[redacted]

[redacted]

CASE ME/6971/21 ACQUISITION BY HITACHI RAIL OF THALES' GROUND TRANSPORTATION SYSTEMS BUSINESS

SUBMISSION ON COMPETITIVE CONDITIONS

1. OVERVIEW

1.1 The Phase 1 decision and the Issues Statement state, in line with the CMA's usual approach, that the CMA believes the prevailing conditions of competition to be the relevant counterfactual against which to assess the impact of the merger.

1.2 At the same time, in the CMA's competitive assessment in the Phase 1 decision, the CMA reviews the proposed theories of harm through the lens of future competition under a scenario in which the Train Control Systems Framework ("**TCSF**"), as envisaged by Network Rail, is adopted and implemented.[1]

1.3 The Phase 2 Issues Statement adopts a similar approach, suggesting that the developments expected in the GB mainline signalling sector will be considered within the CMA's competitive assessment.[2] The Issues Statement goes on to emphasise that the CMA's assessment of the Proposed Transaction in relation to digital mainline signalling projects will have a particular focus on competition for the TCSF.[3]

1.4 By doing so, the CMA appears to assume that the TCSF will be implemented in a relatively timely fashion in accordance with Network Rail's proposed specifications. In other words:

(a) there will be material opportunities arising in the near future for digital signalling projects;

(b) work-bank allocations will be conducted as per the envisaged plans;

(c) sufficient funding will be provided to successfully mitigate barriers to entry, stimulate technological development and accelerate digitalisation;

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1 For example: *"The CMA considers that the Parties' likely success in winning lots on the TCSF will enable both Parties to expand in the supply of ETCS ATP wayside re-signalling in the UK in future."* (Phase 1 decision, para 250) and *"In view of the above evidence, the CMA considers that the Parties, while currently modest players in the supply of OCS projects in the UK, are likely to significantly expand their presence in the UK as a result of the TCSF and compete closely in future."* (Phase 1 decision, para 309).

2 Issues Statement paras 20 to 23.

3 The CMA's theories of harm do not include conventional mainline signalling projects. Issues Statement para 44.

[redacted]

(d) new market entrants will also be otherwise sufficiently incentivised, encouraged and supported [redacted] in launching their products onto the UK's highly complex and regulated network; and

(e) [redacted]

1.5 The CMA's hypothesis also requires that all market participants (whose commercial strategies, alternative opportunities and investment decisions will be crucial to the outcomes of the TCSF) will make the same assumptions as the CMA, particularly as to the attractiveness of the business case for investment [redacted] In short, the CMA's assessment assumes that the TCSF as envisaged will become a reality and will succeed, thereby overcoming the serious defects which have long existed in the UK mainline signalling market as identified in the ORR's 2021 Signalling Market Study Final Report. This would be an excellent result which both Parties would welcome and in which, under the right conditions, one or both of the Parties might wish to play a role.

1.6 However, there are as many reasons to be sceptical about these assumptions as there are reasons to be optimistic. The UK mainline signalling sector has been stubbornly resistant to this level of transformation for decades [redacted]

1.7 The Parties are therefore concerned that the CMA may be placing undue emphasis on one possible (and uncertain) hypothetical framework for future competition at the expense of analysing the *status quo ante* and other alternative scenarios. In particular, this is not in line with an assessment of the effects of the Proposed Transaction against the stated counterfactual of the prevailing conditions of competition [redacted] While the Parties understand that the CMA wishes to consider the TCSF as part of its competitive assessment, the current expression of that proposed structure should not be the sole and fixed lens through which current and future competition is considered. This would not be appropriate for the following reasons:

(a) **The structure of the TCSF is highly uncertain**: in particular, there is uncertainty as to its implementation, scope, the size of the guaranteed work-bank, and the split of work between digital and conventional signalling. [redacted] at this stage, the TCSF is little more than a concept, which may – and indeed is expected to – change between (i) the

[4] See the Prior Information Notice of 2 March 2023: https://bidstats.uk/tenders/2023/W09/793838101.

[redacted]

[redacted]

PQQ, (ii) the ITT, (iii) the selection of the TCSF suppliers and (iv) the ultimate award of specific contracts to TCSF suppliers. Only the last stage provides suppliers with certainty of a specific volume of work. Until this stage, suppliers must make certain assumptions [redacted]

(b) [redacted] The volume of digital signalling works procured within the TCSF is now confirmed to be lower than initially expected in July 2022 and the Parties expect that the volume of digital signalling works ultimately procured within the TCSF may be lower still. A decrease in the value of digital work expected under the TCSF may lead to insufficient incentives for new entrants to invest in competing for the TCSF.

