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ANTICIPATED ACQUISITION BY HITACHI RAIL, LTD.

OF

THALES SA'S GROUND TRANSPORTATION SYSTEMS BUSINESS

RESPONSE TO PROVISIONAL FINDINGS

29 JUNE 2023

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**ANTICIPATED ACQUISITION BY HITACHI RAIL OF THALES' GROUND  
TRANSPORTATION SYSTEMS BUSINESS  
RESPONSE TO PROVISIONAL FINDINGS**

**1. EXECUTIVE SUMMARY**

***Mainline***

1.1 The provisional conclusion that the Proposed Transaction is more likely than not to lead to a substantial lessening of competition ("SLC") for digital mainline signalling in Great Britain ("GB") is legally unsound and is not supported by cogent reasoning or credible evidence.

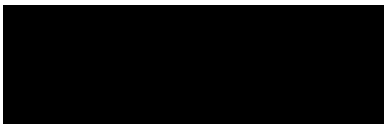
1.2 Stepping back, the following factors alone would indicate that an SLC is highly unlikely: (i) the sector in question has been characterised by a long-entrenched duopoly (with a c.97% installed base) whose incumbency advantages are expected to persist through the transition to digital signalling<sup>1</sup>; (ii) both Parties, and in particular the Target, have negligible presence in the UK; (iii) the sole customer [REDACTED] the Proposed Transaction and (iv) there is sufficient competition for the ongoing Train Control Systems Framework ("TCSF") tender, on which the CMA's analysis is focused.

1.3 [REDACTED]

1.4 [REDACTED]

<sup>1</sup> ORR, Phase 2 submission, 13 March 2023, para 29.

<sup>2</sup> [REDACTED]



1.4.1 [REDACTED]

1.4.2 [REDACTED]

1.4.3 [REDACTED]

1.5 [REDACTED]

1.6 Moreover, the CMA's provisional finding that the Target has a [REDACTED]

1.7 The CMA's provisional conclusion in relation to digital mainline signalling projects in GB is **further impaired by:**

- 1.7.1 **the vague nature of its theory of harm.** Even assuming that the Parties were close competitors – which the evidence does not support – the Provisional Findings do not assess how this would impact competition for or within the TCSF. Rather the CMA's assessment focuses on supplier *characteristics* (such as access to technology and European references), without explaining how purported closeness across these characteristics results in a harm.
- 1.7.2 **the apparent failure to align with Network Rail on key issues.** Notably, it is not apparent from the Provisional Findings that the CMA has sought Network Rail's views on (i) [REDACTED] potential ranking within the [REDACTED] [REDACTED] (ii) the likelihood of a reduction in the number of framework suppliers, or (iii) Network Rail's ability to flex the terms and conditions of the TCSF to safeguard competition for and within the TCSF. These questions are crucial to understanding the likelihood of an SLC arising and their apparent omission from the Provisional Findings therefore renders the CMA's interim conclusions highly deficient.
- 1.8 This is all the more serious since Network Rail, as the key customer for mainline signalling projects in GB, is [REDACTED] the Proposed Transaction, which it believes [REDACTED] for digital mainline signalling projects in GB. In dismissing [REDACTED] views (and indeed those of other third parties who have made similar statements) on the basis that there is insufficient data, the CMA misunderstands the key issue: there is broad consensus across the industry that the Proposed Transaction will result in a stronger challenger to the duopoly and this perception is, in and of itself, sufficient to result in increased rivalry. **The CMA has therefore erred in rejecting the rivalry enhancing effects of the Proposed Transaction.**

### **CBTC**

- 1.9 The CMA's analysis of competition for possible future CBTC projects involving the Bakerloo and Piccadilly underground lines in London is flawed and unsustainable. The evidence does not support the provisional finding that an SLC is more likely than not in this area, given that:
- 1.9.1 Procurement of these projects is both too uncertain (subject to business justification and funding constraints) and distant (expected to be procured in over a decade's time) to form the basis of an SLC finding.
- 1.9.2 By the CMA's own admission, Siemens – and potentially Alstom - is at least as strong as the Target and in any case stronger than Hitachi Rail, which is therefore not the Target's closest competitor.<sup>3</sup> TfL informed the CMA that it

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<sup>3</sup> PFs, paras 69 and 10.341.

was not sure that Hitachi Rail was currently in the [REDACTED]<sup>4</sup> as Siemens, the Target and Alstom and that Hitachi Rail was "*certainly not in the same league*" as the other major suppliers.<sup>5</sup> It follows that whether or not Hitachi Rail competes for future London CBTC projects would not change the Target's optimal bid, even in the face of material uncertainty. Given that situation, it cannot be correct for the CMA to provisionally conclude that the remaining constraints in CBTC post-merger are not sufficient, as matters presently stand, to prevent or mitigate against an SLC arising.<sup>6</sup>

- 1.9.3 In particular, the CMA's analysis could only be sustained with sufficient strong and certain evidence that in or around 2035, Hitachi Rail will be in a position to affect the Target's optimal bid. This would require a radical change in the status quo such that the Target might, particularly at the time of submitting a response to a notional TfL ITT, attribute a significant probability to Hitachi Rail being in a position to offer a materially more competitive bid than both Siemens and Alstom. It is unrealistic to expect, on the balance of probabilities, that this will be the position at the time of the next tender. It is unsupported by the current evidence and has not been analysed by the CMA in any event.
- 1.9.4 The CMA's provisional finding is based on an estimated growth over future years in Hitachi Rail's resources and experience in complex brownfield sites globally. However, even the growth anticipated by the CMA would be insufficient for the Target to reasonably consider that Hitachi Rail would (or could) offer a more competitive bid in London than both Siemens and Alstom, especially given the factors that enshrine Siemens as the Target's fellow incumbent and closest competitor. Moreover, the hypothetical scenario will simply not arise since [REDACTED]  
[REDACTED]  
[REDACTED].<sup>7</sup> In summary, the evidence does not allow the CMA to conclude on the balance of probabilities that an SLC will arise in respect of these projects.

<sup>4</sup> PFs, para 10.242.

<sup>5</sup> PFs, para 10.243.

<sup>6</sup> PFs, paras 71 and 10.343.

<sup>7</sup> See Letter dated 3 May 2023 [REDACTED]; Parties' submission on CBTC signalling projects for metros in the UK, submitted on 23 March 2023, paras 1.3 and 8.1; Parties' Response to CMA RFI dated 23 December 2023, Question 37. See also statements made at the Hitachi Main Party Hearing, Transcript, p.81.

- 1.10 Where an SLC could only exist if a series of cumulative conditions are all met, this has significant implications for the evidential standard that the CMA is required to meet for identifying an SLC in its Final Report. In these circumstances, for an SLC to be established on the balance of probabilities, each of the cumulative conditions has to have a high probability. As an oversimplified example, if each of three conditions had a 75% likelihood, the chances of all three conditions being met would be less than 50%. For the specific SLC provisionally identified by the CMA to arise, all of the following highly uncertain conditions would need to be met:
- 1.10.1 TfL secures the necessary funding and invites tenders for CBTC resignalling on either the Bakerloo or Piccadilly line by 2035;
  - 1.10.2 The Target attributes a material possibility to Hitachi Rail competing for one of those projects;
  - 1.10.3 Over the intervening years, Hitachi Rail has successfully grown its complex brownfield CBTC credentials such that it is perceived by the Target to be in a position to offer a materially more competitive bid than either Siemens or Alstom; and
  - 1.10.4 By that time, there is no additional supplier that has developed its capability sufficiently to exert a stronger competitive constraint on Thales than Hitachi Rail.
- 1.11 As explained further below, the likelihood that all of these cumulative conditions are met is extremely low. The CMA's theory of harm is therefore highly speculative and an SLC cannot be established on the balance of probabilities.

## 2. MAINLINE

### **A. The CMA's assessment of competition for the TCSF is flawed**

- 2.1 The CMA considers that the Proposed Transaction may lead to a reduction in competition for the TCSF<sup>8</sup> and that successful TCSF suppliers will be well placed to compete for future digital signalling projects in GB.<sup>9</sup> These two aspects of the CMA's digital mainline signalling theory of harm are therefore considered together.
- 2.2 The CMA is tasked with determining, on the balance of probabilities, whether the Proposed Transaction is more likely than not to give rise to an SLC in the GB market for the supply of digital signalling projects. However, the analysis carried out by the CMA does not allow it to answer this question:
- 2.2.1 First, the choice of competitive parameters, which the CMA uses to assess closeness of competition is incorrect and results in the CMA placing undue emphasis on characteristics that are of less importance. The CMA has assessed suppliers' capabilities across six criteria, **which do not correspond to the criteria that Network Rail will be using** to score suppliers during the PQQ or ITT phase. Moreover, the CMA does not engage with Network Rail's relative weighting of the different criteria: the Provisional Findings place a significant amount of emphasis on suppliers' access to technology and previous digital signalling experience, whereas Network Rail's criteria focus on project delivery, collaborative behaviours and price.
- 2.2.2 Second, even assuming that the CMA's framework for assessing suppliers' capabilities is coherent, the conclusions drawn from that assessment are not. The outcome of the CMA's analysis does not lead to the conclusion that the Parties exert a competitive constraint on one another that could not be replicated by other suppliers: even when using the CMA's proposed framework for assessing suppliers' capabilities, it is clear that [REDACTED].
- 2.2.3 **This conclusion becomes even more apparent when appropriately factoring in the strengths of integrators.** As described below, the CMA fails to understand that the consortium as a whole is the competitor, and the capabilities of both the OEM and the integrator in that consortium are important to determining the degree of competitive constraint.

<sup>8</sup> The CMA's provisional findings of 8 June 2023 ("PFs"), paras 47 and 48 (Introduction) and paras 8.426 – 8.429.

<sup>9</sup> PFs, paras 8.444 – 8.445.



### A.1 CMA's criteria disconnected from those of Network Rail

- 2.3 The CMA assesses closeness of competition between potential suppliers for the TCSF across several categories that it purportedly identifies on the basis of Network Rail's PQQ and ITT criteria, and feedback from market participants. However, these criteria are removed from those that Network Rail has established and result in the CMA arbitrarily emphasising characteristics which are given limited weight by Network Rail.
- 2.4 A comparison of the categories used in the CMA's analytical framework, compared to those set out in Network Rail's tender criteria, is set out in **Table 1** below.

