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## Anticipated acquisition by Tramlink Nottingham Consortium of NET Phase Two concession

ME/5094/11

The OFT's decision on reference under section 22(1) given on 12 September 2011. Full text of decision published 15 September 2011.

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### PARTIES

1. **Tramlink Nottingham Limited** is a subsidiary of Tramlink Nottingham (Holdings) Limited (jointly, '**Tramlink Nottingham**'). These entities have been set up specifically to enter into the NET Phase Two concession agreement. Tramlink Nottingham is a consortium between the following entities:
  - a. **Meridiam Infrastructure** (30 per cent), an investor in public infrastructure in several European countries and North America, without current UK transport investments
  - b. **OFI InfraVia** (20 per cent), an investor in European infrastructure projects, without current UK investments
  - c. **Alstom Transport** (12.5 per cent), a supplier of rolling stock, systems and services in the railway sector worldwide; in the UK, Alstom Transport currently supplies trains, parts and maintenance services to several train operating companies, and spare parts on an ad hoc basis to several light rail systems; it is also tendering for other tram supply and maintenance contracts in the UK
  - d. **Keolis** (12.5 per cent), a public transport operator active in France and several other European countries and the US; in the UK, Keolis currently has minority interests in train operating companies running the Southeastern, Southern, London Midland and First TransPennine Express franchises

- e. **VINCI Investments** (12.5 per cent), part of VINCI, which is active worldwide in concessions and construction; in the UK, VINCI Investments works in partnership with public sector bodies to build and operate transport and other public infrastructure, and
  - f. **Wellglade Limited** (12.5 per cent), which operates bus services in Nottinghamshire, Derbyshire, the Loughborough area and South Yorkshire, under the names Trent Barton ('TB'), Notts and Derby, Kinchbus, Midland General and TM Travel.
2. **Nottingham Express Transit ('NET') Phase Two concession** (the '**Concession**') is the concession to be granted by Nottingham City Council (the '**Council**') to (i) operate and maintain the existing NET Line One, and (ii) construct and, once finalised, operate and maintain NET Phase Two. NET Line One started operating in 2004 and consists of the tramline between Nottingham City Centre and Hucknall via Bullwell, with a spur to Phoenix Park. NET Phase Two is the collective name for two proposed extensions to NET Line One from Nottingham City Centre: one to Clifton via Wilford (Line Two) and one to Chilwell via the Queen's Medical Centre and Beeston (Line Three). These extensions are currently due to open for service in late 2014. The UK turnover of the existing business that will be part of the Concession, NET Line One as currently operated by Arrow Light Rail Limited, was around £29 million in 2009.

## **TRANSACTION**

- 3. On 29 March 2011 the Council announced that Tramlink Nottingham had been selected as preferred bidder for the Concession. The Council and Tramlink Nottingham are planning to enter into the Concession agreement in October 2011 (the '**Transaction**'). At that point the existing concession to Arrow Light Rail Limited will terminate. The duration of the Concession will be around 22.5 years.
- 4. Tramlink Nottingham's responsibility under the Concession agreement for the design and construction of NET Phase Two will be subcontracted to a joint venture formed by VINCI Construction UK and Alstom Transport. Its responsibility for the operation and maintenance of initially NET Line One and then the entire NET network will be subcontracted to a joint venture (the '**Operating Subcontractor**') owned by Keolis (80 per cent) and Wellglade (20 per cent). The Operating Subcontractor will enter into a tram maintenance subcontract with Alstom Transport, which is also likely to

supply tram rolling stock. On completion of the Transaction, the employees currently operating NET Line One will transfer across to the Operating Subcontractor under the TUPE regulations.

5. Although the parties have not yet reached final agreement on all terms of the Transaction, they submitted advanced drafts of the relevant Transaction documents and informed the OFT that there would be no material change in the terms that the OFT has taken into account in its competitive assessment.

