

Bills Committee on Rail Merger Bill

Clause by Clause Examination of the Rail Merger Bill

Introduction

This note sets out the grouping of individual clauses of the Rail Merger Bill (the Bill) to facilitate Members' discussion of the Bill.

Background

2. Under the proposed structure for the rail merger:
 - (a) the Kowloon-Canton Railway Corporation (KCRC) would enter into a service concession agreement (SCA) with the MTR Corporation Limited (MTRCL) to grant MTRCL the right to use its assets (Concession Property) to operate the existing KCR railway lines and, upon their completion, the new KCR railway lines currently under construction as well as its bus operation in the North-west Transit Service Area (TSA bus service) etc.;
 - (b) MTRCL would purchase a property package and certain short-lived railway assets of KCRC such as stores and spares via one or more sale and purchase agreements;
 - (c) MTRCL would maintain its listing status and would be the legal entity of MergeCo;
 - (d) the post-merger corporation (MergeCo) would be granted a franchise to operate the MTR and KCR railways for an initial period of 50 years from the date of implementation of the rail merger, subject to any extension;
 - (e) the SCA would be coterminous with the franchise of MergeCo;

- (f) MergeCo would be responsible for the operation, maintenance, improvements and replacement of and additions to the Concession Property during the term of the SCA (Concession Period);
- (g) MergeCo would control all the operational arrangements for the MTR and KCR systems as an integrated whole and be responsible for the performance of the total system;
- (h) MergeCo would be required to return the Concession Property together with their improvements and replacements etc. to KCRC upon revocation or expiry of the franchise; and
- (i) the existing Operating Agreement (OA) between MTRCL and the Government would be expanded into an integrated OA to cover the relevant aspects of regulation of the operation of both the MTR and the KCR railways by MergeCo as well as the regulation of fares according to the fare adjustment mechanism (FAM).

3. In order to implement the rail merger on the basis of the proposed structure, it is necessary to introduce suitable amendments to the Mass Transit Railway Ordinance, Cap. 556 (MTRO) and the Kowloon-Canton Railway Corporation Ordinance, Cap. 372 (KCRCO) to empower KCRC to enter into an SCA with MTRCL for the purpose of the rail merger, expand the scope of MTRCL's franchise to cover the expanded business scope of MergeCo, transfer the employment contracts of KCRC staff and other relevant KCRC contracts to MergeCo, and introduce appropriate enabling and consequential provisions for implementing the rail merger. The amended MTRO would be the governing legislation of MergeCo. The integrated OA would stipulate the required service and safety standards of MergeCo's railway operation and the FAM which fall outside the scope of the Bill.

Details of the grouping of individual clauses of the Bill to facilitate discussion

4. The individual clauses of the Bill will be divided into five

groups according to the subject matters for the purpose of discussion. The page reference of the Mark-up Copy of the Bill [LegCo Paper CB(1)1330/06-07(01)] is at **Annex I**.

Group A: Clauses 1 – 5 of the Bill (Preliminary provisions and definitions)

5. The proposed provisions include the preliminary provisions and short title of the Bill, and amendments to the long title, short title and the interpretation sections of the MTRO.

Group B: Clauses 6, 11–15, 20, 7–8, 10 and 16–18 of the Bill (Franchise and related matters)

6. The proposed provisions expand the scope of MTRCL's franchise to cover the operation of the KCR system. The provisions in the MTRO to provide for the extension, revocation and suspension of franchise will also be amended to cope with the expanded scope of the franchise and some new arrangements that arise from the service concession arrangement. Relevant provisions will be added or amended. A brief introduction of the purpose of these provisions is at **Annex II***

Group C: Clauses 9 and 21– 29 of the Bill (Amendments to transfer certain obligations of KCRC to MergeCo and amendments to KCRCO to reflect the functions of KCRC after the rail merger)

7. As MergeCo will be responsible for the operation of the KCR system during the Concession Period, the proposed provisions transfer certain relevant obligations of KCRC under the KCRCO to MergeCo during the Concession Period. In addition, the KCRCO will be amended to reflect the functions of KCRC after the rail merger. A brief introduction of the purpose of these provisions is at **Annex III***

Group D: Clause 19 of the Bill (Vesting of KCRC's employment contracts and certain contractual rights and obligations of other KCRC's contracts in MergeCo)

* The content of Annexes II – IV are mainly extracted from the Legislative Council Brief for the Rail Merger Bill issued in June 2006 (File ref.: ETWB(T)CR1/986/00).

