrow Connect service and some Great Western services (between London Paddington and Heathrow Terminal 4 and Abbey Wood) in May 2018. In December 2018 and in 2019 new services will be introduced running on new infrastructure through central London.

Jurisdiction

9. The CMA has jurisdiction to review a transaction if it is a relevant merger situation under section 23 of the Act. One of the elements of this definition is that two or more enterprises will cease, or have ceased, to be distinct, ie if they are brought under common ownership or control (section 26 of the Act).¹ MTR submitted to the CMA that the Concession Award does not result in two enterprises ceasing to be distinct. The CMA has therefore considered whether, in the present case, the Concession Award results in enterprises

¹ See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, from paragraph 4.5.

ceasing to be distinct or, as MTR submitted, is more akin to an outsourcing arrangement.²

Enterprises

10. The CMA considers that several factors suggest that the Crossrail Concession may constitute an enterprise.³ The CMA notes that the Concession Award entails the lease by MTR of key assets such as Crossrail rolling stock and nearly all Crossrail stations as well as the granting of licences for the use of related brands and intellectual property rights.⁴ The Concession Award also envisages the transfer of staff to MTR through Transfer of Undertakings (Protection of Employment).⁵ The CMA considers that it cannot exclude the possibility that the duration of the Crossrail Concession – eight years, with the possibility to extend to ten years – means that the Concession Award amounts to a sufficiently long-term transfer of these assets and employees to MTR for the Crossrail Concession to constitute an enterprise.
11. However, it was not necessary for the CMA to conclude on whether the Crossrail Concession constitutes an enterprise, because, as set out below, the CMA does not consider that the Concession Award gives MTR a sufficient degree of control over the Crossrail Concession such that enterprises could be considered to cease to be distinct.

Control

12. As noted above, enterprises cease to be distinct under section 26 of the Act if they are brought under common ownership or control. The ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation. When making its assessment, the CMA focuses on an acquirer's ability to materially influence policy relevant to the behaviour of the target entity in the marketplace, including the strategic direction of the target entity and its ability to define and achieve its commercial objectives.⁶ The CMA has therefore assessed whether in the present case the Concession Award will give MTR material influence over the operation of the Crossrail Concession.

² Section 66(3) of the Railways Act 1993 provides that the award of a rail franchise constitutes an acquisition of control of an enterprise. However, this does not apply to franchises awarded by TfL or its subsidiaries pursuant to the Railways (London Regional Transport) (Exemptions) Order 1994. See also the CMA's decision regarding the [acquisition by Keolis Amey Docklands Limited of the Docklands Light Railway Franchise](#) (14 November 2014).

³ See [Mergers: Guidance on the CMA's Jurisdiction and Procedure](#) (CMA2), paragraphs 4.6 to 4.11.

⁴ MTR will enter into an access agreement for stations not leased by it.

⁵ The Transfer of Undertakings (Protection of Employment) Regulations 2006.

⁶ [Mergers: Guidance on the CMA's Jurisdiction and Procedure](#) (CMA2), paragraph 4.14.

13. MTR submitted that it will not gain any material influence over the Crossrail Concession, since, under the CCA, RfL (or its parent TfL) determines the essential elements of MTR's commercial strategy for the Crossrail Concession, including:
- the terms and conditions, including price, of any fare are set by RfL and they cannot be modified by MTR without RfL's prior written consent;
 - RfL sets Service Level Commitments that establish the level, frequency, maximum journey times, stopping patterns, rolling stock class and formation of the services that MTR is to operate;
 - TfL will maintain the passenger contact centre and the Crossrail website. TfL will undertake the Crossrail marketing and advertising activities, will appoint the advertising contractor at the stations and will approve all advertisements. TfL will also provide MTR with an annual marketing plan for Crossrail, which MTR must support TfL in implementing; and
 - TfL (or others such as Network Rail for some infrastructure) will take decisions regarding long-term asset management and capital investment.
14. The CMA also notes that passenger revenues are retained by RfL and that MTR's fee will not be dependent on passenger revenues. Instead, MTR will be remunerated through a fixed concession payment that is adjusted according to several performance metrics.⁷
15. The CMA considered whether, notwithstanding the fact that, as set out above, several commercial decisions are in the control of TfL, MTR may have the ability to exercise material influence over the Crossrail Concession as a result of its role as operator of Crossrail. The CMA considers that, for example, if MTR had this ability, it may have an incentive to use its responsibility for day-to-day operations to degrade any Crossrail services that potentially overlap with MTR's existing public transport services with a view to gaining revenues from passengers switching from Crossrail to their existing services (given that RfL takes the revenue risk for Crossrail).
16. MTR drew the CMA's attention to a range of provisions in the CCA that limit its ability to exercise influence over the Crossrail Concession. Under the CCA,

