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## Anticipated acquisition by National Express Group plc of the Thameslink/Great Northern passenger rail franchise

The OFT's decision on reference under section 33 given on 3 August 2005. Full text of decision published 7 September 2005.

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**Square brackets indicate information removed or replaced for confidentiality reasons at the parties' or third parties' request.**

### **PARTIES**

1. **National Express Group PLC (NEG)** is one of the leading operators of public transport services in the United Kingdom. NEG's principal bus operations are in the West Midlands, with smaller operations in Dundee and London. NEG's coach division comprises three separate brands: National Express (NEL), Airlinks and Eurolines. NEG is also currently a train operating company (TOC) in eight instances, of which three are relevant to this transaction: Gatwick Express (GEX); Midland Mainline (MML); and Silverlink (SL).
2. **Thameslink/Great Northern Rail Franchise (TGN)** is a passenger rail franchise currently under tender. TGN is an amalgamation of two existing franchises, Thameslink and Great Northern. The current Thameslink operator, Thameslink Rail Limited,<sup>1</sup> runs services between Bedford and Brighton passing through the City of London. The current Great Northern operator, West Anglia Great Northern Railway Limited,<sup>2</sup> runs services between Peterborough, King's Lynn, Cambridge and London. For the financial year ended 31 December 2004, the combined UK turnover of the Thameslink and Great Northern franchises was £292 million.

### **TRANSACTION**

3. NEG has submitted a bid to the Strategic Rail Authority (SRA) to be awarded the new TGN franchise.
4. In April 2005 the SRA announced that five bidders, one of which is NEG, had successfully pre-qualified as a bidder for the new TGN franchise. The other four pre-qualified bidders are: FirstGroup; MTR/John Laing; Stagecoach and Capital Trains Limited (a joint venture between DSB and English Welsh and Scottish Railway

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<sup>1</sup> Thameslink Rail Limited is a subsidiary of Govia, a joint venture between Go Ahead and Keolis.

<sup>2</sup> West Anglia Great Northern Railway Limited is a subsidiary of National Express Group.

Holdings Limited). The deadline for delivery of the bids to the SRA is 6 September 2005. The franchise is expected to be awarded to the successful bidder in December 2005.

5. NEG notified the transaction on 12 May 2005. The OFT's administrative timetable expires on 5 August.

## **JURISDICTION**

6. By virtue of section 66(3) of The Railways Act 1993 the award of a rail franchise constitutes acquisition of control of an enterprise and therefore NEG and the TGN franchise will cease to be distinct. The combined turnover generated by the two components of the TGN franchise in the last financial year was in excess of £70 million. Accordingly, arrangements are in progress or contemplation which, if carried into effect, will result in a relevant merger situation will be created for the purposes of section 33(1) of the Enterprise Act 2002 (the Act).

## **RELEVANT MARKET**

7. Overlaps exist between passenger rail transport services provided by the TGN franchise and NEG's GEX, MML and SL rail franchises (rail-rail overlaps, though TGN and SL services do not directly overlap but run parallel, see below), as well as between the TGN franchise and NEG's coach services between Brighton and London via Gatwick, Gatwick and Luton, London and Luton and Luton Airport and between London and Peterborough (coach-rail overlaps). Overlaps also exist between NEG bus operations and TGN rail services within the Transport for London (TfL) region (bus-rail overlaps).

## **Product Scope**

8. Passengers' choice of transport on any journey depends on a number of different factors, including access to a particular means of transport (either at the boarding or disembarkation point), personal preference, value of time and relative costs of the available alternatives. These factors are sometimes included in a wider measure of 'generalised cost'<sup>3</sup> of a journey which passengers try to minimise when travelling. The prospects of intermodal substitution – between rail and other forms of transport – for a given journey are considered in outline below.
9. Where different modes of public transport serve the same point-to-point flow, passengers have the option of switching from one mode to the other; the question of the extent to which they would do so in response to relative changes in price or service

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<sup>3</sup> The generalised cost of a journey includes in-vehicle time; the time spent travelling between stations/stops at each end of the journey, and any additional cost in doing so (eg fares); any interchange penalty reflecting the need to change services or modes to complete a journey; the fare paid for the journey; and sometimes other aspects of the journey such as convenience, reliability or 'image' of the mode of transport used.

levels, notably frequency – and thus the degree of competitive constraint posed by one mode on the other – is considered in more detail below when assessing the specific overlap flows.