## JURISDICTION

6. The parties submitted that the Transaction does not qualify as a relevant merger situation and that therefore the OFT does not have jurisdiction to investigate the Transaction. They submitted that neither the turnover test nor the share of supply test in section 23 of the Enterprise Act 2002 (the 'Act') is met. As regards the turnover test, the turnover of the existing NET Line One business is below £70 million. As regards the share of supply test, the only horizontal overlap in the supply of goods or services arises due to the bus operations in Nottingham of Wellglade through its TB subsidiary. The parties submitted that Wellglade will not, however, acquire control over the NET Line One business, because its small interest in Tramlink Nottingham (12.5 per cent) will not give it the ability materially to influence or otherwise control Tramlink Nottingham's policy.
7. The OFT considers below whether the Transaction qualifies as a relevant merger situation by assessing whether the existing NET Line One business constitutes an enterprise, whether Wellglade will acquire control over this business and whether the share of supply test is met.

## Enterprises ceasing to be distinct

8. Firstly, as the Transaction involves the granting of a concession to operate tram services to a new concessionaire, the OFT has considered whether these tram services constitute an enterprise such that the Transaction will amount to enterprises ceasing to be distinct. If the Transaction is more akin to, for example, an outsourcing arrangement, it would be unlikely to do so.<sup>1</sup>

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<sup>1</sup> See *Mergers Jurisdictional and procedural guidance*, June 2009 (OFT527), paragraph 3.13. In this case, as explained below, the arrangements involve the long-term transfer of assets, rights

9. Some elements of the Transaction suggest that the existing business, NET Line One, may not constitute an enterprise. In particular, Tramlink Nottingham faces some constraints in its ability to run NET Line One, as the tram route is fixed and the Council has determined minimum frequencies that can only be changed with the Council's agreement. The Council's agreement is also needed for a change in the types of ticketing schemes that NET Line One will be part of.
10. Set against this, Tramlink Nottingham will have the ability to determine essential elements of NET Line One's commercial strategy. In particular, Tramlink Nottingham will set the charges levied in respect of NET Line One, including fares. Further, under the TUPE regulations the employees currently operating NET Line One will be transferred to the Operating Subcontractor acting on behalf of Tramlink Nottingham. In respect of the immoveable assets for the NET Line One – tracks, trams and maintenance depot – these will be leased or licensed by the Council to Tramlink Nottingham.<sup>2</sup> Finally, it should be noted that the concession will be for a long period (around 22.5 years).<sup>3</sup>
11. The OFT considers the substance of transactions over its form, hence the legal form of the arrangements is not determinative.<sup>4</sup> In this case, having regard to the OFT's guidance,<sup>5</sup> taking the factors above together, the OFT believes that the award of the Concession involves the existing business of NET Line One as an enterprise ceasing to be distinct from Tramlink Nottingham.

#### **Acquisition of control by Wellglade as an associated person**

12. The OFT accepts the parties' submission that Wellglade will not, on its own, gain any degree of control for the purposes of the Act over the NET
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and/or employees to Tramlink Nottingham which is then able to use them to supply services to paying customers.

<sup>2</sup> The asset ownership arrangements will be different for NET Phase Two, but for jurisdictional purposes the arrangements for NET Line One, as the existing business, are determinative.

<sup>3</sup> The OFT notes that the existing concession had been granted for 27 years from 2004, but in fact only lasted from 2004 until 2011.

<sup>4</sup> *Mergers Jurisdictional and procedural guidance*, paragraph 3.9. See also for example OFT decision of 27 May 2010, *Completed acquisition by Servisair UK Limited of the regional ground handling business of Aviance UK Limited*, paragraph 13.

<sup>5</sup> *Ibid*, paragraph 3.10.

