

Anticipated acquisition by West Midlands Travel Limited of the joint venture shares of Laing Infrastructure Holdings Limited and Ansaldo Trasporti Sistemi Ferroviari SpA in Altram LRT Limited

The OFT's decision on reference under section 33 given on 2 March 2006. Full text of decision published 5 April 2006.

---

**PARTIES**

1. **Altram LRT Limited (Altram)** is a joint venture (JV) between West Midlands Travel Limited, Ansaldo Trasporti Sistemi Ferroviari SpA (Ansaldo) and Laing Infrastructure Holdings Ltd (Laing) (the JV partners). It operates the Midland Metro (the Metro) which currently comprises a tram service between Wolverhampton and Birmingham (Line 1) under a 23 year concession (the Concession Agreement) granted by the West Midlands Passenger Transport Executive, known as Centro.
2. **West Midlands Travel Limited, trading as Travel West Midlands (TWM)**, is a wholly-owned subsidiary of National Express Group plc (NEG). It operates buses throughout the West Midlands and has a one-third shareholding in Altram. TWM is NEG's principal bus operation in the UK with around 1,750 vehicles and an estimated 83 per cent share of bus travel in the West Midlands.
3. NEG also operates eight rail franchises, including Central Trains which runs rail services throughout the Midlands. Central Trains' services comprise a hub and spoke urban network centred on Birmingham, and is run by NEG on a cost-plus basis to a specification laid down by Centro. [Note 1]
4. NEG also operates an extensive network of coach services throughout Great Britain. In the Midlands Metro Line 1 area this includes services between Wolverhampton and Birmingham.

**TRANSACTION**

5. The transaction involves TWM increasing its stake in Altram from 33.3 to 100 per cent by purchasing the shareholdings of both the other JV partners.

Loans of £350,000 each made by Laing and Ansaldo will be waived. [Note 2] The transaction is conditional on the renegotiation with Centro of the Concession Agreement.

6. Altram has been loss-making and TWM submits that it cannot continue, in the long run, to fund all of these losses. Although the JV partners expect Altram to remain loss-making under TWM ownership, TWM is pursuing this transaction anticipating that these losses can be reduced by a significant amount per annum as a result of:
  - the ability to claim tax relief on all the losses rather than only on one-third
  - its intention to dispense with Altram's consultant;
  - removal of need to employ independent lawyers who currently carry out company secretarial and compliance functions.
  
7. TWM does not expect to be able to materially reduce the losses beyond the extent mentioned above unless and until the Metro network is expanded.<sup>1</sup> If expansion goes ahead Centro and TWM intend (but with no contractual commitment) that for the first three years of integrated operation, TWM will operate the expanded Metro network. Thereafter the operation of the entire network will be subject to a re-tendering process. [Note 3] Under the Concession Agreement, Centro is able to terminate the franchise for the purposes of expansion at any time.

## **JURISDICTION**

8. On completion of this transaction, NEG will operate Central Trains, Altram, National Express coaches and TWM bus services. Post merger NEG will have a share of supply greater than 25 per cent in the provision of local public transport services in the West Midlands. NEG would move from having de facto control to legal control of Altram as a result of this transaction. The OFT therefore believes that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation under section 23 of the Enterprise Act (the Act).

## **THE DEVELOPMENT AND OPERATION OF MIDLAND METRO**

9. In late 1993, the initial consortium comprising of Ansaldo and Taylor Woodrow was successful in winning the bid to design, build and operate the tram system

---

<sup>1</sup> Under the arrangement between TWM and Centro, TWM will co-operate on the planning, preparation and integration of the proposed Lines 2 and 3 extensions and their testing commissioning and operation. If construction goes ahead it is unlikely to be operating before 2011. In any event, these arrangements are independent of those relating to Line 1.

known as the Midland Metro. Taylor Woodrow was later replaced by Laing (previously trading as John Laing Investments Limited) when the consortium was renamed Altram. TWM joined the consortium in 1996, in order to bring its experience in public transport operation to the JV. The relationship between the JV partners is governed by the Shareholders' Agreement entered into by the parties in 1996.