10. In very general terms, however, bus services tend to be more frequent than rail services. Bus and coach travel tends to be cheaper than travel by train, although journeys are generally longer due to a larger number of stops or congestion delays.
11. As well as varying by route and flow (see below), the degree of substitutability between different transport modes is also dependent upon characteristics of the user. Of particular relevance is the NEG/Greater Anglia report of the Competition Commission (CC), where coach-on-rail overlaps were prevalent, and where a distinction was drawn between leisure passengers, commuters and business travellers who exhibited different sensitivities to journey times.<sup>4</sup>

### **Geographic Scope**

12. In making a journey, passengers wish to travel from a particular point of origin to a specific destination. These demand-side characteristics underpin the CC's and OFT's conclusions that an origin/destination pair – or 'point-to-point' – approach is typically the appropriate geographic frame of reference for competition assessment. A point to point journey may represent a complete route (e.g., Brighton to London) or may represent a smaller 'flow' that comprises part of a longer route (e.g., Brighton to Preston Park, served by the Brighton-London train). Point-to-point frames of reference have consistently been employed by the OFT and the CC in relation to various modal combinations with rail, including rail, coach and bus respectively (see, e.g., the CC's reports in FirstGroup/Scotrail and NEG/Greater Anglia<sup>5</sup>) and are employed again in this case.
13. The point-to-point approach does on occasion raise the issue of demand-side substitutability when one (or indeed both) point(s) of the proposed origin/destination are geographically distinct, e.g., different railway stations; an analogous issue arises in relation to the proximity of a coach or bus stop to a railway station. In this case, a contested issue relates to the analysis of the Central London-Gatwick flow, dealt with below.

### **COUNTERFACTUAL**

14. In order to assess whether or not a merger may 'result in' a substantial lessening of competition for the purposes of s 33 of the Act, it is necessary to consider what the competitive situation would be absent the merger (referred to as the counterfactual).<sup>6</sup> In this case, NEG is one of five pre-qualified bidders for TGN selected by the SRA; it is

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<sup>4</sup> See National Express Group plc and the Greater Anglia franchise, CC report of 4 November 2004.

<sup>5</sup> FirstGroup plc and the Scottish Passenger Rail franchise, CC report of 28 June 2004 and *ibid*.

<sup>6</sup> See further, OFT Substantive Assessment Guidance (May 2003), para. 3.23.

reasonable to assume that if NEG does not win the TGN franchise, one of the other four bidders will. The appropriate counterfactual, in respect of each relevant frame of reference, is therefore that one of the other four bidders will be awarded the TGN franchise. The specific position in relation to the Central London to Gatwick flow is considered in more detail below.

## **IMPACT OF REGULATION AND THE ANALYTICAL FRAMEWORK**

15. The highly prescriptive nature of the new rail franchise template<sup>7</sup> has been well documented in previous OFT decisions (see FirstGroup/ICEC and Virgin/ICEC).<sup>8</sup> This regulatory regime applies equally to the TGN franchise and directly impacts on the commercial freedom to operate the TGN franchise through tight fare and service level regulation. The current proportion of revenue derived from regulated fares covered by TGN (around 70 per cent) is significantly higher than the national average (about 43 per cent). This is due to the fact that TGN will be a London commuter service operator which has a higher proportion of regulated fare types.
16. This is not to say that there is not scope for competition between rail services on the same flow. However, any assessment of (a) the scope of pre-merger competition on a flow and (b) the impact of the merger at hand on that competition must take into account the regulated framework. As the OFT and CC have set out in previous cases,<sup>9</sup> factors to be taken into account include: (a) the degree to which passengers might be exposed to post-merger price increases on unregulated fare; (b) the extent to which regulated fares might act as a constraint on a TOC's ability to raise unregulated fares; and (c) the extent to which the interavailability<sup>10</sup> of unregulated fares indicates that actual competition on a particular flow is muted.
17. In respect of bus services in London, many bus routes operated under contract to TfL are regulated. TfL (through London Buses) plan each route and specifies the service levels and fares that are to apply to each route. A bus operator is contractually bound by such arrangements and has no control or influence over fares or service levels.
18. For ease of reference, the competition assessment below first considers the TGN/GEX rail overlap on the Central London-Gatwick rail flow, followed by other rail overlaps, and concludes with coach and finally bus overlaps between NEG services and TGN.

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<sup>7</sup> This is the franchise document that specifies the service level commitment.