Line One business (see further at paragraphs 35 to 37 below). However, the OFT considers that the members of the Tramlink Nottingham consortium – the six enterprises listed at paragraph 1(a) to (f) above, including Wellglade – must be regarded as associated persons under section 127(4)(d) of the Act, because they will act together to secure (and then exercise) control of the existing NET Line One business through the award of the Concession. The consortium members must therefore be treated as one person for the purpose of deciding whether any two enterprises will be brought under common control (section 127(1)(a) of the Act).

13. The parties submitted that they should not be considered as associated persons under section 127(4)(d) of the Act because Tramlink Nottingham is a new joint venture company formed to take on the Concession (comparable to the Project Canvas joint venture, which the OFT found did not qualify as a relevant merger situation<sup>6</sup>), the consortium members have no history of acting together, and there is nothing to indicate that they will act together in the future. However, the OFT considers that, although Tramlink Nottingham is a new joint venture, it will acquire an existing business, NET Line One. In contrast, the Project Canvas joint venture was not intended to acquire any existing business. Further, for the associated persons provision to apply it is sufficient for two or more enterprises to act together to secure control of an enterprise or assets. It is not necessary that these enterprises must have (historic) links in addition to their joint ownership of the joint venture.<sup>7</sup>
14. Therefore, as a result of the Transaction, the members of the consortium, including Wellglade, will cease to be distinct from, by collectively gaining control over, the existing NET Line One business.

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<sup>6</sup> OFT decision of 19 May 2010, *Anticipated joint venture between the BBC, ITV, Channel 4, Channel 5, BT, TalkTalk and Arqiva – Project Canvas*.

<sup>7</sup> For example, Competition Commission report of April 2001, *Icopal* (with reference to section 77 of the Fair Trading Act 1973, which was the equivalent of section 127 of the Act): "It is therefore consistent with the purpose of the section that those who have obtained control in concert, and then under the same arrangements continue to safeguard control in concert, should be treated as 'acting together to secure control' of the company" (paragraph 2.36), and OFT decision of 26 February 2004, *Completed acquisition by Milk Link, First Milk and Dairy Farmers of Great Britain of the Westbury processing plant*, paragraph 3. See also the OFT's *Mergers Jurisdictional and procedural guidance*, paragraphs 3.42 and 3.43.

## **Share of supply test**

15. Given that Wellglade will, as an associated person with the other members of the consortium, acquire control over Tramlink Nottingham, Wellglade's supply of bus services in Nottingham must be taken into account in assessing whether the share of supply test is met.<sup>8</sup>
16. Net Line One and Wellglade overlap in the supply of public transport services (that is, bus, tram and train) in Nottingham. The OFT has considered whether Nottingham constitutes a substantial part of the UK such that the share of supply test may be applied to it, as well as the appropriate boundaries of the Nottingham area for jurisdictional purposes. Generally, for an area to be a substantial part of the UK it must be of such size, character and importance as to make it worth consideration as such.<sup>9</sup>
17. In its current market investigation into local bus services, the Competition Commission (the '**CC**') considered the supply of bus services in a number of 'urban areas' in the UK, including Nottingham. The CC defined these urban areas as cities or towns (or groups of nearby cities or towns) and their nearby suburbs which have a highly interconnected bus network that is in some sense distinct from the wider bus network.<sup>10</sup> The CC's definition of the Nottingham urban area covers a number of towns and suburbs around the city and has around 666,000 inhabitants.<sup>11</sup> The CC's definition is similar to the definition applied by the Office for National Statistics in its 2001 census.<sup>12</sup>
18. Without prejudice to the possibility of other potential definitions of Nottingham and its surrounding areas, the OFT considers that the Nottingham urban area, as defined by the CC, constitutes a substantial part

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<sup>8</sup> See OFT's *Mergers Jurisdictional and procedural guidance*, paragraph 3.54.

<sup>9</sup> See the OFT's *Mergers Jurisdictional and procedural guidance*, paragraphs 3.56 and 3.57.