**Table 1 – Comparison of CMA's criteria against those of Network Rail**

<i>CMA's Categories<sup>10</sup></i>	<i>Network Rail's PQQ criteria</i>	<i>Network Rail's ITT criteria</i>
<ul style="list-style-type: none"> <li>▪ Access to technology</li> <li>▪ Management experience and expertise</li> <li>▪ Experience in GB mainline signalling</li> <li>▪ Innovation</li> <li>▪ Financial standing and size</li> <li>▪ Price</li> </ul>	<p><b><i>Technical envelope (100%)</i></b></p> <ul style="list-style-type: none"> <li>▪ Project delivery (38%)</li> <li>▪ Product development (14.25%)</li> <li>▪ Collaboration (14.25%)</li> <li>▪ Capability development (9.5%)</li> <li>▪ Maintainability and obsolescence (9.5%)</li> <li>▪ Health &amp; Safety (9.5%)</li> <li>▪ Sustainability (5%)</li> </ul>	<p><b><i>Technical envelope (70%)</i></b></p> <ul style="list-style-type: none"> <li>▪ Approach to Phase 2 delivery (17.5%)</li> <li>▪ Behavioural (15%)</li> <li>▪ Commercial (10%)</li> <li>▪ Health and safety (10%)</li> <li>▪ Social value (10%)</li> <li>▪ Product development (7.5%)</li> </ul> <p><b><i>Commercial envelope (30%)</i></b></p>

- 2.5 As evident from the above table, the CMA's categories do not correspond to those of Network Rail, and moreover, there is no indication of the relative weight attributed by the CMA to each of its categories. The CMA's analytical framework is therefore not meaningful:

- 2.5.1 Based on the CMA's explanation of its six categories,<sup>11</sup> the CMA's assessment does not appear to consider factors such as successful integration (10%, considered within the Project Delivery criterion at PQQ), Collaboration (14.25% at PQQ), supply chain management (9.5%, considered within the Capability Development criterion at PQQ), Health and Safety (9.5% at PQQ) or Sustainability (5% at PQQ), approach to Phase 2 Delivery (17.5% at ITT, including plans to achieve open interfaces, workforce deployment, cyber security and management of Reliability, Availability, Maintainability and

<sup>10</sup> As described in greater detail below, the Provisional Findings do not however assess suppliers' capabilities with regard to Innovation or Price. See PFs, para 8.338, in relation to Innovation: "It is not currently possible to assess potential bidders' ability to meet the T190 target." And PFs, para 8.354: "We currently, therefore, have not attempted to differentiate between potential bidders with respect to price."

<sup>11</sup> PFs, para 7.105.

Safety), collaboration (15%, within the Behavioural criterion at ITT), Health and Safety (10% at ITT), and Social Value (10% at ITT).

- 2.5.2 In other words, the CMA's assessment does not take account of criteria that account for approximately **48%** of the PQQ score weighting and over **50%** of the ITT score weighting.
- 2.5.3 The CMA's assessment seeks to overcome this deficiency by grouping several different criteria established by Network Rail under the umbrella term "management experience". Specifically, the CMA notes "[m]anagement experience is relevant for a number of criteria against which Network Rail will conduct its tender evaluation, including project delivery, product development, collaboration and capability development"<sup>12</sup> and then proceeds to note that it equates management experience to "(a) Experience in undertaking digital mainline signalling projects; and (b) Experience in homologating technologies in different countries."<sup>13</sup> This is a clear *non sequitur*: the CMA's second statement does not follow from its first, which relates to capabilities that are, for the most part, heavily dependent on local resources and for which European experience is of very limited relevance. This effectively results in the CMA ignoring (while purporting to take into account) Network Rail's tender criteria and overstating the closeness of the Parties, while unduly understating the position of rivals.
- 2.6 The effect of the CMA's significant deviations from Network Rail's stated criteria is an overwhelming focus on access to technology and digital signalling experience, in a way which artificially results in the analysis centring on the "four largest players in Europe".<sup>14</sup> As previously mentioned, in a market that is characterised by a duopoly and in which the Parties have had negligible success, it is disingenuous to place such significant focus on the Parties' European capabilities, which have not given the Parties any competitive edge in the GB market to date<sup>15</sup> and will not do so going forward. Indeed, focusing on European capabilities is wholly uninformative when considering the competitive dynamics for the TCSF as it ignores how Network Rail would in reality assess suppliers' prequalification and tender submissions; and substitutes the CMA's own assessment for that of Network Rail.
- 2.7 Moreover, the CMA's analysis all but ignores the criterion of price and commercial terms, which represent 40% of the weighting at ITT: (i) 10% within the technical envelope (which relates primarily to innovation and cost efficiencies) and (ii) the commercial envelope, accounting for 30% of the total weighting at ITT. This is a stark omission from the CMA's analysis, since price is one of the key underlying objectives

<sup>12</sup> PFs, para 8.233.

<sup>13</sup> PFs, para 8.234.

<sup>14</sup> PFs, para 8.381.

<sup>15</sup>

of the move to digital signalling and therefore expected to be an important parameter of competition for the TCSF.<sup>16</sup>

#### ***A.2 CMA overstates closeness of competition between the Parties***

2.8 For the CMA's case to hold, it would need to show that the reduction in choice leads to a loss of competitive constraint between the Parties that cannot be offset by other competitors, as *any* horizontal merger necessarily leads to a reduction in choice.

2.9 Even working within the CMA's own framework, which for the reasons set out above, is inappropriate, the CMA's analysis still falls far short of demonstrating this point. In particular, based on its own analytical framework, there is strong evidence to show that other new entrants [REDACTED]

2.10 Across the six criteria assessed by the CMA:

2.10.1 **Access to technology:** it finds that the Parties are likely to be close competitors. However, the CMA then notes that the [REDACTED]

[REDACTED] It follows that, at least in this regard, that the CMA considers all of Hitachi Rail, the Target [REDACTED] to have comparable capabilities. Indeed, [REDACTED]

[REDACTED] The Provisional Findings also state that "*any other OEMs potentially participating in the TCSF (other than Siemens and Alstom) would face some obstacles to interfacing with existing GB signalling technology, but we have not seen evidence that these obstacles would differ between these OEMs (other than Siemens and Alstom).*"<sup>20</sup>

2.10.2 **Management experience and expertise:** as explained below (see paragraph 2.13), within this criterion, the CMA effectively only considers OEMs' experience in undertaking digital mainline signalling projects and homologation of technologies in different countries. For the reasons described in paragraph 2.6 above, reliance on European signalling experience is inappropriate. Indeed, given the specific requirements for UK licenced engineers (including design, installation and test engineers), it is inappropriate and highly speculative to read across from European experience to UK delivery capabilities. Similarly, homologation of technology in the UK is not comparable to the homologation

<sup>16</sup> PFs, para 7.22(c): Network Rail explained that reducing the cost of signalling is one of the three key aims of the TCSF.

<sup>17</sup> [REDACTED]  
<sup>18</sup> PFs, para 8.232.

<sup>19</sup> [REDACTED]  
<sup>20</sup> PFs, para 8.304.

process in other countries. As noted in the Working Papers, *"industry feedback indicated that GB had one of the most challenging homologation processes in the world."*<sup>21</sup> This evidence no longer appears to be considered in the Provisional Findings.

2.10.3 Nevertheless, even when having regard to European capabilities, the CMA's analysis does not show that the Parties have comparable positions:

- (a) Digital mainline signalling projects: The difference between the Target's capabilities ( ) and those of Hitachi Rail ( ) is much bigger than those between Hitachi Rail and .
- (b) Homologation of technologies in different countries: Again, the difference between the Target's experience ( ), similar to for each of Siemens and Alstom) and that of Hitachi Rail ( ) is much greater than the difference between Hitachi Rail .<sup>23</sup>

2.10.4 The CMA's conclusion that the Parties are close competitors in this regard, and the CMA's statement that *"CAF and Indra have significantly less experience than the Parties"*<sup>24</sup> do not logically follow from the evidence and strongly suggests that the CMA views the transaction as a '4 to 3', despite clear evidence of a greater number of competitors.

2.10.5 **Experience in GB mainline signalling:** the CMA finds that the Parties are likely to be close competitors, noting that Hitachi Rail has more experience with Network Rail than the Target, but the Target has some GB signalling experience as a supplier of axle counters (a product) and as a provider of TMS solutions.

. The CMA then states ,<sup>25</sup> resulting in a fairly convoluted assessment. At the same time, the CMA then downplays the experience of integrators within consortia, noting that

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PFs, Figure 1 – based on the CMA's analysis of bidding data.

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PFs, Table 11.

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PFs, para 8.286 and 8.287.

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PFs, para 8.330.



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2.10.6 While Hitachi Rail, like Atkins, has previous experience as a major signalling framework supplier, it is an indisputable fact that Atkins and Amey have more experience in GB signalling than Hitachi Rail or the Target.<sup>27</sup> This point is wholly overlooked by the CMA, which focuses its assessment on OEMs and then on integrators (*inter se*). As described in further detail below, the CMA's flawed consideration of integrators leads to serious deficiencies throughout its analysis and is particularly pertinent to its analysis within this criterion. In short, the CMA cannot conclude that the Parties have similar capabilities based on this analysis.

2.10.7 **Innovation, Financial Standing and Size, Price:** the CMA either does not assess suppliers' capabilities across these criteria (with respect to Innovation and Price)<sup>28</sup> or otherwise finds that all suppliers would likely be well placed (with respect to Financial Standing and Size).<sup>29</sup> As explained above, the CMA's failure to engage with suppliers' ability to compete on price is a crucial omission from its analysis, since cost reduction is one of the key underlying aims of the TCSF (see paragraph 2.7).

2.11 It follows from all of the above, that the CMA does not have valid arguments for finding that the competitive constraint exerted by one Party on the other could not be replicated by other suppliers. Indeed, taken in the round, the CMA's analysis essentially seems to indicate – as the Parties have previously stated – that apart from Siemens and Alstom,

<sup>26</sup> PFs, para 8.332.

<sup>27</sup> See for example the Parties' submission on ETCS ATP Wayside Re-signalling Projects, para 3.11 and the Parties' response to the Annotated Issues Statement and Working Papers, para 4.19.

<sup>28</sup> PFs, para 8.338, in relation to Innovation: *"It is not currently possible to assess potential bidders' ability to meet the T190 target."* And PFs, para 8.354: *"We currently, therefore, have not attempted to differentiate between potential bidders with respect to price."*

<sup>29</sup> PFs, para 8.342: *"We consider that each of the companies identified above is likely to meet the financial standing and stability requirements set by Network Rail at PQQ stage, such that financial standing is not a significant differentiating factor."* The Parties' reject the CMA's speculation at para 8.343 of the PFs that *"[e]ven where firms are able to meet those financial requirements considered as part of the tender process, procuring authorities such as Network Rail may request further financial information at any stage of the procurement cycle..."* to conclude once again that the Parties are part of the four largest suppliers. The TCSF Instructions to Participants specifically states at para 7.3.1 that

."