(c) **The timing of digital signalling procurement within the TCSF will favour Siemens and Alstom-Bombardier.** Digital signalling projects may primarily be procured towards the end, or beyond the term, of the TCSF. [redacted] As a result, new entrants, [redacted] may struggle to make a business case for competing for the TCSF.

In addition, new entrants will be at an initial financial disadvantage compared to Siemens and Alstom-Bombardier. As existing UK suppliers, the incumbents will need to spend less time on product development and approval than new entrants and are likely to be able to generate revenues from digital signalling works at an earlier stage than other suppliers. They will also be able to benefit from revenues derived from UK conventional signalling activities while further developing their UK digital signalling offering, further bolstering their position for CP8 [redacted] New suppliers will therefore need to be confident of a sufficient, guaranteed volume of digital signalling work within the TCSF and of their ability to compete in a market which has been dominated by two players, when deciding to incur the costs of entry.

(d) **Much will depend on the implementation of the TCSF.** In a scenario where the formal *tender* for the TCSF is launched along the lines currently envisaged and successfully attracts new entrants, the success of the *framework* itself (*e.g.*, whether new suppliers will be supported during project delivery, their ability to compete with the incumbents for the non-allocated portion of the work bank,

[5] [redacted]

[redacted]

etc[6]) will still depend on how [redacted] Specifically, the success of the TCSF in bringing new entrants up to a level where they will be able to compete with the duopoly will depend on [redacted] (*e.g.*, to assist with managing multiple stakeholders during project delivery). It would therefore be erroneous for the CMA to assume that, absent the Proposed Transaction, both of the Parties would enter and become *"significant suppliers"*[7] for digital mainline signalling projects within the TCS *Framework*, even in a scenario in which the TCSF *tender* has been successfully launched.

[redacted]

1.8 As a result, a scenario in which the TCSF is implemented as currently envisaged *and* has the desired effect is only one of a number of possible outcomes and does not reflect the *most likely conditions of competition*.[9] It should certainly not be the only context in which the merger is assessed and cannot be treated as a form of *de facto* counterfactual representing the prevailing conditions of competition.

1.9 In short, the CMA should consider the Proposed Transaction against current competitive conditions as well as plausible scenarios for future competition which may include, but must not be solely focussed on, its understanding of the TCSF as currently envisaged. Irrespective of the scenarios considered, the Proposed Transaction is pro-competitive and certainly will not result in a Substantial Lessening of Competition ("**SLC**") on any basis.

2. STRUCTURE OF TCSF REMAINS IN FLUX

2.1 The structure of the TCSF has changed significantly since it was first announced in July 2022. While the design of the TCSF may, to some extent, become clearer as Network Rail issues its pre-qualification questionnaire (PQQ), even at this stage, the specifications and implementation of the TCSF will remain subject to change. It is a

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6 See para 2.3 below.

7 Phase 1 decision, for example, paras 12, 272, 282.

8 See for example, ORR Signalling Market Study Final Report (November 2021), paras 7.18 – 7.19: *At an operational and delivery level, Network Rail is incentivised to maintain the operation of the railway. There is a reluctance to depart from SSI technology due to difficulties experienced with past projects introducing new technology.*

9 CMA's Merger Assessment Guidelines ("**MAG**"), para 3.13. *At Phase 2, the CMA has to make an overall judgement as to whether or not an SLC has occurred or is likely to occur. To help make this assessment the CMA will select the most likely conditions of competition as its counterfactual against which to assess the merger.*

[redacted]

[redacted]

ten-year framework and many key elements (*e.g.*, funding, political and industry support) are likely to change during this time.

2.2 The structure of the TCSF, as first described by Network Rail in July 2022, envisaged that:

(a) five framework suppliers would be selected, each of which would be awarded an initial fixed proportion of the total work bank [redacted] in decreasing proportions based on their ranking in the tender process (14%, 11%, 7%, 5% and 3% - amounting to 40% [redacted]

(b) the remainder of the work bank would then be contestable over the period of the TCSF, based on suppliers' performance against key performance indicators ("**KPIs**") or in mini competitions.