8. Upon the rail merger, the employment contracts of all serving KCRC staff would be transferred to MergeCo. Besides, for those KCRC's existing contracts which relate to the operation of the KCRC's railway and bus services, certain rights and liabilities under these contracts would be transferred to MergeCo in order to enable MergeCo to operate the KCR railway and TSA bus services. The proposed provisions deal with such matters. A brief introduction of the purpose of these provisions is at **Annex IV***

Group E: Clause 30 and Schedules 1 and 2 of the Bill (Consequential and related amendments)

9. The proposed provisions contain consequential amendments to other legislation arising from the rail merger.

Environment, Transport and Works Bureau
April 2007

Page reference of the mark-up copy of the Bill

Clause no. of the Bill	Mark-up copy of the Bill	
	Page no. in Chinese version	Page no. in English version
Group A: Clauses 1-5 of the Bill (Preliminary provisions and definitions)		
Clause 1	0001a	0001a
Clause 2	0001a	0001a
Clause 3	0001b	0001b
Clause 4	0001b	0001b
Clause 5	0002-0005	0002-0006
Group B: Clauses 6, 11-15, 20, 7-8, 10 and 16-18 of the Bill (Franchise and related matters)		
Clause 6	0006	0007
Clause 11-15	0011-0018	0012-0021
Clause 20	0033	0037
Clause 7-8	0007-0008	0008-0009
Clause 10	0010	0011
Clause 16-18	0019-0023	0022-0027
Group C: Clauses 9 and 21-29 of the Bill (Amendments to transfer certain obligations of KCRC to MergeCo and amendments to KCRCO to reflect the functions of KCRC after the rail merger)		
Clause 9	0009	0010
Clause 21-29	0034-0051	0038-0055
Group D: Clause 19 of the Bill (Vesting of KCRC's employment contracts and certain contractual rights and obligations of other KCRC's contracts in MergeCo)		
Clause 19	0024-0033	0028-0037
Group E: Clause 30 and Schedules 1 and 2 of the Bill		
Clause 30, Schedules 1&2	0052-0152	0056-0079

Annex II

Group B: Clauses 6, 11-15, 20, 7-8, 10 and 16-18 of the Bill (Franchise and related matters)

Right to operate KCRC's railway and bus services

The present franchise of MTRCL does not cover the right to operate KCR railways. In pursuance of the rail merger, the Bill contains provisions to reset the duration of the franchise to run for an initial period of 50 years from the Merger Date (subject to any extension), and to expand the scope of the franchise from the Merger Date to allow MergeCo to –

- (a) operate the existing and new KCR railway lines currently under construction [viz. the Kowloon Southern Link (KSL) and Lok Ma Chau Spur Line] upon their completion;
- (b) construct and operate any railways which are not extensions of MTR if Government decides to adopt the ownership approach (viz. projects to be funded, constructed and operated by MergeCo) to implement such projects; and
- (c) operate any railways which are granted to MergeCo by way of a service concession from KCRC.

in addition to MTRCL's existing powers to operate the MTR and any extension thereof and to construct any extension to the MTR during the franchise period.

2. At present, the TSA bus operation of KCRC is regulated by way of passenger service licences issued by the Transport Department under the Road Traffic Ordinance, Cap. 374 and is subject to certain provisions in the Public Bus Service Ordinance, Cap 230. After the rail merger, MergeCo's operation of TSA bus service would likewise be regulated outside the scope of the franchise.