### A.3 *The CMA's assessment of consortia is incorrect*

- 2.12 Throughout its analysis, the CMA either (i) does not consider integrators' capabilities within a consortium<sup>30</sup> or (ii) considers first, whether the OEM is a strong competitor and next, if not, whether an integrator could help bridge the capability gap.<sup>31</sup>
- 2.13 As the Parties have continued to state, this approach fundamentally ignores the fact that a consortium is a competitor. The CMA cannot simply assess the capabilities of OEMs first and then, somewhat arbitrarily, determine when and to what extent integrators' capabilities should be considered in the competitive assessment. Such an approach leads to significant deficiencies in the CMA's analysis, within its already flawed analytical framework, for example:
- 2.13.1 **Homologation experience.** The CMA's consideration of suppliers' capabilities with respect to homologation under its criterion of "management experience" does not undertake any assessment of integrators' experience in homologating technology in the UK. However, it is clear from the Provisional Findings [REDACTED] [REDACTED] [REDACTED] [REDACTED] This information is clearly crucial to an analysis of suppliers' abilities in relation to homologation in the UK, which is indisputably more pertinent to an assessment of suppliers' abilities to compete in GB, than any assessment of homologation experience in Europe. In fact, when properly considering the competitive strength of a [REDACTED] [REDACTED].
- 2.13.2 Indeed, the division of responsibilities within [REDACTED] [REDACTED]. The CMA's exclusion of integrators from the technology-related aspects of its assessment is therefore simply incorrect. Moreover, given that [REDACTED] [REDACTED] and should not be considered as simply one among many integrators (please see further paragraph 2.13.5 in this regard).
- 2.13.3 **Signalling experience.** As the Parties have previously explained, integrators are not simply sub-contractors: they are competitors in their own right and in many instances, they are lead contractors in consortia, given their knowledge of the

<sup>30</sup> PFs, para 8.233. The CMA does not consider integrators within the "management experience" criterion, noting simply that *"integrators have other strengths, and we consider those capabilities in more detail in the Experience on the GB mainline section"*.

<sup>31</sup> PFs, para 8.288. The CMA notes *"In this section we discuss first OEMs' experience in GB mainline signalling and second to what extent partnering with an integrator might help OEMs to overcome any lack of GB experience."*

<sup>32</sup> [REDACTED]

<sup>33</sup> WPs, TOH1, slide 40: [REDACTED]

GB mainline signalling sector, familiarity with installed technology and strong relationships with Network Rail.<sup>34</sup> For example, Amey has delivered major enhancements, asset management including inspections, light rail and an integrated heavy rail franchise through its operation of the Docklands Light Railway, Manchester Metrolink and Wales and Borders rail franchise. Amey partnered with Hima-Sella to deliver the SIL4 depot interlocking at Taffs Well, Wales.<sup>35</sup> In addition, Atkins has been named the signalling partner for Network Rail's Southern Region Integrated Delivery alliance for CP7 and CP8. This role confirms Atkins' position as a key signalling supplier in the UK for the next ten years.<sup>36</sup> These points are further supported by the fact that [REDACTED]

2.13.4 While the CMA recognises that [REDACTED] is likely to be the strongest integrator in the context of the TCSF<sup>37</sup> it does not then take this into account when considering the strength of the [REDACTED] as a whole, instead simply stating that [REDACTED]

[REDACTED] This statement reflects a material oversight of the CMA's own previous finding that [REDACTED] is the strongest integrator.

2.13.5 **Narrow focus on delivery capabilities.** Apart from [REDACTED], the CMA lumps all other integrators together without any distinction and focuses primarily on the size of integrators' UK staff.<sup>39</sup> There is no analysis of, for example, integrators' propensity to participate as lead contractors, the breadth of their signalling experience, the depth of their relationship with Network Rail *etc*.

2.13.6 The cursory and incomplete nature of the analysis undertaken by the CMA does a disservice to integrators, who are by all accounts expected to play a key role in the TCSF and in mainline signalling projects generally. Network Rail highlighted, *inter alia*, [REDACTED] that integrators could bring:

<sup>34</sup> Parties' submission on Competitive Conditions, para 4.8.

<sup>35</sup> See, the Parties' submission on ETCS ATP wayside re-signalling projects, section 5, for further details on other integrators.

<sup>36</sup> <https://www.networkrailmediacentre.co.uk/news/network-rail-southern-region-announces-successful-alliance-partners-for-revolutionary-southern-integrated-delivery-portfolio-for-2024-2034>.

<sup>37</sup> PFs, para 8.328.

<sup>38</sup> PFs, para 8.332.

<sup>39</sup> PFs, para 8.328 and 8.329: "Regarding the remaining integrators, we have not seen evidence suggesting significant differences in their capabilities... We do not see differences in the size of integrators' current UK staff as a material differentiator between them."

2.13.7 Similarly, there is evidence in the Provisional Findings based on the Parties' internal documents, which shows that the Parties considered multiple distinguishing factors between integrators. For example: [REDACTED]

[REDACTED] The CMA [REDACTED] but fails to grasp that there are key distinctions between integrators, which should be taken into account in the competitive assessment.

2.13.8 The Provisional Findings therefore appear to be stating that any integrator (outside Atkins) would offer the same level of support to an OEM and therefore exert the same competitive constraint. This is a simplistic approach which fails to recognise that different integrators have different competencies and will therefore exert different levels of competitive constraint.

2.13.9 **Innovation:** integrators are expected to play a key role in achieving the T190+ target, as technology is a relatively limited part of the overall cost. Rather, cost savings are expected to be driven primarily by the approach to project delivery, and through a reduction of costs by Network Rail. As such, the failure to consider integrators within a consortium in this regard is a significant oversight.

2.14 The omission of these factors represents a material shortcoming in the CMA's assessment. Indeed, a more natural analysis of the evidence shows that a [REDACTED]

2.15 [REDACTED] which seems to be based

<sup>40</sup> PFs, para 8.309.  
<sup>41</sup> Annex HRL0000162, slide 17.



largely on ORR's *residual*<sup>42</sup> reservations in relation to multi-supplier solutions,<sup>43</sup> and ignores examples provided by the Parties.<sup>44</sup> In any event, the CMA does not explain (nor does it appear to have considered) the ability for the [REDACTED] [REDACTED] during the five-year development phase.<sup>45</sup>

- 2.16 **Annex A** provides a more detailed analysis of inconsistencies and flaws in the CMA's analysis of Network Rail's assessment criteria.

**B.** [REDACTED]

2.17 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**B.1** [REDACTED]

2.18 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

2.19 [REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>42</sup> PFs, para 8.226: The introduction of a mandatory EULYNX requirement could reduce interfacing risks or partnerships/consortia and therefore offset the competitive advantage providers of the full suite of mainline signalling technology hold. While ORR said that this might work in principle.

<sup>43</sup> PFs, para 8.226.

<sup>44</sup> PFs, para 8.227.

<sup>45</sup> WPs TOH1, slide 8: [REDACTED]  
[REDACTED]  
[REDACTED]

<sup>46</sup> PFs, para 8.113.

<sup>47</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]



[Redacted text block]

**B.2** [Redacted]

2.20 [Redacted text block]

2.21 [Redacted text block]

2.21.1 [Redacted text block]

2.21.2 [Redacted text block]

2.21.3 [Redacted text block]

2.22 [Redacted text block]

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49 [Redacted footnote text]

50 [Redacted footnote text]

### **C. The CMA's alleged SLC is mistaken**

2.23 The Provisional Findings do not establish that the Proposed Transaction is more likely than not to lead to an SLC (i) in a scenario where four suppliers are appointed to the TCSF, (ii) where three suppliers are appointed to the TCSF, (iii) during mini-competitions, or in any combination of the foregoing. As explained in section A above, the evidence does not show that the Parties are close competitors and there is therefore no possibility of an SLC arising on any ground.

2.24 Moreover, the CMA has failed to articulate its SLC. The CMA sets out its theory of harm as follows:<sup>51</sup>

*"The substantial loss of competition resulting from the Merger is likely to lead to a worse outcome in the initial TCSF tender and future mainline signalling tenders in GB. The Merger could result in reduced choice for Network Rail in terms of the strength and number of bidders and could lead to fewer than four suppliers being appointed in the current tender process and thus available to bid, should they so choose, in future mini-competitions within the TCSF.*

*Overall, we currently consider that the Merger could lead to adverse effects in the supply of digital mainline signalling systems to infrastructure managers in GB through higher prices, reduced innovation, worse terms and/or worse performance levels relative to the situation absent the Merger."*

2.25 This theory is not clarified or substantiated in relation to any aspect of the purported SLC, as set out below.

#### ***C.1 The SLC framework is unclear***

2.26 As explained in section A above, the evidence does not show that the Parties are close competitors and indeed shows that [REDACTED]. There is, therefore, no scenario in which a weaker fourth player (or four players with weaker bids) would be appointed to the TCSF.

2.27 For completeness, in the hypothetical scenario where, the Proposed Transaction leads to a weaker fourth supplier (or four players with weaker bids) appointed to the TCSF, the CMA must still explain its theory of harm.

<sup>51</sup> PFs, para 47.

- 2.28 The CMA's merger assessment guidelines note that a theory of horizontal unilateral effects is based on the merged entity being able "profitably to raise prices or degrade non-price aspects of its competitive offering (such as quality, range, service and innovation)."<sup>52</sup> This means that the mere reduction in the number of competitors is insufficient to find an SLC. Moreover, the finding that the Parties are close competitors (which the Parties reject for the reasons detailed above) is also insufficient to find an SLC. Rather, the CMA must consider how that purported closeness would negatively impact competition.
- 2.29 As described above, the CMA focuses its competitive analysis on: (i) suppliers' access to technology, (ii) suppliers' experience in undertaking digital mainline signalling projects and in homologating technologies in different countries, and (iii) suppliers' experience in GB mainline signalling. Even assuming that these are relevant characteristics against which bidders' strengths should be assessed and even assuming that the Parties are close competitors in these areas (both of which are rejected by the Parties for the reasons set out in section A), the CMA still fails to explain how this purported closeness results in a harm.
- 2.30 At the same time, the CMA specifically declines to assess true competitive variables, such as price (see paragraph 2.10.7 above). Given that cost reduction is an underlying goal of the TCSF and that suppliers can therefore be expected to compete strongly on price, the CMA's decision not to assess competitors' abilities to compete on this parameter represents a material analytical oversight.
- 2.31 As a result, it is unclear on what basis the CMA has provisionally concluded that the Proposed Transaction could lead to *"higher prices, reduced innovation, worse terms and/or worse performance levels."*<sup>53</sup>
- 2.32 Moreover, the Provisional Findings fail to engage with the implications of Network Rail's procurement timeline. The Parties expect the ITT will launch on 3 July 2023 and will have a response deadline at the end of September. Competitive pressure is typically greatest during the bid preparation stage, particularly as the TCSF involves a single sealed bid. As the merger review process is ongoing, the Parties will be acting entirely independently from one another and assessing the opportunity separately. Accordingly, the Proposed Transaction will have no impact on competition for initial placement on the TCSF.

## ***C.2 Unsubstantiated claim on reduction in number of framework suppliers***

- 2.33 The Provisional Findings claim that the Proposed Transaction *"could lead to fewer than four suppliers being appointed in the current tender process."*<sup>54</sup> At a minimum, for this theory to be upheld (and assuming for the purposes of the CMA's case, that a reduction

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<sup>52</sup> CMA's merger assessment guidelines, para 4.1.