10. The Concession Agreement (between Altram and Centro) was entered into in August 1995, granting a concession period of 23 years, covering an estimated three year build and 20 year operation. In fact, operations did not begin until summer 1999.
11. An evaluation carried out in 1995 by transport consultants appointed by Centro projected that Line 1 would make an operating profit in the first year and that profits would gradually increase over time. The original projection was that around 14 million passengers might be expected to use Line 1 annually. Actual patronage in the first year of operation was around 5 million. Patronage has continued to be lower than forecast and Altram has therefore been loss-making since its incorporation.
12. Laing's interest in the Metro system has been in the construction of the infrastructure and Ansaldo's has been in the provision of the rolling stock and, given the losses being incurred, TWM submits that neither is committed to the long term success of the project. Since September 2001 Laing and Ansaldo have ceased to provide any financial support for Altram: TWM has financed all the losses – a position that it claims cannot be sustained, particularly as it only receives tax relief on one-third of the losses. If Altram's operations were ceased it would breach the Concession Agreement, risking legal action from Centro to recover losses from the JV partners.
13. Centro expects shortly to submit an application to the Department of Transport for approval of an extension to the Metro by adding two further lines, named Lines 2 and 3. A decision by DfT is expected by the end of the year. [Note 4]

## **COUNTERFACTUAL**

14. The core concept of the substantial lessening of competition test is a comparison of the prospects for competition with and without the merger: the counterfactual. In most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition. The OFT's substantive guidance sets out that the OFT 'may need to take into account likely and imminent changes in the structure of competition in order to reflect as accurately as possible the nature of rivalry

without the merger'.<sup>2</sup> We have assessed whether there is any convincing evidence to indicate that TWM ceasing to fund Altram would be sufficiently likely and imminent absent the merger to be accounted for in our counterfactual.

15. TWM has stated that, despite its claims that Altram's losses are unsustainable, walking away from Altram would be a difficult strategy for it to pursue, in particular given its commitment to passenger transport services in the area. Centro has however suggested that in the absence of this transaction, it believes that TWM would withdraw from Altram. Centro has stated that it would then be forced to operate Line 1 since it believes that any alternative potential operator would not bid for it in its present form, and hence a competitive tender at this time is not viable. TWM has said that Centro's views are based on their bilateral negotiations and, as such, one should treat with caution the evidence from Centro on this point.
16. Having considered all the evidence available, including internal documents of TWM, the OFT considers that there is insufficient evidence to believe that, absent the merger, TWM would cease to fund Altram. There is however some risk that TWM could cease supporting Altram or that Centro would terminate the concession if Lines 2 and 3 are not approved by the DfT, but any such exit by TWM would be caused by that decision rather than by the merger. Furthermore, Centro has stated that the merger will not affect the prospects for DfT approval. As a result, exit at this stage is not considered to be sufficiently likely or imminent to be included in our counterfactual analysis, as the decision regarding Lines 2 and 3 is not due until the end of the year. [Note 5]
17. The appropriate counterfactual is therefore the prevailing conditions of competition.

## **MARKET DEFINITION**

18. Altram and NEG overlap in the provision of public transport on certain point-to-point flows:
  - Altram provides tram transport to passengers on the route of Line 1; and
  - NEG provides bus, coach and train transport to passengers on flows overlapping with Line 1.

### **Product market**

19. The prospects for substitution between different forms of transport for a given journey are specific to the routes and passenger profiles in question. In this case,

---

<sup>2</sup> Paragraph 3.24.

internal documents provided by TWM suggest substitution occurs between tram, train, and bus services on flows covered by Line 1. However, no conclusions need be drawn on the most appropriate product market definition in this case, as on any basis no competition concerns arise.

### **Geographic market**

20. In making a journey, passengers wish to travel from a particular point of origin to a specific destination. Previous cases have therefore primarily assessed competition on a point-to-point basis, and no evidence has been received by the OFT which warrants departing from this approach in this case.

### **COMPETITION ANALYSIS**

21. The OFT has therefore evaluated whether the merger would change the ability and incentive of NEG to alter any parameters of competition (such as fares, frequency, or availability of multi-modal tickets) on (1) tram services and (2) its bus, coach and/or train services in the affected area.
22. TWM maintains that its purchase of the shareholdings of Laing and Ansaldo is neutral in competition terms as it is merely formalises the already existing commercial reality in that TWM is simply moving from a position of de facto control to a position of legal control. TWM submits that although each of the JV partners is currently a one-third shareholder in Altram, in practice the day-to-day running of the business is undertaken by TWM, pursuant to the Operation [Note 6] Agreement between Altram and Centro.
23. Laing and Ansaldo have confirmed to the OFT that they have no involvement in operating Line 1 and do not intend or wish to have any such involvement in the future: Laing is no longer represented on the board; Ansaldo is represented by a single Director at board meetings but has no contact with management; and the Shareholders' Agreement gives Laing and Ansaldo no input into operational issues, except fares, which are governed by the Operation Agreement. Each has written off its investment in Altram.
24. Schedule Six of the Shareholders' Agreement outlines those matters which require unanimity on the part of the shareholders and the board of directors. This has not been complied with since September 2001, when Laing and Ansaldo ceased to provide funding to Altram. Since that point, TWM state that it has exercised de facto control over Altram, disregarding the other parties' rights.<sup>3</sup>

---

<sup>3</sup> See below at paragraph 25 (g).