(c) the majority [redacted] of works within the TCSF would be for digital signalling projects, with the remaining small proportion [redacted] allocated to conventional signalling projects.

(d) each framework supplier would be given up to [redacted] in matched funding for developing digital solutions.

2.3 Over the past eight months it has become increasingly clear that the ultimate structure of the TCSF will differ from that envisaged in July 2022 on one or more crucial metrics. Indeed, in March 2023, Network Rail announced its recalibrated vision for the TCSF:

(a) there will be two lots within the TCSF: one for conventional signalling ("**Lot 1**") and one for digital signalling ("**Lot 2**").

(b) the total estimated value ranges between GBP 3bn and GBP 4bn, across both lots. Of a total of GBP 4bn, up to GBP 1bn is allocated to the conventional signalling lot and up to GBP 3bn is allocated to the digital signalling lot.

(c) up to four suppliers would be selected for each lot, with the following expected allocation of work:

(i) Lot 1: [redacted] of the work bank will be awarded through allocation. Within this [redacted], suppliers will be awarded a fixed proportion based on their ranking: [redacted] The remaining [redacted] of the work bank will be contestable by the four framework suppliers through mini competitions.

(ii) Lot 2: [redacted] of the work bank will be awarded through allocation. Within this [redacted] suppliers will be awarded a fixed proportion based on their ranking: [redacted] The remaining [redacted] of the work bank will be contestable by the four framework suppliers through mini competitions.

[redacted]

(d) [redacted][10]

The TCSF will comprise a smaller volume of digital signalling works than originally envisaged.

2.4 While the Parties consider that the UK mainline signalling sector will ultimately move to digital signalling in the future, the pace of that change is expected to be much slower than initially expected. Procurement of digital projects may take place only infrequently during CP7 and CP8 within the TCSF, and may be more likely in CP9 (*i.e.*, from 2034 onwards).

2.5 As evident from paragraphs 2.2 and 2.3 above, Network Rail recently confirmed that the value and volume of digital signalling works within the TCSF has decreased compared to the amount initially envisaged in July 2022:[11]

(a) In July 2022, Network Rail envisaged tha[redacted] of the work-bank (or [redacted] in value[12]) would be allocated to digital signalling projects. The announcements in March 2023 confirm that this figure has changed to [redacted], at most (*i.e.*, [redacted]% of the total value of the TCSF).

(b) This represents a reduction in the *value* of digital signalling works within the TCSF by [redacted] For comparison, [redacted] significantly exceeds the proportion of work originally envisaged in July 2022 for the TCSF supplier awarded [redacted] place [redacted]) or suppliers awarded [redacted] and [redacted] place combined [redacted] This reduction in the volume of digital signalling works within the TCSF is therefore significant. In fact, Network Rail clarified in its briefing of 10 March 2023 that [redacted]

(c) The reduction in terms of *volume* of digital projects is greater still: in July 2022, Network Rail expected the TCSF to comprise [redacted] digital signalling projects.[13] In its update this month, that number had decreased to [redacted] In other words, over the past eight months, the volume of the digital work bank has decreased by over [redacted]

2.6 Indeed, Scotland's recent High Level Output Specification indicated that ETCS will not be deployed in Scotland in CP7.[14] [redacted]

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10 [redacted]

11 See Prior Information Notice of 2 March 2023: https://bidstats.uk/tenders/2023/W09/793838101.

12 Network Rail indicated that [redacted] of *projects* would relate to digital signalling. The value has been estimated by calculating [redacted] of [redacted]

13 See [redacted] Train Control Systems Framework Supplier Pre-Launch Event 20 July 2022, page 14.

14 Published on 3 February 2023. The High Level Output Specification sets out what Scottish Ministers require the rail industry to achieve with regard to Scottish railway activities during the review period covering 1 April 2024 to 31 March 2029. https://www.transport.gov.scot/publication/scottish-ministers-high-level-output-

[redacted]

2.7 Moreover, the introduction of separate lots for conventional and digital signalling projects, each with up to four framework suppliers, indicates the likely importance of conventional signalling works within the TCSF at the expense of digital signalling works.