<sup>53</sup> PFs, para 48.

<sup>54</sup> PFs, para 47.

in the number of framework suppliers results in competitive harm), the CMA would need to show that the Proposed Transaction has a material chance of resulting in a reduction in the number of framework suppliers within the TCSF.

- 2.34 The CMA notes that Network Rail [REDACTED].<sup>55</sup> However, nothing in the Provisional Findings indicates that the CMA has discussed this further with Network Rail: [REDACTED]

- 2.35 [REDACTED]

### ***C.3 Assessment of competition within the TCSF is flawed***

- 2.36 The CMA's assessment of loss of competition for mini competitions within the TCSF is equally flawed. The Provisional Findings state:

*"While the guaranteed workbank would enable less strong suppliers to build capacity and experience in GB, they could still potentially be at a competitive disadvantage when competing for mini-competitions due to starting from a substantially weaker position than their competitors."*<sup>56</sup>

- 2.37 In other words, the CMA's position is that no other supplier, despite having passed Network Rail's PQQ and ITT processes, regardless of how well it performs in the projects awarded through direct allocation and how determined it is to win additional work, could credibly compete as well as the Parties.

- 2.38 The above-cited argument also effectively operates to say that no supplier (including the Parties) could credibly compete with Siemens or Alstom for mini competitions *"due to starting from a substantially weaker position."*

- 2.39 The Provisional Findings are dismissive of [Parties' Economic Advisers] submissions on competition within the TCSF, however, the abovementioned statement inadvertently agrees with the points made in that submission:

*"In practice, as much as they are the strongest competitors in the initial bidding to qualify, the strongest competitors in any mini-competition would be Siemens and*

<sup>55</sup> PFs, para 7.21.

<sup>56</sup> PFs, para 7.65.

*Alstom-Bombardier. Consequently, unlike the initial bidding where multiple suppliers qualify, in the subsequent stages of the TCSF there can be no meaningful competition for 'third place' or any other losing position, and consequently no loss of competition in the middle of the rankings, as the CMA hypothesised for the initial bidding."*<sup>57</sup>

- 2.40 In other words, unlike competition for the TCSF, which will result in four awards, there is no guaranteed workbank allocated for competition within the TCSF, and a single supplier could in theory win all the projects awarded through mini competition. Siemens and Alstom as the incumbent duopolistic suppliers in GB are therefore likely to win a significant proportion of the projects awarded through mini competitions. The presence of the Parties or any competitors within the TCSF would therefore make no difference to the likely outcome of mini competitions. This would also remain the case if three suppliers were hypothetically appointed to the framework (which for the reasons described above, seems to be an unlikely scenario), instead of four.
- 2.41 On the other hand, insofar as players appointed to the third and fourth places in the TCSF could compete in the mini competitions, any player would be as well placed to compete as the Parties. For the reasons set out in section A above, [REDACTED]  
[REDACTED]  
[REDACTED] Moreover, and in any event, Network Rail's intention is for all qualified suppliers in the TCSF to be brought up to the same level and to compete on equal footing in mini competitions.
- 2.42 The CMA's concerns in relation to mini competition within the TCSF are therefore not valid.

#### ***C.4. The alleged SLC appears to be untested***

- 2.43 The CMA's theory of harm in relation to digital mainline signalling projects in Great Britain concerns one primary customer: Network Rail. It would logically follow that the CMA should test the core elements of its alleged SLC with Network Rail.
- 2.44 **The CMA must have regard to Network Rail's views.** However, the Provisional Findings indicate the opposite and in fact, the CMA largely diminishes the significance of Network Rail's views, stating that *"Network Rail is in the middle of a tender process, the TCSF, that is directly affected by the Merger. It therefore faces strong reputational incentives to avoid disrupting the procurement and to avoid the perception of having preconceived views about the competitiveness of potential bidders in the TCSF."*<sup>58</sup>
- 2.45 The CMA's rationale in this regard is inconsistent with its approach elsewhere in the Provisional Findings. For instance, the CMA has repeatedly disclosed Network Rail's view on competitors where those statements could somehow be interpreted to mean that

<sup>57</sup> [Parties' Economic Advisers] Paper, paragraph 4.8(c)(i).  
<sup>58</sup> PFs, para 8.399.

the Parties compete more closely with each other than with other OEMs.<sup>59</sup> Network Rail, as the customer and the assessor for the TCSF is best placed to ascertain how the Merged Entity will perform within the TCSF, and the likely impact of the Proposed Transaction on incumbent suppliers. Indeed, it is possible that Network Rail's positive views [REDACTED]

2.46 The CMA must have regard to the fact that Network Rail is the architect of, and customer for, the TCSF and is also the key infrastructure manager for mainline signalling projects in Great Britain. It is therefore clearly well placed to understand the dynamics of competition in the mainline signalling sector.

2.47 **The CMA's assessment appears to be at odds with that of Network Rail.** In addition, it is not apparent that the CMA has vetted the following key aspects of its theory of harm with Network Rail.

2.47.1 Nothing in the Provisional Findings indicates that the CMA has asked Network Rail for its views on [REDACTED] potential ranking within the TCSF, [REDACTED], based on the submissions received. Rather, Network Rail's views on potential suppliers appears to date from February 2023 (cited at para 8.378), pre-dating both the PQQ and suppliers' PQQ responses.

2.47.2 It is also unclear whether the CMA has asked Network Rail about the likelihood of three, rather than four, suppliers being appointed to the framework. This is a key question to determining the extent to which this aspect of the CMA's SLC is plausible.

2.47.3 Moreover, the Provisional Findings do not engage with the fact that Network Rail sets the terms and conditions on which it engages with suppliers. Specifically, Network Rail:

- (a) Designed the structure of the TCSF, including funding support for technology development, detailed rules and binding obligations placed upon suppliers regarding collaboration and interoperability;
- (b) Has the ability to specify target prices and other budgetary constraints in Commission Contracts, all of which are intended to ensure effective competition for supplies delivered under the framework; and

<sup>59</sup> For example in para 8.378(c) of the PFs, Network Rail is reported to have stated that "*CAF, Indra and Mermec did not hold the same scale of portfolios of work and dominance as the Parties, Siemens, and Alstom in Europe*".

- (c) Has the ability to engage proactively with suppliers for the duration of the TCSF in setting the terms and conditions on which works and services are to be delivered under the framework.

2.47.4 Network Rail therefore has all the tools at its disposal to safeguard effective competition, including to mitigate any hypothetical lessening of competition as alleged by the CMA.

2.48 The CMA's theory of harm cannot be upheld when the sole customer, a sophisticated buyer and the statutory undertaker responsible for mainline infrastructure in Great Britain, [REDACTED] and where that customer's feedback on key issues does not appear to have been solicited by the CMA.

**D. The CMA diminishes findings of rivalry enhancing effects and erroneously undermines Network Rail's views**

2.49 **The perception that the merged entity will be a greater challenger to Siemens and Alstom is sufficient for rivalry enhancing effects to arise in bidding markets.** Network Rail, the ORR and third parties consider that the Proposed Transaction would result in increased rivalry for mainline signalling projects in Great Britain as set out below. There is, therefore, a broad perception across the industry that the merged entity would represent a stronger challenge to the incumbent suppliers and thereby increase competitive pressure:

2.49.1 Network Rail stated that [REDACTED]

2.49.2 The ORR also indicated the possibility for the Proposed Transaction to result in increased competition: the Merged Entity *"will be in a stronger position to compete against Siemens and Alstom for some TCSF volumes than would be the case for either Hitachi or Thales individually", with the 'clearest example of such volumes' being 'the second largest framework lot.'*<sup>61</sup>

2.49.3 VolkerRail, Stadler and Mipro also voiced similar opinions.<sup>62</sup>

2.50 The CMA therefore misses the point when dismissing third parties' views on the basis that they "had no access to data relating to potential synergies"<sup>63</sup> and the Parties' arguments on the basis that any efficiencies are not merger specific.<sup>64</sup> The Proposed

<sup>60</sup> PFs, para 11.23.

<sup>61</sup> PFs, para 11.22.

<sup>62</sup> PFs, para 11.25.

<sup>63</sup> PFs, para 11.24.

<sup>64</sup> PFs, para 11.31.



Transaction will create a stronger challenger for mainline signalling projects in Great Britain, and Siemens and Alstom do not need to see detailed evidence of synergies to perceive the merged entity as a competitive threat and to therefore improve their bids.

- 2.51 **The CMA must therefore carry out a balancing exercise.** As set out in the Provisional Findings, where there is increased rivalry as a result of the Proposed Transaction, the CMA would need to assess competition in the round to determine the extent to which the increase in rivalry for the higher slots in the TCSF outweigh the hypothetical loss of rivalry for lower slots.<sup>65</sup> The Provisional Findings do not engage in any such exercise and the CMA also does not appear to have discussed the extent of any rivalry enhancing effects, or the likelihood that such effects would outweigh any hypothetical loss of competition, with Network Rail.
- 2.52 The CMA's failure to engage in this exercise renders its provisional finding of an SLC deficient.

#### **E. Conclusion**

- 2.53 In conclusion, there is no plausible basis for the provisional finding that the Proposed Transaction would give rise to an SLC in respect of digital mainline signalling projects in the UK, nor does the evidence presented in the Provisional Findings support such a conclusion.
- 2.54 **On the contrary,** [REDACTED]
- 2.55 **The CMA has failed to articulate the alleged SLC** in respect of digital mainline signalling projects in GB, which remains vague and undefined several months into the phase 2 merger review process. The theory of harm lacks coherence insofar as the CMA (i) compares capabilities which are expected to have very little bearing on suppliers' scores during the TCSF, (ii) fails to explain how any purported closeness between the

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<sup>65</sup> PFs, para 7.63.

Parties across these capabilities could result in a lessening of competition, and (iii) simultaneously fails to undertake a reasonable assessment of suppliers' abilities to compete on variables such as price.