Extension, revocation and suspension of franchise

3. There are existing provisions in the MTRO to provide for the extension, revocation and suspension of franchise. We propose that these provisions should continue to apply, subject to certain modifications to cater for the expanded scope of the franchise as well as some new arrangements that arise from the service concession arrangements as set out below:

- (a) At present, the franchise can be revoked or suspended by the Chief Executive in Council on specified grounds as prescribed in the MTRO. The Bill contains provisions to stipulate that the grounds for franchise suspension would in future also cover relevant matters concerning the operation of the KCR railways. The grounds for franchise revocation would in future cover relevant matters concerning the operation of the KCR railways as well as substantial failure by MergeCo to comply with an obligation under the SCA which has certain significant consequences such as endangering passenger safety.
- (b) In view of the service concession arrangement to enable MergeCo to use KCRC assets to operate the KCR railways after the rail merger, the Bill contains provisions to stipulate that in future a major default by MergeCo in fulfilling its obligations in the SCA with KCRC (viz. payment default, breach of the restrictions against disposals or the creation of security) would trigger procedures for revocation of the part of franchise as it relates to the KCR railways. MergeCo would retain the part of franchise as it relates to the MTR in this situation, provided that there is nothing untoward in the operation of those railways that would trigger the procedures for revocation of the whole franchise as mentioned in sub-paragraph (a) above.
- (c) There are existing provisions to enable Government to take possession of assets for the operation of the MTR upon franchise revocation, suspension or expiry and to provide for the liability of Government to pay compensation to MTRCL under specified circumstances for the assets so possessed. Such arrangements would continue to apply to MTRCL's assets used for MTR operation which are taken possession by Government, whilst as agreed with MTRCL in the merger

negotiations, there would be a separate compensation regime for the Concession Property and their improvement and replacements etc. so taken possession of to be specified in the integrated OA. The Bill contains corresponding provisions to set out the liability of Government to pay compensation for the taking possession of Concession Property and their improvement and replacement etc. for the operation of the KCR system. The amount of compensation will be calculated in accordance with the provisions of the integrated OA.

- (d) Upon progressive integration of the MTR and KCR system in future, there would be assets used for the operation of both the MTR system and the KCR system (Common Property). The Bill contains provisions stipulating that there shall be arrangements to enable Government to use the Common Property which Government has not taken possession of upon franchise revocation, suspension or expiry. Correspondingly, there are provisions in the Bill for MergeCo, upon revocation of the franchise as it relates to the KCR railways or suspension of part of the franchise, to use those Common Property which had been taken possession of by Government (if any). Arrangements for the use of the Common Property would be set out in the integrated OA.
- (e) The existing MTRO requires MTRCL to maintain a proper and efficient service and stipulates that in approving an extension of MTRCL's franchise, the Chief Executive in Council needs to be satisfied that the Corporation is capable of maintaining a proper and efficient service. Since MergeCo would be operating both the KCR railway and the TSA bus services after the merger, the Bill contains provisions which make it clear that where MergeCo operates the TSA bus service during the Concession Period, it must ensure that such service is operated properly and efficiently.

Annex III

Group C: Clauses 9 and 21 – 29 of the Bill (Amendments to transfer certain obligations of KCRC to MTRCL and amendments to KCRCO to cope with the functions of KCRC after the rail merger)

KCRC would cease to have any railway or bus operation nor would it be responsible for constructing any new railways during the Concession Period. In gist, KCRC's role during the Concession Period will comprise, for example, the following key elements:

- (a) the grantor of the service concession receiving concession payments from MergeCo; and
- (b) the owner of KCRC projects that are still under construction as at the merger date viz. KSL and the Lok Ma Chau Spur Line if not yet completed by then, and the principal of the agency agreement with MergeCo under which KCRC will employ MergeCo as the agent to complete the construction for the above projects; and

2. In view of the above, we propose to make the following amendments to the KCRCO:

- (a) to empower KCRC to grant the right to MergeCo to use its assets for operation of its railway and bus services by way of a service concession and, in connection with the service concession, to dispose of its assets;
- (b) to make it clear that KCRC shall not exercise its power under the KCRCO to operate railway and bus services nor to construct new railways during the Concession Period;
- (c) to make it clear that KCRC is not required to appoint a Chief Executive Officer during the Concession Period;
- (d) to make consequential changes to the composition of the Managing Board to take into account the proposal in sub-paragraph (c) above; and
- (e) to change the quorum of the Managing Board from five to a simple majority of the members of the Managing Board

during the Concession Period, as we envisage that the size of the Managing Board of KCRC would be around five during the Concession Period when the corporation would have no transport operation function.