2.8 For the reasons set out below, even the recalibrated proportion of digital signalling works [redacted]% of the TCSF by value or approximately [redacted]% by volume[15]) is likely to be overly optimistic and the amount of digital signalling works ultimately procured within the TCSF is likely to decrease further still:

(a) [redacted] The further projects are pushed into the future, the less [redacted] commit to delivering these projects, given the multiple variables (funding, priorities *etc*) that could arise in the intervening period. It is also conceivable that some digital signalling projects might be procured outside the scope of Lot 2 in CP8 [redacted] given that procurement for most digital signalling projects will take place several years in the future and the likelihood of numerous intervening variables [redacted]

(b) [redacted]

2.9 The reduction in the volume of digital signalling works from [redacted] to [redacted] projects (of which some projects will be for ETCS overlay only, and therefore likely to be allocated to the incumbents[17]) [redacted]

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specification-hlos-control-period-7-2024-2029/. "*The Scottish Ministers have considered carefully the planned approach to signalling investment elsewhere in Great Britain for CP7, but consider that it does not align with Scotland's strategic priorities at this time. In particular, the Scottish Ministers consider that no business case exists for the European Train Control System (ETCS) Level 2 in Scotland at this time, as the railway traffic characteristics and capacity issues are not the same as those for which this system is more effective. Further, that the potential benefits of this system may be secured more cost effectively, more quickly and at lower risk by other investments.*"

15 In its update this month, Network Rail indicated that it expects the TCSF to comprise [redacted] digital signalling projects and [redacted] conventional signalling projects.

16 [redacted]

17 As the CMA recognised in its Phase 1 decision, the procurement of ETCS overlay projects would favour incumbent suppliers (Phase 1 decision, para 328).

[redacted]

[redacted]

2.10 [redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

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18 Response to Issues Letter, para 2.9.2.

19 In February and March 2023.

20 [redacted]

[redacted]

2.11 In this scenario, the Parties would not be close competitors for Lot 2 within the TCSF, [redacted]

2.12 For completeness, the CMA has not identified concerns in relation to the supply of conventional signalling projects in the UK.[21] Unlike digital signalling, conventional signalling is both a national and a legacy market: the UK conventional signalling market is old, with dominant players and little room for new entrants. Moreover, Network Rail has confirmed[22] that successful suppliers for Lot 1 will be expected to have technology ready for deployment at the time of, or shortly after, the award of the TCSF [redacted]

3. COMPETITION FOR LOT 2 REQUIRES [redacted] SUFFICIENT INCENTIVES

3.1 As described below, a reduction in the volume, and delay to the timing, of digital signalling works within the TCSF [redacted] will reduce incentives for [redacted] new entrants to enter the UK market by competing for Lot 2 of the TCSF.

Timing and proportion of digital signalling works will impact suppliers' incentives to compete for the digital signalling lot

3.2 The Parties agree with Network Rail's view[23] that the move to digital signalling is expected to increase the range of credible suppliers in the UK in the long term.

3.3 However, even if the TCSF were to be launched in the form currently envisaged:

(a) [redacted]

21 Phase 1 decision, para 318.

22 In its briefing of 10 March 2023.

23 Cited in the Phase 1 decision, para 159.

[redacted][24]

(b) Siemens and Alstom-Bombardier are the only suppliers that are expected to have digital-ready interlockings, RBC and SCS that are approved for use in the UK by the time that the TCSF is awarded. As such:

(i) While they may need to make small modifications to comply with the specifications required for the TCSF, Siemens and Alstom-Bombardier would not need to incur material upfront investment costs in order to deliver ETCS projects in the UK.

(ii) New entrants would not be able to deploy their digital signalling projects for around [redacted] years of the TCSF. This means that Siemens and Alstom-Bombardier would likely be able to deliver ETCS projects (and generate revenue) within Lot 2 while other framework suppliers may still be developing and seeking approval of their ETCS capabilities.

(iii) Siemens and Alstom-Bombardier would then logically be the strongest competitors for the contestable portion of the Lot 2 work-bank, having had experience of delivering ETCS projects in the UK and would therefore be well-placed to meet Network Rail's KPIs.

(c) Taking the above factors into account, suppliers may struggle to reconcile the significant upfront investment required to enter the UK, and the costs of bidding for the TCSF tender, with the uncertain potential future gains of securing a sufficient volume of digital signalling projects within Lot 2.

(d) As such, the case for participating in Lot 2 will involve careful consideration of the costs and benefits by each existing and potential market participant, who may take diverse views on, for example, the implications of changes in the timing and likely structure of the final form of the TCSF.[25]

3.4 The business case for new entrants to invest in digital signalling products for the UK will be further complicated if, [redacted] the committed volume of digital signalling projects within Lot 2 decreases or, where the stated volume of digital signalling projects remains the same on paper, [redacted] adequate volume of digital signalling projects within Lot 2 (*e.g.*, see further paragraph 3.6 *et seq.* below).