<sup>10</sup> CC's provisional findings report of 6 May 2011 in its local bus services market investigation (the '**CC Bus Report**'), paragraph 4.9.

<sup>11</sup> Id, paragraph 4.18. The areas covered are: Nottingham; Beeston and Stapleford; Carlton; Long Eaton; West Bridgford; Arnold; Ilkeston; Hucknall; Heanor; Clifton; Eastwood; Kimberley; Breaston; Radcliffe on Trent; Ruddington; West Hallam; Burton Joyce; and Awsworth (Annex B to Appendix 4.2 to the CC Bus Report).

<sup>12</sup> Dataset 'KS01 Usual resident population: Census 2001, Key Statistics for urban areas'.

of the UK given in any case its size and population. This is consistent with previous OFT and CC decisions regarding local bus services.<sup>13</sup>

19. The parties estimated that they will have a combined share of supply of around 31 per cent (with an increment of around 3 per cent) of public transport services in the Nottingham urban area following the Transaction, consisting of the bus services of TB and the tram service of the NET Line One business (see paragraph 39 below). This is supported by the CC's findings regarding the Nottingham urban area.<sup>14</sup> As a result the share of supply test in section 23(4) of the Act is met.

### **Conclusion on jurisdiction**

20. For the reasons set out above, as a result of the Transaction the enterprises of Wellglade and NET Line One will cease to be distinct. The share of supply test is met because their combined share of supply of public transport services in the Nottingham urban area exceeds 25 per cent. The OFT therefore believes 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.
21. The OFT's administrative deadline for a decision is 29 September 2011.

### **COUNTERFACTUAL**

22. In its merger analysis, the OFT compares the prospects for competition with the merger against the competitive situation without the merger, the 'counterfactual'. In most cases, the OFT adopts the prevailing conditions of competition before the merger as the counterfactual. However, in certain circumstances the OFT will assess a merger against an alternative counterfactual. This includes rail franchise awards, where the pre-merger situation cannot be the appropriate counterfactual because the existing rail franchise will end and the new franchise must be awarded to one of the shortlisted bidders, which may not include the existing operator.<sup>15</sup>

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<sup>13</sup> See, for example, OFT decision of 23 December 2009, *Anticipated acquisition by Stagecoach Bus Holdings Limited of Islwyn Borough Transport Limited*, paragraph 6, and the CC's reports in *Stagecoach/Eastbourne/Cavendish*, 22 October 2009, paragraph 3.14, and *Stagecoach/Preston*, 11 November 2009, paragraph 3.25.

<sup>14</sup> Appendix 4.3 to the CC Bus Report.

<sup>15</sup> *Merger Assessment Guidelines* (CC2 and OFT1254, September 2010), section 4.3 and in particular paragraphs 4.3.28 and 4.3.29.

23. In this case, consistent with the approach in rail franchise cases, the OFT has taken the view that the appropriate counterfactual to the Transaction is the award of the Concession to a firm or consortium that would raise no competition concerns or to a hypothetical bidder where any competition concerns are remedied through behavioural remedies.

## **MARKET DEFINITION**

24. The overlap in this case arises between the bus services run by TB and the NET tram service.

### **Product market**

25. In previous cases, the OFT and the CC considered the supply of public transport services as the relevant product market. This included bus, tram and rail services where journeys could be made by these different modes of public transport, although it was noted that the extent to which different modes were substitutable would vary between individual routes and passengers.<sup>16</sup> Both the parties and third parties noted that trams can compete strongly with buses on the same routes due to trams' greater reliability and reduced journey time.
26. TB noted that, contrary to the CC's provisional findings in its local bus services investigation, it believes the car exercises a significant competitive constraint on bus and tram travel. Third parties supported this. However, neither TB nor third parties submitted substantial underlying evidence for their view.
27. In this case, as the overlap is between a bus operator and a tram operator and part of the NET Line One route runs parallel to a rail service, on a cautious basis the OFT has considered competition between bus, tram and rail services.<sup>17</sup> It was not necessary for the OFT to determine the exact scope of the product market given that the Transaction does not give rise to competition concerns on any plausible product market.