3. Clauses 9 and 21 of the Bill will transfer the relevant obligations of KCRC under sections 23, 34B and 35A of the KCRCO to MergeCo during the Concession Period. These relevant provisions in the KCRCO are at **Appendix**.

KOWLOON-CANTON RAILWAY CORPORATION ORDINANCE

Section 23

Chapter: 372 Title: KOWLOON-CANTON Gazette 13 of 1998
RAILWAY Number:
CORPORATION
ORDINANCE

Section: **23** Heading: **Maintenance of** Version 03/04/1998
crossings, bridges, Date:
arches, culverts, etc.

Remarks:

Adaptation amendments retroactively made - see 29 of 1998 s. 105

The Corporation shall construct and maintain for the use of the occupiers of land not held by the Government and adjoining the railway- (Amended 29 of 1998 s. 105)

(a) crossings of the railway for the purpose of making good any use of the land enjoyed before the railway was constructed or as nearly as is reasonably practicable; and

(b) works for the purpose of conveying water from or to the land as freely as before the construction of the railway or as nearly as is reasonably practicable:

Provided that the Corporation shall not be obliged under this section to do anything-

(i) in such a manner as would prevent or inconvenience the use of the railway; or

(ii) in respect to which the person, whose right to occupy the land has been prejudiced, made no objection or claim during the time of the construction of that part of the railway affecting that land or has accepted compensation; or

(iii) where, after the construction of that part of the railway adjoining any land, a natural or artificial feature of that land is altered by any event outside the

control of the Corporation and the Corporation has done all that is required of it under this section before that alteration took place.

(Amended 56 of 1986 s. 21; 13 of 1998 s. 9)

Section 34B

Chapter: 372 Title: KOWLOON-CANTON Gazette
RAILWAY Number:
CORPORATION
ORDINANCE

Section: **34B** Heading: **Application of section 11 of the Tramway Ordinance** Version 30/06/1997
Date:

Section 11 of the Tramway Ordinance (Cap 107) shall apply to the North-west Railway and, for the purposes of such application, references in that section to "the company" shall be construed as references to the Corporation and references to "the tramway" as references to that railway.

(Added 56 of 1986 s. 16)

Section 35A

Chapter: 372 Title: KOWLOON-CANTON Gazette
RAILWAY Number:
CORPORATION
ORDINANCE

Section: **35A** Heading: **Public Bus Services Ordinance not to apply to Corporation's bus services within the North-west Transit Service Area** Version 30/06/1997
Date:

The Public Bus Services Ordinance (Cap 230) shall not apply to any bus service operated by or on behalf of the Corporation within the North-west Transit Service Area with the following exceptions-

(a) sections 16(1)(b), 18, 19, 20 and 21;

(b) sections 2 and 3 to the extent that they apply to the provisions specified in paragraph (a),

and for the purposes of those provisions the Corporation shall be deemed to be a grantee within the meaning of that Ordinance.

(Added 56 of 1986 s. 18)

Group D: Clause 19 of the Bill (Vesting of KCRC's employment contracts and certain contractual rights and obligations of other KCRC's contracts in MergeCo)

Employment-related matters

Under the merger package, all serving staff of the two railway corporations would be employed by MergeCo on their prevailing terms and conditions upon the rail merger. There are specific provisions in the Bill for transferring the employment contracts of all serving KCRC staff at the time of the rail merger to MergeCo with continuity of their prevailing retirement benefits. The employment under the employment contracts so transferred to MergeCo would be deemed for all purpose to be a single continuous employment.

Treatment of certain KCRC's contracts

2. Some of KCRC's contracts relate to the operation of the KCRC's railway and bus services, such as maintenance contracts. Certain rights and liabilities under these contracts would be transferred to MergeCo in order to enable MergeCo to operate the KCRC services. The Bill contains a provision for vesting the relevant rights and liabilities in the contracts which fall to be exercised or performed by KCRC on or after the merger in MergeCo as well as a waiver clause which would waive any conditions contained in the relevant KCRC contracts that prohibit such vesting. Similarly, a re-vesting provision is included in the Bill for the re-vesting of the relevant contracts from MergeCo to KCRC upon the revocation of the whole franchise or the part of franchise as it relates to KCR railways, as well as upon the expiry of the franchise, if the said contracts remain valid by then.