<sup>8</sup> Both cases reported on 21 December 2004. See [www.of.gov.uk](http://www.of.gov.uk)

<sup>9</sup> For references to the OFT decisions in FirstGroup/ICEC and Virgin/ICEC see note 7. Reference is also made to the CC commentary on FirstGroup/ICEC.

<sup>10</sup> These are fares that are available from all the operators operating on a particular flow. The rail operators who participate in the inter-available fare charge the same price. The ticket also allows the passenger use of any service where the ticket is inter-available.

## **RAIL-RAIL OVERLAPS**

### **TGN/GEX (Central London-Gatwick)**

19. Both GEX (currently operated by NEG) and TGN (i.e. the Thameslink portion currently operated by GOVIA) run services between Central London and Gatwick Airport, although the points of origin/destination in London differ between the two services. TGN's services run from the City, Blackfriars and London Bridge whereas GEX runs from London Victoria. In addition Southern (also currently operated by GOVIA) runs services along the same flow, primarily between London Victoria and Gatwick, although some services go via London Bridge. NEG also operates a coach service on this flow but with significantly less frequency and revenue compared to the rail services.
20. NEG has argued that GEX and TGN are not close competitors, in part because they serve different London origin/destination points. There is clearly some intuitive force in this argument. However, there is little empirical evidence to support this proposition. In fact, the available evidence tends to suggest the opposite conclusion. First, a consultant study commissioned by GEX suggests the existence of a material number of marginal passengers who might switch between the Blackfriars/London Bridge destination points and Victoria station in response to relative price changes. Second, NEG's internal business planning documents routinely refer to a 'Central London' or 'Inner London' to Gatwick 'market' that is served by three rail operators (GEX, Thameslink (referred to as TGN hereafter), and Southern). In this circumstance, NEG's argument cannot be accepted. The OFT considers that the appropriate frame of reference for consideration of the competitive effects of this proposed acquisition is a 'Central London-Gatwick' flow.
21. As to the counterfactual on this overlap flow (see para. 14), the outcome does not depend on which of the other four bidders is selected, because unlike NEG, none of these bidders would have overlapping rail operations with TGN. Although NEG contests the OFT's analysis of post-merger incentives, it does not take issue with the counterfactual.

### **Assessment**

22. A successful bid by NEG for TGN, unlike that of other bidders, would reduce the number of independent rail operators on the Central London-Gatwick flow from 3 to 2 and result in NEG's share of supply on this flow being in the high 80s (around [ ] per cent; increment around 10 per cent), with Southern accounting for the remainder (around [10-15] per cent). In these circumstances, the theory of harm posited by the OFT is that post-merger NEG would have sufficient incentive profitably to increase rail fares on this flow (on the part of GEX, TGN or both) owing to the loss of an important independent competitive constraint in TGN on GEX, and potentially the loss of the GEX constraint on TGN.

23. At the outset, two points of context should be noted. First, while a material proportion of TGN's and Southern's fares are regulated, GEX fares are generally not regulated. Second, [ ] the SRA appears to have concluded that consumers on this flow would be better served by the fruits of competition than by pricing coordination [through the setting of inter-available fares] among the TOCs.
24. NEG has submitted that TGN is not an important constraint on the activities of GEX because GEX's service offering is differentiated from that offered by the TGN and Southern commuter services. GEX provides a premium non-stop airport service with bespoke rolling stock specifically designed for this purpose whereas TGN (and indeed Southern) is a commuter service with stops between London and Gatwick. NEG submitted a pricing impact study in support of this proposition. NEG argued that GEX's growth in this market is heavily influenced by the air market and not by other commuter train services that run on the same flow. NEG also argued that a greater constraint on GEX's commercial behaviour arises from other modes of transport such as the private car and taxi services.
25. The evidence on the extent of competition between GEX and TGN is mixed. A substantial body of evidence concerning the competitive relationship between TGN and GEX comes from NEG/GEX internal documents.
- NEG's internal documents refer to both Southern and TGN as competitors. In one internal document NEG describes the market as containing 'two aggressive...operators' which was a reference to both Southern and TGN.
  - An independent pricing analysis (commissioned by NEG in 2004<sup>11</sup>) concluded that, in the event of a GEX 10 per cent price increase, [15 per cent-25 per cent] of those passengers switching away from GEX would divert to TGN services, [25 per cent-35 per cent] to Southern and around [40 per cent-50 per cent] diversion to other modes of transport (including private car, taxi and coach).<sup>12</sup> In addition the pricing model showed a high cross-price elasticity to market share for TGN of around [+0.35 - +0.55] compared to Southern with [+0.50 - +0.70] (albeit with a high margin of error). NEG argued that this pricing study was flawed and has not been followed by the company in price setting.
  - NEG argued that its key Board and Fares Strategy document (drafted prior to its 2004 price increase) showed that the findings of the independent study were ignored when NEG went ahead with a price increase on GEX fares. However, this document – while important – does not explicitly undermine or rejected the