25. TWM has provided the OFT with evidence to support its submission that it has had de facto control of the business since the other JV partners ceased to fund the JV in 2001. The following are examples of TWM exercising its control over Altram independently of the other JV partners:

#### **Independent negotiation with third parties**

- a) TWM has, on behalf of Altram, unilaterally negotiated several agreements with Centro including a new Concession Agreement and the multi-operator ticketing reimbursement plan. Unilaterally it has previously, and continues to, correspond and negotiate with land compensation claimants.

#### **Independent management**

- b) In 2001, TWM closed Altram's offices and arranged for the dismissal of its employees. TWM provided one room within its own head office for a part-time consultant to use but this has now been dispensed with and Altram no longer has any dedicated office space. TWM has subsumed the role of Altram chief executive within TWM and in 2004 appointed a General Manager of Altram without reference to the other shareholders.
- c) In June 2002, TWM changed Altram's auditors from KPMG (who were Laing's auditors) to Ernst & Young who are also the auditors for TWM and NEG. TWM prepares all documents for and liaises exclusively with the new auditors with no recourse to or involvement of the other shareholders.
- d) TWM carries out all the financial management of Altram without any participation from the other shareholders. This includes producing monthly accounts, the operation of ledgers, bank reconciliations, due diligence consents and all tax returns and negotiations. In addition, notwithstanding the provisions of the Shareholders' Agreement requiring board approval, TWM prepares all of Altram's budgets and business plans with no input from the other shareholders. In fact, no copies of these documents are even made available to Laing or Ansaldo.

#### **Independent operational decisions**

- e) The last fare review in which the other JV partners were consulted or took any active interest was in July 2001, just before they ceased providing financial support for Altram. The last three fare reviews of March 2003, January 2004 and January 2005 have all been unilaterally decided upon and implemented by TWM without consultation with the other shareholders.

- f) TWM has also unilaterally negotiated changes in the operating frequency and timetable of Line 1 with Centro and independently implemented these agreed changes absent any consultation with, or recourse to, the other JV partners. In addition, TWM represents Altram on the West Midlands Bus Operators' Panel and the West Midlands Bus Operators' Group, including in relation to all Altram's multi-operator ticketing issues.
- g) Both of the other JV partners have confirmed that TWM has been in sole operational control of the business since 2001 and that their continued presence as shareholders has merely been to manage their exit from the venture in a way that would minimise their losses.
- h) Ansaldo has stated 'Ansaldo took this decision not to provide further funding to Altram in September 2001 because it had at that time provided to Altram all of the funding that was required of it under the Concession Deed Guarantee/Cross-Indemnity arrangements and it was not prepared to invest further monies in a loss making venture which showed no prospect of ever becoming profitable.'<sup>4</sup>
- i) Laing has explained that in 2001 it 'informed Altram and its Shareholders that they would not advance any further monies to Altram in order to keep it solvent...Laing felt that there was no economic future in Altram and that to contribute further funds would only increase its loss in what it believed to be a failing project.'<sup>5</sup>
- j) Both Laing and Ansaldo have also confirmed that they have no interest in, or input into, the operational running of Altram (including fares, frequencies, business plans etc.) or in re-engaging with the JV in the future. Both Ansaldo and Laing have stated that they do not believe that the transaction will make any difference in terms of the day-to-day running of Altram. They have both cited the lengthy renegotiation of the Concession Agreement between TWM and Centro as the main reason for the delay in their exit from the JV.

### **Integration of TWM and Altram**

- k) The independent negotiations, management functions and operational decisions taken by TWM in exercise of this de facto control of Altram to date have created a situation where full integration has already been to a large extent achieved. The following examples illustrate an already high degree of operational integration between TWM's bus services and the Metro:

---

<sup>4</sup> Excerpt from evidence received in the course of the OFT's inquiry.

<sup>5</sup> Excerpt from evidence received in the course of the OFT's inquiry.

- Bus stops for TWM and other operators' services linking with the Metro were relocated when the Metro opened and no further relocation or integration is planned or anticipated.
- All trams already make announcements and contain publicity regarding links to specific bus services (including TWM services). The Metro also appears in various TWM literature including the TWM travelcard guide and TWM network route map.
- All Metro publicity is prepared by TWM staff and the Metro advertising contract covering both 'on tram' and 'at stop' publicity is monitored and managed by TWM. No further integration is proposed or anticipated in terms of publicity.
- The TWM and Midland Metro websites are linked and the Metro's website is hosted by TWM.
- TWM's Customer Care facility also handles customer queries and complaints relating to both bus and Metro services.
- TWM and Metro are also integrated in terms of ticketing, with TWM travelcards including Metro travel as an 'add-on' already available. In addition, TWM manages the direct debiting of customers who automatically renew their Metro passes.