- 2.56 This being the case, even if the CMA had managed to establish that the Parties are close competitors (which, as set out above, it has failed to do), it has not established how the alleged loss of competition between the Parties and the presence of a hypothetical weaker fourth competitor on the TCSF would result in worse prices or other terms for Network Rail.
- 2.57 **No realistic prospect of only three framework suppliers.** The Provisional Findings then turn to the claim that the Proposed Transaction could result in an overall reduction in the number of framework suppliers from four to three. Given Network Rail's statement that it [REDACTED],<sup>66</sup> the CMA has to meet a [REDACTED] determine that it is likely that only three suppliers would be awarded a place on the TCSF. It is not apparent that the CMA has discussed the likelihood of such a scenario with Network Rail and there is certainly no meaningful engagement on this aspect of the theory of harm in the Provisional Findings. This concern is therefore also without merit.
- 2.58 **Any possible loss of competition within the framework is also, on the CMA's case, highly improbable.** Unlike competition for the TCSF, there is no guaranteed allocation of projects procured through mini competitions *within* the TCSF. A single supplier could in theory win all of the projects tendered through mini competitions and, according to the CMA's statement copied below, the suppliers most likely to win mini competitions are Siemens and Alstom:
- "While the guaranteed workbank would enable less strong suppliers to build capacity and experience in GB, they could still potentially be at a competitive disadvantage when competing for mini-competitions due to starting from a substantially weaker position than their competitors."*<sup>67</sup>
- 2.59 As a result, no aspect of the alleged SLC has not been articulated or substantiated by the CMA.
- 2.60 **In the event that any hypothetical SLC were to arise, the CMA must take into account the rivalry enhancing effects** of the Proposed Transaction and in particular, Network Rail's views in this regard, as the architect of the TCSF and a sophisticated infrastructure manager, responsible for signalling projects across GB.

<sup>66</sup> PFs, para 7.21.

<sup>67</sup> PFs, para 7.65.

- 2.61 Given the significant analytical and evidential gaps in the Provisional Findings, the Parties would urge the CMA to engage closely with Network Rail in relation to the following key questions:
- 2.61.1 Whether the competitor set (beyond the incumbents of Siemens and Alstom) [REDACTED]  
[REDACTED]  
[REDACTED]
  - 2.61.2 Whether the alleged closeness of competition between the Parties, and the hypothetical loss of close competition, could lead to worse outcomes for Network Rail.
  - 2.61.3 The likelihood of the TCSF only having three suppliers, having regard to suppliers' PQQ submissions.
  - 2.61.4 The extent to which Network Rail has levers at its disposal to ensure greater competition and improved outcomes in terms of price or other conditions.
  - 2.61.5 In the event of a hypothetical SLC arising as a result of the Proposed Transaction, the extent to which enhanced rivalry would offset any loss of competition.
- 2.62 In the absence of meaningful engagement with Network Rail, and corresponding evidence supporting, these abovementioned points, **the CMA's provisional finding of an SLC in the GB market for digital mainline signalling projects cannot be upheld.**

### 3. CBTC

#### A. Errors in the CMA's reasoning

3.1 The CMA has provisionally concluded that the Proposed Transaction is likely to result in the removal of a significant constraint on the Target as the CBTC market leader in the London Underground, on the basis that:

- 3.1.1 there are a limited number of competitors for London Underground tenders;
- 3.1.2 despite having no previous experience of working on the London Underground or with TfL, and despite the very high barriers that the CMA has acknowledged,<sup>68</sup> Hitachi Rail will grow in stature and theoretically bid for such projects in the future thereby becoming a significant competitive constraint on the Target;
- 3.1.3 the remaining constraints from Siemens and potentially Alstom are not likely to be sufficient to offset the loss brought about by the Proposed Transaction; and
- 3.1.4 it is unlikely that new entrants that may enter the market in future could theoretically bid for such projects.

3.2 The CMA's reasoning suffers from a number of conceptual and analytical errors.

#### *AI. The provisional finding is undermined by the improbable nature of all other relevant circumstances arising:*

3.3 Aside from any consideration of the implausibility of Hitachi Rail's future entry and participation in London Underground projects and its relative weaknesses should it elect to do so, there is insufficient certainty as to when, if at all, the Piccadilly and Bakerloo projects will arise for the CMA to sensibly take them into consideration as a future possible SLC. The following factors are currently unknown:

- 3.3.1 If and when TfL will have the funding to tender the projects concerned.<sup>69</sup>
- 3.3.2 Timing of any tender for the project (which appears to be at least 10 years in the future).<sup>70</sup>
- 3.3.3 The subject matter and process for any future contract award. For example, TfL's position has changed in relation to [REDACTED] [REDACTED] the Central line was previously within scope of the cancelled DTUP tender (2017), [REDACTED]

<sup>68</sup> PFs, para 10.102.

<sup>69</sup> PFs, para 9.45 – 9.46.

<sup>70</sup> PFs, para 9.49.

.<sup>71</sup> [REDACTED] while TfL currently plans to tender the Piccadilly and Bakerloo lines competitively, it may yet change its plans. Moreover, while the Waterloo & City line was included as part of the DTUP tender, TfL told the CMA that it “did not have any current plans to procure resignalling for that line.”<sup>72</sup> Overall, the CMA draws an arbitrary distinction in acknowledging *"the uncertainty associated with predicting competitive conditions in this market so far into the future"* in relation to tenders occurring *"much later than 2035"* while basing its assessment on tenders that are likely to be tendered in the next 10 – 12 years (*i.e.*, in 2033 – 2035).

- 3.3.4 Whether the tenders would contain requirements that Hitachi Rail has any prospect of satisfying. As TfL has not yet determined the criteria for currently unconfirmed tenders so far into the future,<sup>73</sup> the CMA acknowledges that *"there are uncertainties in relation to the design of TfL's future CBTC tenders for the Piccadilly and Bakerloo."*<sup>74</sup>

**A.2 The CMA errs in taking as a "starting point" that Hitachi Rail would be perceived as a credible competitor in 10-12 years**

- 3.4 As the CMA notes, it must select "the *most likely* conditions of competition as the counterfactual against which to assess the merger,"<sup>75</sup> which it concludes are "the prevailing conditions of competition."<sup>76</sup> However, having set this out, the CMA goes on to assume conditions of competition that are vastly different from the present, namely a hypothetical scenario in which Hitachi Rail:
- 3.4.1 will grow in stature and bid for CBTC resignalling projects in London, despite having no previous experience working on the London Underground or with TfL, and despite explicit statements [REDACTED]; and
  - 3.4.2 will become a stronger competitive constraint on the Target than Siemens, an incumbent on the London Underground, despite the very high entry barriers that the CMA has acknowledged.

<sup>71</sup> PFs, para 9.20.

<sup>72</sup> PFs, para 9.20.

<sup>73</sup> PFs, para 9.30.

<sup>74</sup> PFs, para 9.51 (a).

<sup>75</sup> PFs, para 5.3.

<sup>76</sup> PFs, para. 5.13.

- 3.5 This assumption, already untenable based on the current evidence,<sup>77</sup> is all the more unreasonable given the uncertain and distant timing of the CMA's purported counterfactual, *at least* 10-12 years into the future, for reasons set out by the CAT:<sup>78</sup>

*"we doubt very much [...] if an impairment to dynamic competition that is not thought to manifest itself within five years at the outside can be considered to be an expectation. The world is simply not that predictable."*

- 3.6 Therefore, *if* the CMA insists on such a long and distant timeframe, the quality of its evidence is all the more important, a principle that can also be found in EU case law:<sup>79</sup>

*"the more prospective the analysis is and the chains of cause and effect dimly discernible, uncertain and difficult to establish, the more the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the internal market is important."*

- 3.7 The CMA's analysis further suggests that *any* reduction in the number of possible competitors for CBTC projects is a substantial lessening of competition without specifying the horizontal unilateral effects leading to the alleged harm.

- 3.7.1 On the current facts, the CMA cannot rely on the proposition that where *"competition mainly takes place among a few firms, any two would normally be regarded as sufficiently close competitors that the elimination of competition between them would raise competition concerns, subject to evidence to the contrary"*<sup>80</sup> given that Hitachi Rail is not one of the firms among which *"competition mainly takes place"* in the London Underground. Contrary to the CMA's assertion,<sup>81</sup> [REDACTED] in a London Underground tender and in that instance [REDACTED]. Indeed, the CMA acknowledges that *"barriers to entry on the London Underground are high"*<sup>82</sup> and that *"at present, there are only two suppliers that have delivered CBTC signalling projects on the London Underground: Thales and Siemens"*.<sup>83</sup> Therefore, competition in London *"mainly"* takes place among Siemens, the Target and Alstom, with Hitachi Rail firmly on the outside. TfL's recent attempt at awarding a CBTC contract to a supplier with no previous experience of the

<sup>77</sup> See Section B below.

<sup>78</sup> *Meta Platforms, Inc v Competition and Markets Authority* [2022] CAT 26, Judgment of 14 June 2022, para 105. The same can be said in respect of potential competition, see paras 100 and 103.

<sup>79</sup> Judgment of the General Court of 28 May 2020 CK, Case T-399/16 - *CK Telecoms UK Investments Ltd v Commission*, para 111.

<sup>80</sup> PFs, para. 10.29.

<sup>81</sup> PFs, para 10.28 alleges that [REDACTED]

<sup>82</sup> PFs, para 57.

<sup>83</sup> PFs, paras 57, 10.28 and 10.325.

London Underground was [REDACTED],<sup>84</sup> rendering it unlikely that TfL would attempt to do so again.<sup>85</sup>

- 3.7.2 It follows that the Provisional Findings err in taking as a "starting point" that Hitachi Rail "*would [...] be perceived as a potential, and credible, competitor for future CBTC tenders in the London Underground, absent the Merger*".<sup>86</sup> Rather, the "starting point" should reflect the status quo that competition for London Underground projects will continue to take place among Siemens, the Target and potentially Alstom, with Hitachi Rail placed outside of this competitor set.

**A.3 *The CMA's assertion that the constraints of Siemens and Alstom are insufficient to prevent an SLC is unsupported***

- 3.8 In a bidding market with one winner, the winner's bid can only be materially affected by the participation of a rival if the winner attributes a material probability to that rival offering the most competitive bid of all other competitors – *i.e.*, to being the closest/strongest. Given this principle, the CMA's analysis of competition for future CBTC tenders in London is severely deficient:

- 3.8.1 First, the Provisional Findings state that Hitachi Rail is not the Target's closest competitor: "*Hitachi's lack of previous experience on the London Underground will mean that it may not be the closest competitor to Thales*";<sup>87</sup> "*The evidence shows that Siemens is at least as strong as Thales against each of the assessed competition parameters, and stronger than Hitachi. Alstom [...] is a strong global CBTC supplier with considerable experience and technical capabilities.*"<sup>88</sup>

- 3.8.2 Then, the Provisional Findings assert (without any reasoning) that the constraints of Siemens and Alstom are insufficient to prevent an SLC: "*[T]he remaining constraints post-Merger from Siemens and Alstom are not likely to be sufficient to offset the loss brought about by the Merger*".<sup>89</sup>

- 3.9 This reasoning is a *non sequitur*: in economic terms the ranking reported by the CMA would imply that there is no merger effect. Given that, as the CMA finds, Siemens is "*at least as strong as Thales*" and therefore Hitachi Rail is not the Target's closest competitor, whether or not Hitachi Rail competes for CBTC projects would not change the Target's optimal bid.

<sup>84</sup> PFs, para 10.328.

<sup>85</sup> See further para 3.16.2 below.

<sup>86</sup> PFs, paras 60 and 10.110.

<sup>87</sup> PFs, para 10.343.