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<sup>11</sup> Addendum – this study was commissioned by Airport Express, created by NEG and BAA plc to undertake joint marketing initiatives in respect of Gatwick Express, Stansted Express and Heathrow Express.

<sup>12</sup> In this connection, NEG operates coach services from Central London to Gatwick. However, the numbers of passengers carried on those coach services is very small compared with the passengers carried on the three rail services. In the circumstances of the present case, the OFT has not needed to consider further the importance of NEG's coach service on this flow.

findings of the independent pricing study when the 2004 fares increase was decided upon by NEG. In fact NEG appears to have pursued a strategy of fare increases in the 'hope' that the market would be more inelastic than the pricing study suggested, and the document also references 'direct head to head competition with two other rail companies, South Central and Thameslink' (notwithstanding that a pricing comparison table does not feature the latter).

- An 'Impact analysis' conducted by NEG, specifically for the purposes of this merger situation, showed no correlation between GEX price increases in 2004 and corresponding increases in passenger numbers for both TGN and Southern. NEG argues that this reinforces its view that GEX is in a separate market that is affected not by other commuter train operators but by seasonal variations in the air travel market, although this is difficult to reconcile with the proposition that Southern (but not TGN) is a real competitor on this flow.
26. Overall, it is clear that NEG's submissions are not without real merit. However, it is also clear that the available evidence does support the proposition that TGN represents a material competitive constraint on GEX. Certain third parties also deem the various rail modes on this flow to be in competition with one another. Considering the totality of the available evidence, the OFT believes that, while GEX faces strong competition from Southern and from private transport (such as car and taxi), TGN represents an important competitive constraint on GEX's pricing behaviour.
27. This conclusion is reinforced by modelling a 10 per cent price increase using the internal statistics from NEG's pricing study. The relevant cross-elasticities and diversion ratios lead one to predict a material and profitable post-merger price increase. This conclusion holds even allowing for the potentially stronger competitive constraint placed on GEX by Southern on the one hand and by private modes of transport in aggregate on the other.
28. Given the highly regulated nature of the rail network, expansion by existing TOCs to act as a competitive constraint to the merged GEX/TGN is highly unlikely. Similarly, entry by new train operators – although theoretically possible under the open access arrangements – is highly unlikely, given the need for SRA approval and difficulty (outlined by current train operators) of running profitable services that overlap with existing train operating companies.
29. On the basis of the evidence, the OFT believes that there is a realistic prospect of a substantial lessening of competition on the Central London-Gatwick flow.

## **TGN/MML**

30. As regards the TGN/MML overlaps, no other rail operator provides services. There is a small number of overlap flows between points such as Bedford and London Kings Cross/London St. Pancras respectively. However, no concerns were raised on the evidence available to the OFT.

31. TGN is the lead operator and 99 per cent of all unregulated fares are interavailable as between TGN and MML. Absent evidence to the contrary, this would suggest little or no price competition between the two operators. Furthermore the OFT examined whether MML could introduce lower dedicated fares to constrain TGN's ability to set high interavailable fares but given the asymmetry in service frequencies (TGN-8 per hour and MML 1 per hour) the impact on competition would be minimal. In addition, an examination of MML's internal documents showed no reference, plan or discussion to suggest that the introduction of dedicated fares were part of its strategy. Accordingly, the OFT has no basis for concerns on these overlaps.

## **TGN/SL**

32. There are no direct overlaps between the TGN and SL services, although the two lines run close to each other for a portion of the overall route, coming closest together at a distance of about 5.8 miles. In this context, the OFT examined whether there may be some shared catchment areas between TGN and SL from various parts of Hertfordshire and Bedfordshire into London. SL services terminate at Euston and TGN at Kings Cross, City Thameslink via Moorgate and Farringdon and then onto Blackfriars and London Bridge.
33. With the exception of Dunstable (population of 34,120) and Houghton Regis (population of 17,130) there are no substantial communities that lie in shared catchment areas between the two services. NEG also submitted a post code analysis of season ticket holders in the shared catchment area and found that of the [ ] customers included in the sample whose closest station was a TGN station, only [ ] passengers opted to use an alternative service, with just [ ] season ticket passengers opting to use SL instead of a TGN service.
34. Consequently, the OFT does not believe that there is any material pre-merger competition between TGN and SL that would be lost as a result of the two services coming under common ownership.