24 [redacted]

25 In particular, the pricing of signalling projects is heavily influenced by costs other than the technology itself, including significant project delivery costs including for design, installation, testing and commissioning, which requires local capabilities and manpower. This means that market participants such as Integrators (particularly those with a large existing UK presence / workforce to deploy and with fewer alternatives outside of the UK) may have a different perspective on the TCSF [redacted], and may compete aggressively, including through procuring technology (buying products or licensing) or forming consortia with European OEMs.

[redacted]

3.5 By contrast, Siemens and Alstom-Bombardier, as the incumbent suppliers, along with [redacted] and potentially another Integrator [redacted] will be able to benefit from revenues derived from conventional signalling projects awarded in Lot 1, while further developing their digital signalling offering (or procuring digital products, as the case may be) for Lot 2. In addition, delivery of conventional projects during CP7/CP8 would provide an advantage for future delivery of ETCS projects: Network Rail may, in the future, choose to overlay ETCS atop these projects (rather than choosing re-signalling), as interlockings installed in CP7/CP8 would not need to be replaced for several decades. In this scenario, the incumbent supplier of conventional signalling products will have a significant advantage in the delivery of ETCS overlay projects.

[redacted] ***ability to deliver digitalisation within the TCSF***

3.6 **Previous attempts to digitalise have failed.** [redacted] aims to modernise and move to digitalisation have often had to give way to the pragmatic need to keep the railways safe and operational, through procuring conventional signalling in short order from trusted suppliers. [redacted]

3.7 Indeed, [redacted] framework for ETCS development as early as 2012.[26] The aim was for framework suppliers to develop and test ETCS level 2 signalling for use in the UK, with a view to then awarding contracts for the delivery of ETCS projects. The framework suppliers developed a test facility (ENIF), but no projects were subsequently awarded.

3.8 A few years later, [redacted] the Digital Railway programme, with the aim of upgrading a number of lines to ETCS during the course of CP6.[27] Of these routes, only the East Coast Mainline is in the process of being upgraded, and this project was awarded to Siemens.

3.9 **Funding is unconfirmed.** The value of the TCSF lots is indicative only. It is unclear whether [redacted] a specific value of work (as opposed to a percentage of the total amount, whatever that may be) to each successful supplier during the early stages of procurement. [redacted]

3.10 Uncertainty around funding disproportionately impacts digital signalling projects, given that almost all digital signalling projects within the TCSF are expected to be procured in CP8. [redacted]

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26 See https://www railjournal.com/signalling/network-rail-selects-four-etcs-development-partners/.

27 See http://www.infrastructure-intelligence.com/article/may-2017/britains-railways-poised-modernise.

28 See also [redacted]

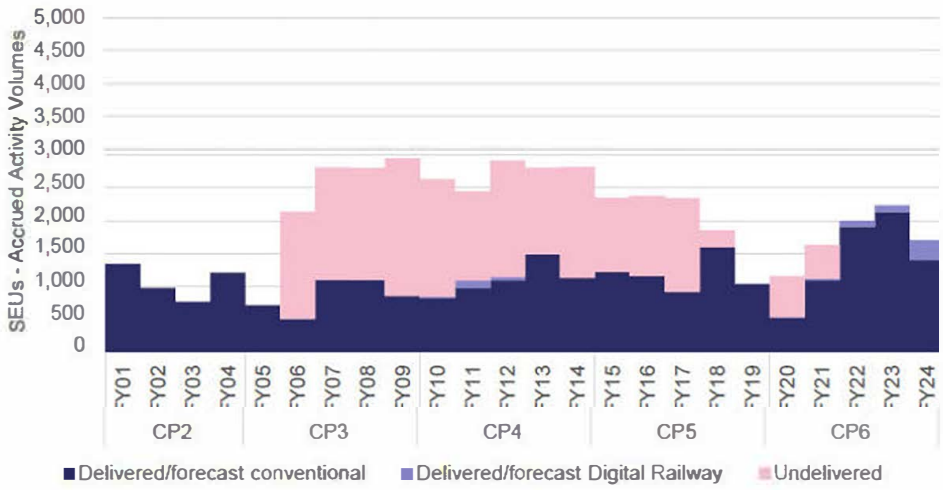
[redacted]