#### **The anticipated effect of the transaction**

26. Although a legal entity, Altram has no existence separate from TWM, with no employees and no place of business: it exists only through directors' meetings and its annual general meeting (which, in any event, is conducted by telephone). Although legal rights of veto exist, they are limited to issues of corporate governance and capital expenditure rather than operational matters and moreover they have never been exercised. The one operational matter which is theoretically for the board of Altram rather than TWM individually (in terms of the Operation Agreement with Altram or the Concession Agreement with Centro) to decide is Line 1's fare policy.<sup>6</sup> However in practice, as described above, all fare changes since July 2001 have been designed and implemented by TWM without consulting the board of Altram. Based on the evidence received by the OFT, there is no reason to believe that this position would change in the future. Moving to legal control from its current de facto control will therefore make no material difference to TWM's ability to change any parameters of competition on tram, train, bus or coach services.
27. Therefore, in the particular circumstances of this transaction, the OFT considers that, despite the increase in shareholding from 33.3 per cent to 100 per cent, the

---

<sup>6</sup> Service frequency and various quality parameters (speed, safety, comfort, cleanliness etc.) are specified in detail by Centro in the Concession Agreement and neither Altram nor TWM has any control or influence over these aspects of the Metro's operation.



evidence received demonstrates that the transaction will not materially change the ability or incentives of NEG or TWM to change any parameters of competition in relation to any tram, rail, coach or bus service on the overlapping flows, as TWM already acts as if it were the sole shareholder in Altram.

28. TWM could theoretically have an incentive to change the parameters of competition of its tram or overlapping transport services on the affected point-to-point flows *if* TWM gained more revenue from Altram post-merger than it did pre-merger. However, since 2001, Altram [Note 7] has funded 100 per cent of the losses of Altram and has been acting as a 100 per cent shareholder. As noted above, Altram is forecast to remain loss-making for the foreseeable future. TWM's incentives to change the parameters of competition on any of the overlapping flows and modes of transport have been in place since 2001 and do not materially change as a result of the merger.

### **THIRD PARTY VIEWS**

29. Centro has made various submissions and provided the OFT with evidence in support of its view that, since TWM has been running the Concession for more than four years, the merger will make no difference to the competitive situation in the market. The only impact Centro anticipates is that improvements in terms of its remit as the local passenger transport association will be easier to achieve in a more timely and cost effective manner.
30. One third party bus operator stated that the introduction of the Metro had no impact on its bus operations. Conversely, two third party bus operators were concerned about the transaction. Some of their concerns were not merger specific (e.g. a concern that it is difficult to compete with trams as they are faster, more punctual and are not subject to congestion) and the remainder related principally to the situation before the merger rather than to any effect of the merger on competition.

### **ASSESSMENT**

31. All three JV partners and Centro have provided the OFT with extensive documentary evidence to support their submission that the transaction will have no material impact on competition. The evidence available has demonstrated that TWM has had effective control of Altram since 2001 and the OFT believes that the chances of this position changing in the future are too remote to be credible.
32. Both Laing and Ansaldo have confirmed that TWM has been in sole operational control of the business since 2001. Notwithstanding the existence of legal rights of veto on numerous primarily non-operational issues, Ansaldo and Laing have

confirmed that they have not exercised their rights under the JV since 2001 and have no interest or incentive in doing so in the future. They have also confirmed that their continued presence as shareholders has merely been to manage their exit from the venture in a way that would minimise losses. They are both of the view that the change in legal control is merely a formalisation of the already existing commercial reality. Centro, the public body responsible for passengers' interests in the relevant area, supports this view and also considers that the transaction will be in the interests of passengers.

33. In the particular circumstances of this transaction, the OFT considers that, despite the change in shareholding from 33.3 per cent to 100 per cent, the large volume of evidence received demonstrates that the transaction will not materially change the ability, or incentive, of NEG or TWM to change any parameters of competition in relation to any tram, rail, coach or bus service on the overlapping flows, as TWM already acts as if it were the sole shareholder in Altram.
34. Consequently, the OFT does not believe 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.

## **DECISION**

35. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.

## **END NOTES**

1. Altram wishes to clarify that only Central Trains' services within the West Midlands are run on a cost-plus basis by NEG on behalf of Centro.
2. Altram wishes to clarify that the loans of £350,000 were made by Laing and Ansaldo to Altram.
3. Centro wishes to clarify that its procurement strategy for the expansion is subject to DfT approval.
4. Centro would like to make clear that this expectation is subject to significant uncertainty.
5. See note 4.
6. Factual correction: the day-to-day running of the business is undertaken by TWM, pursuant to the Concession Agreement between Altram and Centro.
7. Factual correction: since 2001, TWM rather than Altram has funded 100 per cent of the losses of Altram and has been acting as a 100 per cent shareholder.