## **COACH-RAIL OVERLAPS**

### **Theory of harm**

35. Post-merger, the transaction would result in eighteen coach-on-rail overlapping flows. In addition, NEG informed the OFT that coach services on three flows were cancelled in March 2005 (Gatwick- Bedford, Luton Airport – Bedford and Luton – Bedford)– these were therefore not considered further in the analysis. In relation to the remaining overlaps the theory of harm tested by the OFT is informed by the CC's detailed analysis in First/ScotRail. In summary, the OFT has first considered whether NEG has the post-merger incentive to raise coach prices or reduce coach frequencies (relative to their levels absent the merger), because NEG would recoup its share of increased rail revenue deriving from passengers switching from coach to



rail. Additional revenue from rail may prompt NEG to engage in such behaviour where it had no incentive or less incentive to do so, pre-merger, when it was independent of the TGN franchise.

## **Modelling framework**

36. In assessing whether NEG would have the incentive to switch passengers from coach to rail on the remaining flows, assuming that coach and rail are substitutable in the view of passengers and thus compete, the analysis simulates the increase in profit NEG could achieve by raising coach fares or reducing coach frequencies. In conducting the analysis aggressive assumptions were made on the own price elasticity of demand for coach travel on price increases and headway elasticity for reductions in frequency. In both cases the elasticity used was -1 with a 70 per cent switching rate to rail services. This represents a worse case against NEG in terms of post-merger incentives compared to previous assumptions adopted by the CC. Coach price increases were considered of 3 per cent, 10 per cent, 20 per cent and 50 per cent. For reductions in frequency the ranges used were; 10 per cent, 20 per cent and 50 per cent.
37. A further element to the profitability analysis arises because on most overlapping flows, a competing train operator (Southern) is also present. It was necessary to take into account the presence of other train operators on each flow and this was factored into the analysis by apportioning the level of switching from coach to rail according to each train operators share of supply by both passenger numbers and by service frequency. On some flows (e.g. London to Gatwick), NEG already has existing rail services and for the purposes of considering additional rail revenue resulting from the merger, only the incremental rail services (i.e. TGN's services) were considered.
38. It was also necessary to take account of network revenues earned by NEL, which would be lost as passengers switch from coach to rail. The CC, in its NEG/Greater Anglia report, assumed that the proportion of network revenues lost was in proportion to the percentage of switching passengers to total route passengers. In the OFT model, it was also necessary to take account of the fact that an overlapping flow only accounts for a certain proportion of revenues and passengers on any route. This approach was taken because the network revenue data could not be categorised by flow. As a result the network revenue lost on some flows may be overestimated and underestimated on others.

## **Results**

39. The analysis showed that when network revenues are taken into account, a coach fare increase resulted in losses on almost all flows. On only two flows the profit was minimal ([ ] and [ ]). In any event the initial revenue uplift on all flows was less than [ ] per cent of current NEG and TGN coach and rail revenues. In relation to the reduction of frequencies, even when the cost savings were taken into account, the analysis

shows that for all scenarios NEG would make a loss in revenue by reducing coach frequency, even before network revenues are taken into account.

### **Simultaneous raising of unregulated rail fares**

40. The OFT also considered whether NEG would have a post-merger incentive and ability to increase unregulated rail fares and coach fares together where there was an overlap to take account of there being fewer competitors. However, on many flows, 90 per cent or more of rail revenue was derived from inter-available fares and the competing rail operator (Southern) set the interavailable fare. On the majority of others, there is a competing rail operator present – which tends to suggest that the majority of switching away from TGN's trains would not be passed onto the coach service, thus reducing incentives to act anti-competitively.
41. The only flows for which this is not the case is for Gatwick – Luton and Gatwick – Luton Airport. Here, qualitative analysis suggests little pre-merger competition; even a major disruption on the train service resulted in very minimal switching to the coach service and past evidence on pricing does not indicate that NEL and TGN considered each other as competitors.

### **Conclusion**

42. In light of the above reasoning, the OFT does not believe that NEG has a material post-merger incentive to raise prices or reduce services, relative to their levels absent the merger, on the coach-rail overlap flows at issue in this case.