[redacted]

3.11 Moreover, Network Rail has confirmed that the envisaged value of the TCSF (GBP 3bn to 4bn across both lots) is based on a decrease in Signalling Equivalent Unit ("**SEU**") costs rates: [redacted] for conventional signalling projects depending on the complexity and targeting [redacted] for digital signalling projects. Costs are currently at approximately [redacted] for conventional signalling.[29] While digital signalling is expected to reduce overall costs in the long term, through decreasing the amount of lineside equipment (and therefore maintenance *etc.*) delivery of signalling projects at costs of [redacted] is [redacted] in the medium term [redacted] As a result, [redacted] Projects awarded early are likely to be either conventional signalling projects awarded within Lot 1 or digital signalling projects awarded to incumbents who are expected to have digital signalling products approved for use in the UK (*i.e.*, Siemens and Alstom-Bombardier).

3.12 [redacted]

Figure 1 – Historical planned vs. delivered volume of work



Source: Figure 7.1, ORR signalling market study, final report

3.13 **Digitalisation requires buy-in from multiple stakeholders.** Network Rail is a decentralised organisation, in which the five regions have historically procured signalling works separately [redacted]

[29] ORR Signalling Market Study Final Report (November 2021), page 8.

[redacted]

(a) As set out in paragraph 2.6, the Scottish Region does not intend to procure digital signalling in CP7.

(b) The Wales and Western Region recently announced that the [redacted][30] [redacted] Network Rail has the ability to extend the major signalling framework for a period of up to two years.

3.14 In addition, in order for Network Rail to upgrade routes with ETCS ATP wayside re-signalling, trains also need to be fitted with on-board ETCS, otherwise trains will simply not be able to travel through these routes (given that an ETCS ATP wayside re-signalling project entails the removal of legacy trackside assets). However, the decision to retrofit trains is taken by train operating companies ("**TOCs**") or in some cases, rolling stock leasing companies (ROSCOs). [redacted] As a result, deployment of ETCS ATP wayside may be delayed, [redacted] Alternatively, faced with significant delays, Network Rail may choose to overlay ETCS on existing interlockings so as to maintain a dual system which would allow for travel by trains with ETCS on-board units and trains with legacy TPWS on-board units. In such a case, the procurement of ETCS overlay projects would favour the incumbents for the reasons recognised by the CMA in its Phase 1 decision.[31]

4. IMPLEMENTATION OF THE TCSF MAY NOT HAVE THE DESIRED IMPACT

4.1 Even if the TCSF were launched as currently envisaged, which for the reasons set out above, is unlikely, the CMA cannot assume that it would result in Hitachi Rail and the Target (absent the Proposed Transaction), becoming "*significant suppliers*"[32] for digital mainline signalling projects within Lot 2.

4.2 [redacted] Both Parties are global companies that are constantly assessing opportunities in different countries with varying degrees of attractiveness[33] (including size and

30 Supplier briefing attended by Hitachi Rail on 23 February 2023.

31 Phase 1 decision, para 328.

32 Phase 1 decision, para 12. *"While both Parties currently have a limited presence in UK signalling markets, the CMA found that both are established players in Europe with strong signalling capabilities, and that, absent the Merger, both would independently bid for, and be close competitors, for the TCSF. Within this context, the CMA found that both Parties would be well placed to become significant suppliers and compete closely in relation to two specific types of signalling projects that will fall under the TCSF."*

33 [redacted]

predictability of an opportunity, barriers to entry, local resources available, competitive position, credibility of roll-out plan, execution risk, track record and relationship with customer, *etc.*)

4.3 and therefore could not be considered close competitors.

4.4 Second, the implementation of the TCSF will not, by itself diminish the significant incumbency advantage of Siemens and Alstom-Bombardier, including for digital signalling, and much will depend on (i) support new suppliers over the course of the TCSF, and (ii) how projects are awarded within the TCSF.

Network Rail is undergoing significant changes

4.5 Network Rail is undergoing significant restructuring as part of the move to "Great British Railways", which will ultimately absorb Network Rail, as well as many of the functions of the Rail Delivery Group. This move has been described as the "biggest

[34]

change to the railways in 25 years"[35] [redacted]

4.6 [redacted]

(a) Signalling products must be approved for use in the UK by a specialist team within Network Rail. [redacted] (Siemens and Alstom-Bombardier being the only suppliers expected to have interlockings, RBC and SCS approved for use in the UK by the time that the TCSF is awarded).