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<sup>16</sup> See, for example, OFT decision in *Stagecoach/Islewyn Borough Transport*, paragraph 10, and the CC Bus Report, paragraphs 18-19.

<sup>17</sup> The OFT notes that market definition begins with the narrowest plausible candidate market in which the parties overlap. See *Merger Assessment Guidelines*, paragraph 5.2.11.

## **Geographic scope**

28. In previous cases, the OFT and the CC considered point-to-point journeys (flows) as the relevant geographic market, as well as, where appropriate in the circumstances of the case, a wider area based on the networks of services.<sup>18</sup>
29. In this case, the OFT has considered competition on a flow-by-flow basis and has also considered any impact of the Transaction in Nottingham overall. It was not necessary for the OFT to determine the exact scope of the geographic market given that the Transaction does not give rise to competition concerns on any plausible geographic market.

## **UNILATERAL EFFECTS**

30. For the largest part of the NET tram network, TB does not offer overlapping bus services. The overlaps are limited to the following:
  - NET Line One overlaps with TB's 'Rainbow 3' service between Hucknall and Moor Bridge, and with TB's 'Rainbow 1' service between Phoenix Park and Cinderhill, and from all of these points to the city centre
  - NET Line Two, when constructed, will overlap with TB's 'Ruddington Connection' service between Ruddington Lane and Wilford Lane and from these points to the city centre
  - NET Line Three, when constructed, will overlap with TB's 'Indigo' service between Castle College and the Queen's Medical Centre, and with TB's 'Route 18' service between Cator Lane and Beeston and University Boulevard and the Queen's Medical Centre, and from all of these points to the city centre.

From the end of the overlap flows to the city centre, there are no head-to-head overlaps between TB's services and the tram. On some of the overlap flows TB and the tram face competition from bus services operated by NCT, Your Bus and/or Premiere as well as the train line between Hucknall and Nottingham city centre.

31. Generally, a merger may give rise to unilateral effects as a price increase becomes less costly due to the products of the two merging firms being brought under common ownership or control. Following the merger, when

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<sup>18</sup> See, for example, OFT decision in *Stagecoach/Islwyn Borough Transport*, paragraphs 13-17, and the CC Bus Report, paragraphs 20-22.

raising price the merged firm will recoup the profit on recaptured sales from those customers who would have switched to the products of the other merging firm.<sup>19</sup> In this case, in view of the minority position of Wellglade in the Tramlink Nottingham consortium and the limited overlaps, the OFT has considered whether the Transaction could give the parties the ability and incentive to reduce competition between the tram network and TB's bus services.<sup>20</sup>

#### **Incentive to reduce competition by TB's bus services**

32. Firstly, the OFT considered whether the Transaction could result in an incentive for Wellglade to reduce competition of TB's bus services with the tram in respect of, for example, bus fares and frequencies. However, as Wellglade has only 12.5 per cent of the shares in Tramlink Nottingham, it would receive only a small share of profits from passenger revenues that would divert to the tram. These revenues would in any case be limited by the likelihood that at least some passengers would switch to competing bus or rail services rather than the tram.
33. In addition, the parties submitted that the flows where TB's services overlap with NET Line One represent only a small percentage of the revenues from the relevant TB routes (17 per cent for the Rainbow 3 revenues and 1.4 per cent for the Rainbow 1 revenues). Therefore, any worsening of TB's competitive offer on these overlap flows may in fact reduce TB's revenues due to their impact on the entire routes.
34. The parties further informed the OFT that there are no arrangements in the context of the Transaction (such as a non-compete agreement) that restrict TB's freedom to provide bus services.