### **Barriers to entry and expansion**

43. There has been recent entry into the 'no frills' segment by Megabus. However, this service tends to be on big arterial routes, and entry on smaller flows may be less likely. Given that no concerns arise on the overlapping coach-rail flows, there is no need to conclude on these issues.

### **BUS-RAIL OVERLAPS**

44. NEG operates bus services that overlap with TGN rail services in Central London under a contract with Transport for London (TfL). NEG is unable to set fares, routes or frequencies for the bus services as these are determined by TfL. As such, no competition issues arise as a result of the merger.

### **VERTICAL ISSUES**

45. This transaction does not raise any vertical competition issues.

## **THIRD PARTY VIEWS**

46. Third party responses generally raised no concerns in respect of this merger; this is not atypical given that the relevant customers tend to be individual consumers rather than firms, including on the TGN/GEX overlap. A third party raised possible concerns although it was not specific. Some third parties confirmed that TGN actively competes with GEX.

## **ASSESSMENT**

47. The key issue in this case is whether NEG will have a post-merger incentive to increase rail fares on GEX and/or on TGN on the Central London to Gatwick flow. This issue arises given that the NEG bid for TGN, unlike that of other bidders, would place these two TOCs under common ownership with close to 90 per cent share of supply and leave only one other rail competitor, Southern. The incentive may arise after the removal of TGN as an important constraint on GEX or vice versa, notwithstanding the presence of Southern, which NEG argues does compete with GEX, and any constraints posed by private transport.
48. The GEX and TGN services are clearly differentiated in numerous respects, including London stations served, and in terms of their price and service level propositions. While NEG's submissions have merit, and its pricing impact study, taken by itself, does suggest limited substitutability between GEX and TGN, documentary and other evidence available to the OFT underpins a belief that there is a realistic prospect of a substantial lessening of competition on this flow. This conclusion holds true notwithstanding that the documentary evidence also supported certain propositions advanced by NEG, including that Southern and private transport are important constraints on GEX.
49. The OFT's investigation did not lead to material competition concerns on other overlaps between NEG's existing rail, coach and bus operations. The reasons for this depended on the circumstances of the respective overlaps, and are set out in more detail above.
50. In conclusion, the OFT believes that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom, in particular on the Central London-Gatwick flow.

## **UNDERTAKINGS IN LIEU**

51. NEG has indicated that it is willing to offer undertakings in lieu of reference pursuant to section 73 of the Act. NEG has offered the following undertakings in relation to the Central London-Gatwick flow:
- NEG has offered to divest GEX by way of surrender of the franchise to the SRA. As the rail regulations preclude a TOC from unilaterally surrendering a franchise or

assigning it to a third party, any such action would require the prior approval of the SRA.<sup>13</sup> The OFT has explored this issue with the SRA. On the basis of information available to it, the OFT is not satisfied that the remedy is either clear-cut or capable of ready implementation in line with OFT guidelines.<sup>14</sup> Unfortunately, therefore, this undertaking cannot be accepted in lieu of reference to the CC.

- In the alternative, NEG also offered to introduce a GEX standard day return ticket, initially priced at the same level as the standard open return and then regulated going forward at the prevailing rate for regulated fares generally (currently RPI +1). It is unclear how this particular commitment would address the theory of harm underlying the duty to refer, specifically, NEG's incentives to raise prices on GEX, TGN or both when under its common control, compared to facing an independent operator of TGN. Accordingly, this undertaking too fails the OFT's standard that the remedy be clear-cut and capable of ready implementation. This concern aside, behavioural undertakings generally also raise the issue of enforcement and monitoring cost and burdens. While the OFT does take into account that the concerns here relate exclusively to rail, a regulated sector, an additional concern is that of duration of the proposed behavioural undertaking, as the overlap could conceivably endure until the formal expiry date of the GEX franchise in 2011.

## DECISION

52. The OFT is therefore referring the anticipated acquisition by NEG of the TGN franchise to the Competition Commission on the information currently available under section 33(1) of the Act.

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<sup>13</sup> NEG has requested that OFT clarifies that its offer stems from current discussions with SRA with a view to surrendering the Gatwick Express franchise before its expiry date. In making this offer NEG noted that a structural outcome may be available subject to these ongoing discussions.

<sup>14</sup> Mergers –substantive assessment guidelines May 2003, para. 8.3