⁷ TfL's Finance and Policy Committee paper on Crossrail Train Operating Concession, 17 July 2014, paragraphs 4.22 to 4.25.

MTR will be subject to a performance regime under which it will be assessed against detailed, predetermined performance measures that have been set by RfL. The primary operating performance measures include:

- headway (ie intervals between trains);
- capacity (including unavailability of train units, cancellations and missed station stops); and
- delays.⁸

17. The CCA provides for several additional performance measures, including detailed metrics related to:

- station and train cleanliness;
- station equipment requirements (for example relating to ticket vending machines and lifts); and
- ticket queueing times and station staffing levels.

18. Under the CCA, MTR must record and monitor all operating performance failures on a daily basis and report these to TfL, and must conduct regular audits in relation to other performance measures. In addition, TfL will conduct various quarterly surveys to monitor MTR's performance against its targets.

19. The CCA further provides that MTR's performance against its targets is translated in deductions from its concession payments and, for some measures, bonuses. The importance of the financial implications of TfL's performance regime was noted by TfL, which stated that the monetary values of deductions and bonuses have been carefully calibrated to provide sufficient financial incentives for the Crossrail operator to meet its performance targets.⁹ In addition, the CCA provides RfL with tools to remedy poor performance through an enforcement regime that escalates through remedial plan notices, corrective action notices, step-in rights and ultimately contractual default.¹⁰ As set out in the CCA, these steps can involve significant financial consequences for MTR, including costs incurred in remedying poor performance and, in the

⁸ This is also set out in [TfL's Finance and Policy Committee paper on Crossrail Train Operating Concession](#), 17 July 2014, paragraphs 4.25 to 4.36.

⁹ *Idem*, paragraph 4.27.

¹⁰ This is further confirmed by [TfL's Finance and Policy Committee paper on Crossrail Train Operating Concession](#), 17 July 2014, paragraphs 4.41-4.45.

event of contractual default, the obligation to reimburse RfL for costs incurred in re-tendering the Crossrail Concession.¹¹

20. Based on the evidence set out above regarding the performance regime that MTR will be subject to – in particular the range of performance metrics, the monitoring process and the significant financial and other consequences of missing targets, including possible stepping in by RfL and early termination of the CCA – the CMA considers that MTR does not have the ability materially to influence the Crossrail Concession.

Conclusion on jurisdiction

21. The CMA notes that, as set out above, MTR will use the assets and the employees associated with the Crossrail Concession to provide Crossrail services for the duration of the Crossrail Concession of eight years (with a possible extension to ten years). Nevertheless, the CMA notes that TfL and its subsidiary, RfL, will retain control of the commercial strategy of the Crossrail Concession, including price levels, operational service levels, and customer-facing and marketing activities. In addition, in operating the Crossrail Concession, MTR will be subject to a comprehensive performance regime that includes regular monitoring by TfL and is linked to significant financial consequences of missing performance targets.
22. Taking all of the facts set out above into account, the CMA considers that, on balance, the Concession Award will not result in enterprises ceasing to be distinct and that therefore a relevant merger situation will not be created.

Decision

23. Consequently, the CMA does not believe that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

Nelson Jung
Director of Mergers Group
Competition and Markets Authority
15 January 2015

¹¹ As a security for MTR's performance of its obligations under the CCA, MTR's liability is backed by a performance bond at a value of £15 million (increasing to £25 million from 2018) as well as a parent guarantee which is capped at £80 million.