#### **Ability and incentive to reduce competition by NET's tram services**

35. Secondly, the OFT considered whether the Transaction could result in a worsening of the tram's competitive offer where it competes with TB's bus

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<sup>19</sup> *Merger Assessment Guidelines*, paragraphs 5.4.7 and 5.4.8.

<sup>20</sup> The fact that Wellglade will acquire control over Tramlink Nottingham as an associated person with the other members of the consortium for the purposes of the jurisdictional assessment (see paragraphs 12 to 14 above) does not mean that it should also be considered collectively for the purposes of the substantive assessment of the Transaction. Hence, as set out below, in its substantive assessment the OFT has taken into account that Wellglade individually does not acquire control over Tramlink Nottingham.

services. Wellglade, through its TB subsidiary, would receive all revenues of passengers switching from the tram to TB's services. However, Wellglade's ability to determine the competitive strategy of the tram service is limited. The route of NET Line One cannot be changed and the routes of NET Lines Two and Three have also already been set. Also, the Council has determined minimum frequencies that can only be changed with the Council's agreement.

36. This leaves the tram fares as the main commercial parameter that can be determined by Tramlink Nottingham. However, Wellglade's ability to determine these fares is limited. The other members of the Tramlink Nottingham consortium have no reason to accept a fare-setting strategy premised on the fact that Wellglade's TB bus operations may benefit from diversion away from the tram service. Also, Wellglade's 12.5 per cent share in Tramlink Nottingham does not give it a veto right over any strategic commercial decisions, either as a shareholder or through the board member it is entitled to appoint, since the supermajority to approve such decisions will be at most 75 per cent (the exact percentage remains to be determined).
37. The OFT has also considered whether Wellglade's role in the Operating Subcontractor gives it significant influence over the tram's fares, since the Operating Subcontractor will advise Tramlink Nottingham about the level of fares that would best meet the budgeted farebox revenue targets set by the Tramlink Nottingham board. However, Wellglade has only a 20 per cent shareholding in the Operating Subcontractor, with Keolis holding the remaining 80 per cent. This shareholding does not give it a veto right over any commercial decisions of the Operating Subcontractor. It is also not possible for Wellglade and Keolis jointly to veto any commercial decisions by Tramlink Nottingham, such as on fares, given that their joint shareholding in Tramlink Nottingham is not sufficient to break even the supermajority required for Tramlink Nottingham's key commercial decisions.
38. In addition, the parties submitted that the flows where NET Line One overlaps with TB's bus service represent only a small percentage of NET Line One's revenues: 11 per cent for the Hucknall/Moor Bridge/city centre flow and eight per cent for the Phoenix Park/Cinderhill/city centre flow. Therefore, any changes in NET Line One's competitive offer may be

counter-productive due to their impact on its entire route, suggesting that the parties do not have the incentive to make such changes.

## NETWORK EFFECTS

39. In previous cases, the OFT and the CC considered competition between bus operators' networks and the possibility that multi-trip network tickets form a barrier to entry or may result in foreclosure.<sup>21</sup> The OFT notes that currently Nottingham City Transport ('NCT') has the largest bus network in the Nottingham urban area, while TB's network is significantly smaller.<sup>22</sup> The table below shows that the addition of NET Line One to TB's network does not substantially alter its share of supply if all public transport are considered together. This share and the increment to it are not at a level that would ordinarily give the OFT cause for concern over unilateral effects. NET's share is likely to increase following the opening of NET Lines Two and Three, but this is unlikely to cause the combined share of NET and Wellglade to rise above NCT's share.

### Public transport in the Nottingham urban area

Operator	Operated public transport miles per annum (millions)	Share of supply (per cent)
Trent Barton	6.09	27.3
NET Line One	0.75	3.4
<b>Combined</b>	<b>6.84</b>	<b>30.7</b>
NCT	12.32	55.3
Other bus operators	2.54	11.4
Rail	0.58	2.6
Total	22.28	100

Source: parties' calculation, using the same methodology as in the CC Bus Report.