<sup>88</sup> PFs, para 69 and 10.341.

<sup>89</sup> PFs, para 71. The reasoning in the main body (see paras 10.341 – 10.343) does not add any material explanation.

- 3.10 The CMA's reasoning relies on bidders having relevant uncertainty, such that "*all credible competitors (not just the closest competitor) are likely to play a role in adding to the competitive constraint*".<sup>90</sup> In that case, however, the critical issue is whether it is more likely than not that in ten years or more, it can be expected that the Target might reasonably attribute a significant probability to Hitachi Rail offering a materially more competitive bid than both Siemens and Alstom. That is, even if Hitachi Rail were a competitor for future London CBTC projects [REDACTED], it would only incrementally constrain the Target (compared to Siemens and Alstom) if the Target attributes some positive probability to Hitachi Rail being a closer competitor than Siemens and Alstom.
- 3.11 The Parties acknowledge that an average "non-closest" competitor could exercise a constraint but only if it is assumed to have a reasonable chance of being closest/strongest. However, as further explained in **section B** below, the probability of this occurring is very low on the specific facts, as it would entail a distant fourth placed player (on average) globally, coming second in London, meaning that Hitachi Rail would need to be more competitive than Siemens and potentially Alstom for tenders relating to extremely complex CBTC projects, in a system which, per the CMA's own findings, "*incumbent suppliers are likely to benefit from a competitive advantage, potentially a significant one.*"<sup>91</sup>.

***A.4 The Provisional Findings contain no analysis of the impact of any lessening of competitive constraint on the remaining suppliers***

- 3.12 The CMA has not articulated how or by what metric other suppliers would compete on less competitive terms if Hitachi Rail were not a competitor. In particular, TfL has noted that "its assessment is primarily led by the technical requirements of a supplier [REDACTED]"<sup>92</sup> "Assuming a continuation of the lower weighting of price to TfL's assessment" the CMA states that it has "not considered suppliers' relative pricing strategies in detail."<sup>93</sup>

**B. The evidence assessed by the CMA does not support an SLC finding**

- 3.13 For the Target to form a reasonable expectation that Hitachi Rail would potentially be its closest competitor in the 2035 London Underground tenders, it would need to attribute a significant probability to Hitachi Rail participating in the tenders and being at least as credible as *both* Siemens and Alstom. The lack of sufficient evidence for each of these propositions is considered below.

<sup>90</sup> PFs, para 9.23.

<sup>91</sup> PFs, para 10.102.

<sup>92</sup> PFs, para 10.303.

<sup>93</sup> PFs, para 10.304. See also PFs, 10.306.



### ***B. 1 The likelihood of Hitachi Rail's participation***

3.14 In the Provisional Findings, the CMA assesses the probability that Hitachi Rail would participate in the London Underground tenders. While the CMA acknowledges that it "cannot predict with certainty whether Hitachi will bid for future CBTC tenders for the Bakerloo and Piccadilly lines, *absent the Merger*",<sup>94</sup> it disregards the statements made by Hitachi Rail on numerous occasions [REDACTED]

[REDACTED].<sup>96</sup> It is noteworthy that [REDACTED]  
[REDACTED].<sup>97</sup> The fact that even incumbents appear to be struggling with the delivery of CBTC systems for TfL renders these opportunities even more unattractive to new entrants.<sup>98</sup> Overall, the London Underground is a *highly challenging* environment for new entrants due to the high barriers to entry and incumbency advantages, as set out further below.<sup>99</sup>

3.15 Even if Hitachi Rail continues to *consider* brownfield CBTC projects on a case-by-case basis,<sup>100</sup> the CMA is wrong to assume that Hitachi Rail will necessarily *bid and win* such projects in the next 10 – 12 years. In particular, [REDACTED]

3.16 [REDACTED], Hitachi Rail has recently decided not to compete for brownfield tenders in a number of cases, such as [REDACTED]

[REDACTED].<sup>103</sup> The CMA appears to discount this evidence on the basis that Hitachi Rail

<sup>94</sup> PFs, paras 60 and 10.182.

<sup>95</sup> PFs, para 10.177.

<sup>96</sup> *E.g.*, there is no mention of the statements made at the Hitachi Main Party Hearing, MPH Transcript, p.81, lines 3 and p.71, lines 17 – 19 or of those in the letter dated 3 May 2023 [REDACTED]

<sup>97</sup> PFs, para 10.89.

<sup>98</sup> PFs, para 10.65.

<sup>99</sup> See below, at paras 3.22 to 3.24.

<sup>100</sup> PFs, paras 10.112 and 10.155.

<sup>101</sup> [REDACTED]  
[REDACTED].

<sup>102</sup> [REDACTED]

[REDACTED].  
<sup>103</sup> [REDACTED]  
[REDACTED]

"faced specific issues in respect of each of these projects which contributed [*sic*] for the decision not to pursue potential bids... [REDACTED]

[REDACTED]".<sup>104</sup> However:

3.16.1 [REDACTED], these issues are quite common in brownfield projects (interfacing requirements) and/or in CBTC projects generally (customer budgets and tight timescales). [REDACTED]

3.16.2 [REDACTED]. The CMA itself notes that the evidence from competitors indicated that there would likely be interfacing challenges for new entrants on the Piccadilly line.<sup>106</sup> Moreover, like any Public Transport Authority, TfL is likely to face pressure in terms of budget and timescales to avoid financial burden on the taxpayer and inconvenience to passengers. Suppliers without experience in London or other similar high-capacity metro systems, [REDACTED] will find it more difficult to appropriately factor in the costs and risks involved in the delivery of such projects. For instance, the KPMG report on its review of the cancelled SSR contract noted that Bombardier (a new entrant) had failed to appreciate the *"scale and complexity of the scope of their work and LU's expectations for levels of compliance documentation, interaction, management and scrutiny compared to the many other international signalling projects that have successfully delivered elsewhere."*<sup>107</sup> Bombardier had also put forward a price that was *"substantially lower than the next bidder"* that transpired to be unattainable in practice.<sup>108</sup> [REDACTED]

3.17 [REDACTED], the CMA builds its theory of harm in CBTC on Hitachi Rail being likely to bid, leveraging on its recent experience outside of the UK and EU.<sup>109</sup>

<sup>104</sup> PFs, para 10.156.

<sup>105</sup> See Letter [REDACTED] to the Inquiry Group, dated 3 May 2023 and Parties' Response to the Annotated Issues Statement and Working Papers, dated 2 May 2023, Section B, paras 1.6, 2.5 and 5.5.

<sup>106</sup> PFs, para 10.100. See also Siemens, at PFs, para 10.90 and Stadler at PFs, para 10.91.

<sup>107</sup> KMPG Report, slide 2.

<sup>108</sup> KMPG Report, slide 16 and 21.

<sup>109</sup> PFs, paras 10.218, 10.257 and Figure 6.

3.18 As evidence of Hitachi Rail's general appetite to bid for CBTC projects, the CMA relies on bidding data (including participation rates and win rates).<sup>110</sup> The data do not, however, support the CMA's reliance:

3.18.1 First, the data in the Provisional Findings show that Siemens and Alstom participated in many more tenders than Hitachi Rail at the global level (*e.g.*, Provisional Findings, Figure 4, tables 17, 18, 19). This is despite the data presented in the Provisional Findings being incomplete for global tenders other than those in which the Parties competed. The CMA built a database using the Parties' responses to s.109 requests and data from competitors, but competitors provided data only on the five largest tenders that they competed for outside of Europe. As acknowledged by the CMA, this ultimately overstates the Parties' positions and understates those of Siemens and Alstom.<sup>111</sup>

3.18.2 Using the Parties' data for EU/EEA, Hitachi Rail's participation rate is [REDACTED] and significantly lower than Siemens and Alstom:

- (a) Participation rate at EU level, all contestable projects in 2012-2022: Hitachi Rail [REDACTED]; Target [REDACTED]; Siemens [REDACTED]; Alstom [REDACTED]
- (b) Participation rate at EU level, brownfield projects in 2012-2022: Hitachi Rail [REDACTED]; Target [REDACTED]; Siemens [REDACTED]; Alstom [REDACTED]

3.18.3 In addition, the Parties' meeting rates are low for EU tenders:

- (a) The Parties bid against each other only in [REDACTED] of the contracts over the past ten years ([REDACTED] over the past five years). In comparison, the Target and Siemens bid against each other in [REDACTED] of the contracts over the past ten years, while the Target and Alstom bid against each other in [REDACTED]. For completeness, Hitachi Rail and Siemens bid against each other in [REDACTED] of the contracts, and Hitachi Rail and Alstom bid against each other in [REDACTED].
- (b) For all contestable projects in 2012-2022, the Target faced Hitachi in [REDACTED] projects ([REDACTED]), while it faced Siemens in [REDACTED] projects ([REDACTED]) and Alstom in [REDACTED] projects ([REDACTED]). For completeness, Hitachi Rail faced the Target in [REDACTED] projects ([REDACTED]), while it faced Siemens in [REDACTED] projects ([REDACTED]) and Alstom in [REDACTED] projects ([REDACTED]).
- (c) Moreover, competitive pressure or the lack thereof is as much a function of perception as of objective factors, meaning as long as its competitors will have a low expectation of Hitachi Rail's strength in competition for London Underground projects, it does not apply competitive pressure to those competitors. Hitachi Rail is not, and will not in

<sup>110</sup> PFs, para 10.203 *et seq.*

<sup>111</sup> PFs, para. 10.207.

\_\_\_\_\_

\_\_\_\_\_

[REDACTED].<sup>112</sup> The importance of these resources is abundantly clear in the evidence<sup>113</sup> and the CMA's provisional conclusion that "*entry barriers [...] are high [but] surmountable*" for new entrants is contrary to the wealth of evidence provided by third parties that such barriers are not plausibly surmountable.<sup>114</sup> It also drastically underestimates the size of the investment involved in hiring (and training / onboarding) sufficient resources with the right local skills, not only to execute the project but also to successfully construct a winning tender in the first place. Engineers with the requisite expertise, qualifications and hands-on experience of London Underground are scarce resources, [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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PFs, paras 10.86 to 10.93.

PFs, para 10.104.

114

[REDACTED], the Target and other suppliers of CBTC are likely to (i) attribute a low probability to meeting Hitachi Rail in future bids for complex brownfield projects in London and (ii) ascribe little weight to Hitachi Rail's ability to submit a competitive bid for any brownfield project in London.

- 3.19 As a result, based on an analysis of the bidding data and also other evidence available to the CMA, the Target is highly unlikely to attribute a significant probability to Hitachi Rail bidding (or putting forward a strong bid) in the London Underground tenders (in contrast to Siemens and Alstom).