(b) New suppliers, including the Parties, will require Network Rail's assistance in managing the delivery of a digital project. Digital signalling projects require the management of multiple stakeholders, including Network Rail's regional bodies, train operators, safety authorities, Department for Transport, drivers, maintainers and their unions. This will be incredibly challenging for new suppliers, with minimal UK signalling experience, without Network Rail's support throughout the process [redacted]

4.7 Given the factors described above, even if the TCSF were successfully launched with sufficient volumes of digital signalling works, it is likely that new suppliers [redacted] support to develop digital products expeditiously and then to successfully manage stakeholders during the delivery of digital projects. [redacted]

[redacted]

[35] The Williams-Shapps Plan for Rail: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994603/gbr-williams-shapps-plan-for-rail.pdf.

[36] See also recent announcements of large-scale redundancies within Network Rail, for example, https://www.railtechnologymagazine.com/articles/1800-rail-industry-jobs-risk.

[37] [redacted]

4.8 Moreover, [redacted] it is extremely likely that Integrators would be strong competitors in light of their significant delivery capabilities, familiarity with managing signalling projects and stakeholders, and their ability to procure signalling technology from the incumbents (thereby not requiring any further product approval).

The award of projects within the TCSF

4.9 Network Rail is yet to provide detailed information on how projects will be allocated within the TCSF. The extent to which incumbent suppliers will have an advantage is therefore not yet clear. However, based on the information available at this stage, the Parties expect that the duopoly will at least benefit from the following advantages:

(a) As explained in 3.3(b) above, Siemens and Alstom-Bombardier are expected to be the only suppliers that would have digital-ready interlockings, RBC and SCS that are approved for use in the UK by the time the TCSF is awarded. This means that, the few ETCS projects allocated within CP7 are likely to be delivered by Siemens and Alstom-Bombardier, while other framework suppliers may still be developing their ETCS capabilities.

(b) Siemens and Alstom-Bombardier will develop their delivery capabilities for digital projects during CP7, building on their already significant delivery capabilities for conventional signalling projects. For example, their delivery teams will become familiar with ETCS technology and installation. Siemens and Alstom-Bombardier will therefore be stronger (proven) competitors for ETCS projects and the unallocated portion of the TCSF work-bank.[38]

(c) In addition, as mentioned in paragraph 4.6(b), new entrants will face challenges when managing multiple stakeholders [redacted]. As a result, their delivery of ETCS projects may be delayed or expensive. In order to keep the railways operational, Network Rail may then choose to procure conventional signalling projects from incumbent suppliers whom it believes could deliver legacy projects more quickly. [redacted]

4.10 For the reasons set out in sections 2 and 3, a version of the TCSF which comprises a significant volume of digital signalling projects does not present the most likely conditions of future competition for mainline signalling in the UK, nor is a realistic counterfactual in that scenario one in which the Parties would become "*significant suppliers*" of digital signalling projects.

4.11 If, however, the CMA maintains the TCSF as currently envisaged on paper as the focal point for its assessment of competitive conditions, it is both logical and fair that the

[38] [redacted]

[redacted]

[redacted]

assumptions which underpin the TCSF should also be built into this assessment. This would imply that new entrants will be encouraged and supported via adequate funding, work-bank allocation and speedy homologation of products, *etc*. In such a scenario (whether probable or otherwise), existing smaller players and new entrants would have incentives to compete aggressively for their share of Lot 2 including by investing, diversifying and scaling up their activities, entering into consortia and seeking technology licenses from incumbents.[39] Moreover, as Network Rail's stated objective is for all suppliers to be brought up to similar levels of ETCS capability, any concern that the Parties (to the exclusion of other competitors) would be particularly well placed to compete for digital signalling projects within the TCSF, would be unfounded.

4.12 [redacted][40]

5. CONCLUSION: A NUMBER OF LIKELY VARIATIONS AND NO SLC ARISES UNDER ANY SCENARIO

5.1 In considering the conditions of prevailing competition,[41] the CMA and the OFT have previously taken account of multiple counterfactuals in similar cases where *"there are inherent difficulties and associated risks in trying to predict with any certainty what the conditions of competition would have been absent the merger."*[42] In the present case, it is incumbent on the CMA to have regard to alternative plausible scenarios to the TCSF as currently presented, which may indeed be more likely to materialise.