40. The Transaction will not result in the removal of potential competition on non-overlap flows since the tram is physically restricted in its operations to

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<sup>21</sup> See, for example, OFT decision of 28 May 2009, *Stagecoach/Preston*, from paragraph 82, and the CC Bus Report, from paragraph 9.50.

<sup>22</sup> The CC found that NCT's share of supply of bus services in the Nottingham urban area was 58.8 per cent, with TB's share at 29.1 per cent and Premiere's share at 2.9 per cent (Appendix 4.3 to the CC Bus Report).

its existing and pre-determined future routes. However, in relation to ticketing two third parties raised potential concerns. One third party was concerned that a possible offer of a bundled ticket with a discounted cap for combined tram and TB travel could reduce the ability of TB's competitors to attract passengers who use a combination of tram and bus services. A second third party indicated that its ticketing concerns depended on the extent of restrictions on operators joining any multi-modal ticketing scheme.

41. Generally, bringing complementary products under common ownership may allow the merged firm to obtain the positive effect of a fall in the price of one on sales of the others, resulting in lower prices for all products in the bundle.<sup>23</sup> In this case, lower fares from a bundled tram and bus ticket may benefit passengers. However, the third party referred to above raised the concern that, in the longer term, bundled tickets may result in competing bus operators exiting the market due to the advantage the bundled ticket confers to TB, which may result in higher fares and reduced services due to the lack of competition.
42. Currently NCT, which is part of the incumbent consortium operating NET Line One, sells a number of tickets that can be used on both NCT services and NET Line One, including the Easyrider Citycard that is effectively a season ticket. The only TB ticket that currently combines bus and tram is the Hucknall Connect ticket, which is valid on NET Line One and TB Connect buses in Hucknall. The only multi-operator/multi-modal ticket available in Nottingham is the Kangaroo card, which is administered by the Council. The Kangaroo card is valid on NET Line One, NCT, TB and other operators' bus services, and certain rail services.
43. The parties stated that any ticketing concerns were not justified because they do not intend to offer any tickets that give a discount on the combined use of the tram and TB's bus services. The parties also do not intend to include the tram network as a bundled offer on the Mango card, which is TB's current pre-paid smartcard. The parties stated that the multi-operator Kangaroo card will continue to be accepted on the tram and will

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<sup>23</sup> *Merger Assessment Guidelines*, paragraph 5.7.17.

also become available as a season ticket from completion of the Transaction.<sup>24</sup>

44. The parties further stated that from March 2013, they intend to accept the Mango card on the tram and simultaneously increase NET's paper ticket fare to encourage a move away from paper ticketing, but not to offer a bundled discount on the Mango card and to charge passengers separately depending on whether they use the card on the tram or the bus. This change in fare structure does give passengers a financial incentive to use a Mango card on the tram. However, passengers will not benefit from using the Mango card on a combination of TB buses and the tram. The only disadvantage for passengers using competing bus services is that they have to carry two tickets (the Mango card and the ticket for the competing bus service), but this is likely to be only a minor inconvenience that would not reduce the incentive for passengers to use competing bus services.
45. After completion of the Transaction, the parties may change their current plans and may consider offering, for example, a bundled TB/tram ticket. However, the parties further submitted that this would not be commercially attractive to Tramlink Nottingham, because (a) the current uptake of multi-modal tickets is low (around 55 per cent of tickets sold on NET Line One are tram-only tickets),<sup>25</sup> (b) a bundled TB bus and tram offering would not be as attractive to passengers as the current bundled NCT bus and tram offering given that TB runs fewer routes to the city centre than NCT, and (c) a bundled TB bus and tram offering would be costly to administer relative to any revenue benefit as TB would have to apply to Tramlink Nottingham for reimbursement for tickets bought through Tramlink Nottingham and used on TB buses.
46. The OFT also notes that, as shown by the parties, a bundled offering did not form part of Tramlink Nottingham's bid proposal and its revenue forecast over the life of the concession did not envisage such an offering. This supports the parties' submission that a bundled offering is not commercially attractive. Further, even if Tramlink Nottingham would change its views, it would need to obtain the Council's agreement for a

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<sup>24</sup> The existing combined NCT/NET Line One tickets may also continue to be available after the Transaction (this is unclear at the time of this OFT decision), but this does not affect the OFT's present assessment as NCT will be unconnected to NET after the Transaction.