**B.2 Could Hitachi Rail realistically be a more credible competitor than both Siemens and Alstom?**

- 3.20 Despite Hitachi Rail's submissions on the difficulties encountered in recent CBTC brownfield projects and the lack of local experience and suitable references for the London Underground tenders, the Provisional Findings conclude that “*Hitachi has the relevant management experience and technical expertise to undertake complex brownfield projects and be a credible competitor for future London Underground CBTC contracts*”.<sup>116</sup> This conclusion is based on the CMA's assessment that:<sup>117</sup>

- 3.20.1 Hitachi Rail is an experienced supplier that has undertaken a number of high-value brownfield projects, including BART;
- 3.20.2 Despite some challenges, Hitachi Rail is expanding its pool of CBTC brownfield references with a number of recent projects;
- 3.20.3 Hitachi Rail's portfolio meets some or most of the characteristics that contribute to the complexity of a metro system; and
- 3.20.4 Feedback from customers on Hitachi Rail's performance has been largely positive, including in projects where Hitachi Rail has experienced difficulties and [REDACTED]

- 3.21 On examination, the evidence considered by the CMA does not support this assessment and does not support the theory that the Target could view Hitachi Rail as a credible contender, let alone having a significant chance of being a more credible competitor than *both* Siemens and Alstom in the future CBTC opportunities in London. When considering relevant competitive parameters that the CMA anticipates will be relevant for the Piccadilly and Bakerloo projects, *i.e.*, (i) local knowledge and capacity, and (ii)

<sup>116</sup> PFs, paras 10.296 and 10.340.

<sup>117</sup> PFs, paras 10.338-10.340.

experience in undertaking CBTC re-signalling projects,<sup>118</sup> it is clear that Hitachi Rail lags far behind Siemens and Alstom.

(a) *Local knowledge and capacity (experience of London projects)*

3.22 The particular complexity of London Underground projects makes it unlikely that the Target would ascribe a material probability to Hitachi Rail being a more credible bidder than Siemens and Alstom. As the Provisional Findings recognise, London Underground projects are particularly complex along several dimensions combined, *"owing to the sprawling nature of an aged network that has been in existence for over a century with multiple lines, intersections, junctions, and narrow deep tube tunnels."*<sup>119</sup> The CMA acknowledges the "potentially significant" competitive advantages conferred by having experience of, knowledge and an existing technological solution used on the London Underground, presenting high barriers to entry for new entrants such as Hitachi Rail.<sup>120</sup>

3.22.1 *"Having experience and knowledge of London Underground systems as well as existing capacity in the UK is likely to be advantageous to a bidder's chances of selection."*<sup>121</sup>

3.22.2 *"Having an existing relationship with TfL, specifically through supplying signalling but also to a lesser extent through the supply of other services, may confer upon a supplier a competitive advantage."*<sup>122</sup>

3.22.3 *"Having an existing technological solution used on the London Underground may confer a competitive advantage as incumbents would have been able to demonstrate their previous ability to meet TfL's requirements. New entrants would likely face challenges in adapting their core product to the specific requirements of TfL and the London Underground including, potentially, higher costs and longer approval and deployment timescales. Incumbents will have an advantage in relation to these challenges and would have the benefit of being able to rely on the learning from previous projects."*<sup>123</sup>

3.23 This is based *inter alia* on statements from third parties:

3.23.1 Alstom noted that TfL would assess *"knowledge and knowhow of the local environment and any particular local standards"* and that *"the ability to develop an experienced local workforce is a competitive strength"*.<sup>124</sup> Alstom further

<sup>118</sup> PFs, para 9.39.

<sup>119</sup> PFs, para 10.323.

<sup>120</sup> PF, para 10.102. See also PF, para 10.103. [REDACTED] Alstom have also acknowledged the high barriers to entry that Hitachi Rail would face in terms of local knowhow and experience. PFs, paras 10.41 and 10.42.

<sup>121</sup> PFs, para 9.39(c).

<sup>122</sup> PFs, para 9.39 (c). See also PF, para. 10.97.

<sup>123</sup> PFs, para 10.48.

<sup>124</sup> PFs, para 9.36.

noted that there was an *"important difference between an OEM who has already installed the signalling technology, and an OEM who has never installed the signalling technology' in a particular metro network."*<sup>125</sup> For instance, *"the Piccadilly line runs alongside Metropolitan line infrastructure (being signalled by Thales), which created an entry barrier for new entrants to resignal the line"*.<sup>126</sup>

"<sup>127</sup>

- 3.23.2 Siemens noted that the London Underground was *"one of the most complex metros you could think of"* because it operated *"in a very old environment"*; it requires *"experienced people to understand the situation, and then also to adapt your existing software to the needs of TfL"*.<sup>128</sup> Indeed, *"a supplier could 'only be successful' if it had 'the best-qualified people on the ground sitting with the customer'"*.<sup>129</sup>

<sup>130</sup> and

suppliers that have already adapted their software to the needs of TfL *"have all this knowledge already, and [...] have adapted [their] software already to the needs of the customer."*<sup>131</sup> It follows that Siemens would

<sup>132</sup> Overall, Siemens

<sup>133</sup>

- 3.23.3 Stadler noted that the Target *"will always have the advantage" in projects in the London Underground because the Target "would know the existing system', the customer and its operational needs."*<sup>134</sup> It noted that *"Thales, Alstom and Siemens were much stronger on the London Underground."*<sup>135</sup>

- 3.24 It follows that Siemens and Thales already enjoy a “potentially significant” incumbency advantage in London.<sup>136</sup>

*"Given that Thales and Siemens are the only two suppliers with experience of completing CBTC signalling projects on the network, we expect that both suppliers are likely to be strong competitors and will likely benefit from a*

<sup>125</sup> PFs, para 10.41.

<sup>126</sup> PFs, para 10.89.

<sup>127</sup> PFs, para 10.317.

<sup>128</sup> PFs, para 10.60(b).

<sup>129</sup> PFs, para 10.88.

<sup>130</sup> PFs, para 10.42.

<sup>131</sup> PFs, para 10.43.

<sup>132</sup> PFs, para 10.90.

<sup>133</sup> PFs, para 10.316.

<sup>134</sup> PFs, para 10.60(c).

<sup>135</sup> PFs, para 10.271.

<sup>136</sup> PFs, para 10.33 and 10.102.

*competitive advantage when bidding for future London Underground tenders.*"<sup>137</sup>

- 3.25 Although the CMA considers that barriers to entry for London Underground projects are surmountable,<sup>138</sup> it does not demonstrate that there is a material likelihood that Hitachi Rail could not only overcome these barriers but also become a more credible competitor than Siemens. To the contrary, it acknowledges that the "important advantages" enjoyed by the Target and Siemens are "difficult" for new entrants to overcome<sup>139</sup> and that *"Hitachi Rail's lack of previous experience on the London Underground means that it may not be the closest competitor to Thales"*.<sup>140</sup> TfL informed the CMA that it was not sure that Hitachi Rail was currently in the [REDACTED]<sup>141</sup> as Siemens, the Target and Alstom and that it was *"certainly not in the same league"* as the other major suppliers.<sup>142</sup>
- 3.26 Instead, the CMA downplays these factors, placing much weight on TfL's statements relating to its openness to consider non-incumbent suppliers.<sup>143</sup> This ignores the fact that TfL is unlikely to admit a preference for incumbent suppliers given the public procurement criteria with which it is required to comply and its natural desire to *"avoid the perception of having preconceived views about the competitiveness of potential bidders,"* a point made earlier in the Provisional Findings to downplay the relevance of Network Rail's statements.<sup>144</sup> It is important to note that TfL admitted that *"any newcomer would need to become familiar with its standards"*, that *"each of its lines had 'their own operating practices' and described itself as 'quite a difficult client to get to understand'."*<sup>145</sup>
- 3.27 Finally, KPMG's recommendation to TfL, which TfL has accepted, included:<sup>146</sup>
- 3.27.1 allocating a higher weighting to suppliers' technical and delivery capabilities than to pricing and commercial criteria; and
  - 3.27.2 ensuring that suppliers' case studies more closely reflect the conditions of the London Underground.
- 3.28 Notably, KPMG advised that *"a lower risk procurement option for TfL would be to stick with 'proven' London Underground suppliers in the future"*.<sup>147</sup> The CMA's assertion that KPMG's recommendation *"does not indicate that TfL was misguided in introducing*

<sup>137</sup> PFs, para 10.300.

<sup>138</sup> PFs, para 10.104.

<sup>139</sup> PFs, para 10.97.

<sup>140</sup> PFs, para 68.

<sup>141</sup> PFs, para 10.242.

<sup>142</sup> PFs, para 10.243.

<sup>143</sup> See e.g., PF paras 9.31, 10.39, 10.49, 10.56 and 10.76 and 10.103(c).

<sup>144</sup> Cf PFs, para 8.399. It is noteworthy that the CMA chooses to downplay Network Rail's lack of concern about the merger on this basis, but fails to consider TfL's incentives.

<sup>145</sup> PFs, para 10.57.

<sup>146</sup> PFs, para 9.17 and 10.62.

<sup>147</sup> PFs, para 10.59.



*a new supplier but that future assessments should place greater weight on the technical capabilities of a supplier than on price*"<sup>148</sup> misses the point: TfL has been advised to focus on suppliers' delivery capability in order to avoid repeating past mistakes when selecting a supplier, especially a non-incumbent supplier whose execution performance is unknown and undemonstrated. Even if the CMA hypothetically considers the disadvantage faced by new entrants is "*not so severe that new entrants could not be competitive*", this does not mean that Hitachi Rail would be a credible competitor for future CBTC tenders in London or a closer competitor to the Target than both Siemens and Alstom.<sup>149</sup> Moreover, given the public nature of KPMG's findings, it is highly unlikely that the Target would ascribe much weight to the possibility of Hitachi Rail competing in future tenders, let alone of Hitachi Rail submitting a strong bid.

(b) *Experience in undertaking CBTC resignalling projects*

3.29

3.30 The CMA's case on Hitachi Rail being a credible bidder revolves largely around the successful BART bid. However:

3.30.1 BART is not as complex as London in all the relevant dimensions combined. The CMA's analysis does not adequately reflect that it is a greater challenge to manage many dimensions of complexity at the same time, as is necessary in London, than to manage just one or two, as might be necessary for BART. In particular, BART is mainly a suburban commuter network, whose five lines run predominantly in parallel, with few interconnecting junctions and a network topology that is far simpler than the London metro. In addition, <sup>151</sup> Project delivery is also facilitated by BART being closed at night, allowing for signalling works to take place across eight hours, in comparison to only four or five hours on the London metro.<sup>152</sup> The Parties note that SFMTA's view of the project as "complex" is in isolation, without comparison to London projects.<sup>153</sup> It is also

<sup>148</sup> PFs, para 10.62.

<sup>149</sup> *Ibid.*

<sup>150</sup> As noted in the PFs, para 10.207, the Parties' participation rates may be overstated, and Siemens and Alstom understated.

<sup>151</sup> See further para 3.39.5 on the factors that tend to render junctions more or less complex.

<sup>152</sup> See Parties' submission on CBTC projects, para 7.5(g).