5.2 Identifying the alternative scenarios requires the CMA to take account of the following variable elements:

(a) [redacted]

39 [redacted]

40 [redacted]

41 MAG 3.2: *"The appropriate counterfactual may increase or reduce the prospects of an SLC finding by the CMA"*. Previous OFT guidance also stated that the counterfactual assessment is *"the core concept of the substantial lessening of competition test"*. (OFT Mergers - Substantive Assessment Guidance May 2003 para 3.23).

42 OFT Report of 24 October 2008, *Anticipated acquisition by Lloyds TSB plc of HBOS plc*. See also discussions in: CMA Final Report of 4 August 2020, *Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo;* CMA Final Report of 12 June 2019, *Completed acquisition by PayPal Holdings, Inc. of iZettle AB*, CMA Final Report of 18 September 2015, *Anticipated acquisition by Poundland Group Plc of 99p Stores Limited.*

[redacted]

(b) **New entrants [redacted] may have insufficient incentives to compete for Lot 2:** [redacted] levels of development funding, [redacted] new entrants may not have sufficient incentives to enter the UK digital signalling sector. [redacted] which further reduces the likelihood of digital signalling projects being procured within the TCSF (and therefore the probability that new entrants will recover the costs of entry).

(c) **Suppliers may struggle to achieve ETCS capability in the near term:** For the reasons described in paragraph 4.6 above, [redacted] new suppliers unsupported when delivering projects within the TCSF. Moreover, Siemens and Alstom-Bombardier would not need to undertake product development and approval, or may require very minimal time for this initial phase. This could mean that Lot 2 framework suppliers, with the exception of Siemens and Alstom-Bombardier, would face severe delays in bringing their products to market, which would reduce the revenues that new suppliers can achieve during the term of the TCSF, undermining the business case for participation [redacted] may reduce incentives to compete for the TCSF in the first instance and also hamper the ability of suppliers to be successful within the TCSF.

(d) **The volume of conventional signalling works in Lot 1 may further increase:** in light of all of the above, the volume of conventional signalling works within Lot 1 is likely to increase, at the expense of digital signalling works in Lot 2. Conventional signalling works would likely be undertaken by Siemens, Alstom-Bombardier, as well as Atkins and potentially another Integrator [redacted] The conventional signalling products installed during CP7 and CP8 would have a lifecycle of [redacted] years. It is likely that Network Rail would seek to upgrade to ETCS within this timeframe and, to do so, it may choose to procure ETCS overlay projects rather than re-signalling projects (given that the interlockings installed in CP7/CP8 would not be at life-expiry). In this case, the incumbent

[redacted]

[redacted]

suppliers of conventional signalling products will have a significant advantage in the delivery ETCS overlay projects.

5.3 In summary, adoption and implementation of the TCSF as currently envisaged is only one of a number of possible outcomes and does not reflect the *most likely conditions of competition.*[43] It should certainly not be the only context in which the merger is assessed and cannot be treated as a form of *de facto* counterfactual representing the prevailing conditions of competition.

5.4 Regardless of whether the CMA conducts its competitive analysis against a scenario in which the TCSF takes place as currently envisaged or one in which the TCSF is launched with reduced scope or implemented with limited effect, the Proposed Transaction will not result in an SLC for the following reasons:

(a) [redacted]

(b) To the extent that the Parties would, in the absence of the Proposed Transaction, have the incentives to compete for a place within that version of the TCSF, so too would a number of credible European players such as CAF, Stadler, Indra as well as Integrators (in particular, Atkins),[44] [redacted]

(c) In the [redacted] scenario where the TCSF is implemented with a reduced volume of digital signalling projects and an increased proportion of conventional signalling works, competing for Lot 2 of the TCSF will be less attractive and less viable for [redacted] new entrants (depending on their commercial and strategic priorities). [redacted] in such a scenario against Siemens, Alstom-Bombardier and Atkins (in addition to new entrants), [redacted]

[43] MAG, para 3.13: *"At Phase 2, the CMA has to make an overall judgement as to whether or not an SLC has occurred or is likely to occur. To help make this assessment the CMA will select the most likely conditions of competition as its counterfactual against which to assess the merger."*

[44] [redacted]

[redacted]

(d) [redacted][45]

5.5 The Parties would be pleased to provide additional information and elaborate further on any aspect of this submission if it would be of assistance to the CMA.

17 March 2023

[45] [redacted]