<sup>25</sup> Hence there appears to be significant demand for tram and bus tickets on an individual, non-bundled basis.

bundled offering because the tram ticket types form part of the Concession agreement. The view of the Council is likely to be based more on passengers' interests than on Tramlink Nottingham's or TB's commercial gain. The parties also indicated that they are mindful of the existence of the Public Transport Ticketing Schemes Block Exemption,<sup>26</sup> which sets certain conditions to protect competition when certain ticketing schemes are introduced. They stated that, before introducing a bundled ticket as part of the Mango scheme, it is likely that they would seek a discussion with the OFT as to whether the conditions of the Public Transport Ticketing Schemes Block Exemption (if applicable) have been met. The OFT therefore considers that the Transaction does not give rise to competition concerns on the basis of network or ticketing effects.

## **THIRD-PARTY VIEWS**

47. Third-party views have been discussed above where relevant. Passenger groups were not concerned about the Transaction. However, some competitors raised a concern about network effects, which is discussed above.

## **ASSESSMENT**

48. Tramlink Nottingham is a consortium set up to enter into the NET Phase Two concession to operate NET Line One and construct and operate NET Lines Two and Three. There are limited overlaps between the NET services and the bus services operated by TB, which through its parent, Wellglade, has a 12.5 per cent share in the consortium. Although Wellglade will not, on its own, gain any degree of control over the NET Line One business for the purposes of the Act, it will acquire control over this business as an associated person with the other members of the consortium.
49. The OFT has considered whether the Transaction could result in an incentive for Wellglade to reduce competition of TB's bus services with the tram. The OFT has concluded that this was not the case, because

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<sup>26</sup> The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001/319), as extended to 1 March 2016 by the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2011 (SI 2011/227). This Block Exemption automatically exempts certain types of integrated ticketing arrangements between public transport providers from provisions in the Competition Act 1998 that prohibit anti-competitive agreements, provided that the arrangements meet conditions to ensure that they only impose restrictions necessary to achieve efficiencies and benefits to consumers and do not substantially eliminate competition.

Wellglade would receive only a small share of profits from any passenger revenues diverting to the tram and the overlap flows represent only a small percentage of TB's revenues from the relevant routes.

50. The OFT has further considered whether the Transaction could result in a worsening of the tram's competitive offer where it competes with TB's bus services. Again, the OFT has concluded that this was not the case, given the lack of material influence of TB on Tramlink Nottingham's commercial policy and the absence of any reason for the other consortium members to accept a change to the tram's commercial strategy based on a benefit to TB. Also, the overlap flows represent only a small percentage of NET Line One's revenues.
51. Finally, the OFT has considered whether the Transaction could give rise to ticketing schemes that could have an impact on competition. A third party raised concerns about the possible introduction of a bundled ticket with a discounted cap for combined tram and TB travel. However, a bundled ticket does not form part of Tramlink Nottingham's bid proposal and the parties do not intend to offer such a ticket. Later introduction of such a ticket would need the Council's agreement, which is likely to be based more on passengers' interests than on the commercial interests of Tramlink Nottingham and TB. Competition is further protected by the application of the prohibition on anticompetitive agreements in the Competition Act 1998 and the conditions imposed by the Public Transport Ticketing Schemes Block Exemption for exemptions from this prohibition. The OFT therefore concluded that the Transaction does not give rise to competition concerns on the basis of ticketing arrangements.
52. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

53. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.