<sup>153</sup> PFs, para 10.268.

hardly surprising that a customer would consider their own project complex given that it is their focus and frame of reference. TfL noted that it could not say whether BART would be a useful reference in future London underground tenders.<sup>154</sup>

3.30.2 [REDACTED]

3.30.3 BART is just one project that must also be assessed against the full context of Hitachi Rail's brownfield experience, including recent [REDACTED] in complex CBTC brownfield projects that [REDACTED] in several dimensions relevant for the London Underground tenders. [REDACTED]. However, the CMA appears to downplay the significance [REDACTED]

3.31 The CMA relies on customer feedback for Glasgow and Brussels, two other ongoing projects, as "broadly positive".<sup>156</sup> The customer for the Brussels project indicated that [REDACTED]<sup>157</sup> and the customer for the Glasgow project that [REDACTED]. While Hitachi Rail appreciates its customers' overall balanced feedback, this has to be viewed with the following considerations in mind:

3.31.1 The complexity of these projects is not comparable to the London Underground.<sup>158</sup>

3.31.2 These are ongoing projects and therefore customers may have an interest in remaining neutral in light of their [REDACTED] and ongoing working relationships [REDACTED]. It is also not in the customers' interests to acknowledge failings in the projects they are managing. Nonetheless, [REDACTED]

3.31.3 Even if these customers provide "broadly positive" or balanced feedback on Hitachi Rail following completion of these projects, future Public Transport Authorities would view this in combination with [REDACTED]

<sup>154</sup> PFs, para 10.269.  
<sup>155</sup> See **section B1** above.  
<sup>156</sup> PFs, para 10.290.  
<sup>157</sup> PFs, para 10.282.  
<sup>158</sup> [REDACTED]

3.31.4 Hitachi Rail's experience of these projects has been [REDACTED]

(a) [REDACTED]

(b) [REDACTED]

3.31.5 The CMA should also not place weight on customer feedback on Hitachi Rail's tender submission for these projects,<sup>163</sup> given that these submissions predate Hitachi Rail's actual completed delivery of the projects and are based on Hitachi Rail's own tender submissions, which are naturally presented in a positive light.

3.32 Hitachi Rail's performance in other recently won projects is still unknown.<sup>164</sup> The CMA however seems to consider that additional projects can only help Hitachi Rail's track record, irrespective of how Hitachi Rail performs – *i.e.*, even if Hitachi Rail fails to achieve performance goals in these projects. This cannot be correct.

3.33 The CMA errs further in considering Hitachi Rail's future trajectory,<sup>165</sup> while not similarly assessing that of other competitors. The CMA notes that Hitachi Rail is expected to have completed a number of additional brownfield projects in the next 5 years and since the DTUP tender, without considering the additional experience that other suppliers would also have accrued in that time and, judging from past experience, is likely to further strengthen their credentials.<sup>166</sup> In particular, since the DTUP, Siemens has delivered the CrossRail project and the Target has [REDACTED] delivered the 4LM and DLR projects.

3.34 Overall, the Target and Siemens, as the current incumbents with TfL, have inevitably acquired significant and in-depth knowledge of the complexities of the London Underground, and will inevitably be in a good position to understand the challenges that other operators would face when bidding for similar projects. Accordingly, based

<sup>159</sup> See Parties' Response to Annotated Issues Statement and Working Papers, dated 2 May 2023, Section B, paras. 2.1, 2.2, and 4.12 and Letter [REDACTED] to the Inquiry Group, dated 3 May 2023, p.3.

<sup>160</sup> See **section B1** above.

<sup>161</sup> Parties Response to CMA's RFI of 27 April 2023 submitted on 3 May 2023, Annex Q7, p.2.

<sup>162</sup> Parties Response to CMA's RFI of 27 April 2023 submitted on 3 May 2023, Annex Q7, p.2.

<sup>163</sup> PFs, para 10.282.

<sup>164</sup> PFs, para 10.293.

<sup>165</sup> *E.g.*, PF, paras 10.183 and 10.250.

<sup>166</sup> At most, the CMA makes a fleeting reference to the possibility that these might gain further experience. See para 10.256.

on this evidence, there seems to be no basis to expect that the Target would assign any material probability to Hitachi Rail being considered a more credible competitor than Siemens and potentially Alstom in the 2035 London Underground tenders.

*Limited relevance of project comparison criteria*

- 3.35 The CMA's assessment of Hitachi Rail's previous CBTC projects, as set out in **Table 20** of the Provisional Findings, is incorrect in two significant ways.
- 3.36 First, it misunderstands the Parties' submissions as suggesting that Hitachi Rail needs a single reference that is comparable to resignalling the London Underground. The CMA notes: "*...the Parties' analysis of the characteristics of Hitachi's projects is based on two assumptions that we consider to be inappropriate or not supported by the evidence: (a) First, that each of Hitachi's references would need to display most or all the characteristics of the London Underground. In practice, a supplier can use up to three case studies to demonstrate its capabilities to the criteria being assessed, meaning that no single case study is needed to display all the characteristics required for a particular project.*"<sup>167</sup>
- 3.37 However, the Parties in fact stated that Hitachi Rail would be unable to show, across few references (the maximum number allowed in the DTUP tender process was [REDACTED]) that it has experience that TfL would consider relevant for future London tenders (in the event that the significant incumbency advantage is somehow surmountable and in the hypothetical scenario that [REDACTED] – both of which the Parties strongly dispute).<sup>168</sup>
- 3.38 Second, the criteria listed in **Table 20** of the Provisional Findings are relevant but not sufficient to compete for future London tenders. That is:
- 3.38.1 the Parties provided this information to show that there are key features of future London projects that Hitachi Rail cannot match based on its previous experience.
- 3.38.2 the criteria set out in **Table 20** do not reflect the full set of parameters to which TfL would have regard and so it is insufficient to apply these criteria to say that Hitachi Rail has comparable CBTC experience. Indeed, nothing in the Provisional Findings suggests that **Table 20** sets out the criteria that TfL would assess. Indeed, TfL has not yet scoped these tenders and so cannot say which criteria it may use to assess the suitability of a reference site.<sup>169</sup>

<sup>167</sup> PFs, para 10.263.

<sup>168</sup> Parties' response to the AIS and WP, 2 May 2023, Section B, paragraph 4.9. [REDACTED]

<sup>169</sup> PFs, para 9.30.

3.39 Notwithstanding that there is no one single element that drives the complexity of a line (but rather the combination of several elements), **Table 20** shows that Hitachi Rail's previous CBTC projects do not compare to the Piccadilly line in terms of:

- 3.39.1 length of the line: 148 km for the Piccadilly line, 88km for Hitachi Rail's CBTC project with the longest track length (BART, yellow line). Lines are usually divided into sections and upgraded in stages (due to risk management), leading to multiple iterations of the migration and the need to continuously update the configuration of the new system at the boundary between the old and new technology. Shorter lines are therefore easier to upgrade in terms of ensuring continuity and limiting impact, as well as requiring a smaller workforce;
- 3.39.2 length of the underground section, which adds particular operational complexity to project delivery: 70-75 km for the Piccadilly line, [REDACTED] km for Hitachi Rail's CBTC project with the longest underground section ([REDACTED]);
- 3.39.3 number of stations: 53 for the Piccadilly line, 28 Hitachi Rail's CBTC projects with the greatest number of stations; or
- 3.39.4 annual ridership: approximately 200m for the Piccadilly line, whereas none of Hitachi Rail's CBTC projects relate to lines with ridership over approximately 100m.
- 3.39.5 nature of junctions: the number of junctions is not necessarily indicative of the overall complexity of a project, which is subject to a number of site conditions. For instance:
  - (a) Where the lines are physically separated and do not share tracks, the number of junctions are not relevant from a signalling perspective as the signalling system of one line has no interface with the other one.
  - (b) By contrast, where there are lines sharing tracks and/or platforms, the complexity increases due to a need to interface and render compatible the data exchanged by the different signalling systems, requiring multiple customized solutions. Against this background, the Parties note that the Piccadilly line would likely interface to at least 6 different lines,

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3.40 It is therefore unclear how the CMA concludes that *"we also note that all the characteristics listed in the table are met by at least one of Hitachi's listed*

<sup>170</sup> Please note that the number of junctions provided in Table 20 of the PFs simply reflects the number of stations through which one or more "lines" pass, and not necessarily the number of lines with shared tracks and/or platforms.

projects."<sup>171</sup> This statement is clearly illogical and is contradicted by the evidence to which the CMA purports to have had regard.

- 3.41 Moreover, TfL has not confirmed the relevance of many of the projects which the CMA considers to be relevant examples of Hitachi Rail's previous CBTC experience:

*"TfL noted that it could not say whether Hitachi's CBTC projects in BART, Glasgow and Paris (line 6)<sup>172</sup> would be a useful reference point in future TfL CBTC tenders, as TfL would have to investigate whether Hitachi's CBTC projects are similar in terms of size and complexity."*<sup>173</sup>

- 3.42 The CMA's assessment of Hitachi Rail's previous CBTC projects is therefore incorrect. The evidence certainly does not establish that Hitachi Rail could meet the characteristics of future London Underground tenders based on three case studies only and the CMA's findings on this point therefore cannot be upheld.
- 3.43 In conclusion, a wealth of evidence presented by the CMA which categorically shows that the Parties are **not now and will not become in future** close competitors for London CBTC projects.

### ***B.3 Reference to internal documents***

#### ***(a) Hitachi Rail's incentives to bid and prioritisation approach***

- 3.44 At the outset, it is important to recall that any future London projects are not expected to be tendered before 10 – 12 years' time. It is therefore unreasonable to expect or require Hitachi Rail to have precise detailed documentary evidence of its [REDACTED] intention to bid, particularly in light of Hitachi's Rail's document-light management model.<sup>174</sup>
- 3.45 Nevertheless, should the CMA wish to rely on internal documents to support the contention that, despite Hitachi Rail's historical absence from London Underground tenders, Hitachi Rail is likely to bid for future London projects in 10 -12 years' time, the onus is on the CMA to show that, on the balance of probabilities (*i.e.*, that it is *more likely* than not) an SLC will arise in respect of CBTC projects in the UK. The CMA has conceded that it is unable to do so: "*the internal documentary evidence does not provide a clear picture as to whether Hitachi is likely to participate in future CBTC opportunities on the Bakerloo and Piccadilly lines*".<sup>175</sup>

<sup>171</sup> PFs, para 10.267.

<sup>172</sup> The Parties note that the Paris (line 6) project is only [REDACTED]

<sup>173</sup> PFs, para 10.269 (emphasis added).

<sup>174</sup> See *e.g.*, Hitachi Main Party Hearing Transcript, page 23 and Hitachi Rail's response to CMA RFI of 29 March 2023, dated 2 April 2023, para 2.

<sup>175</sup> PFs, para 10.178.

3.46 In the absence of any evidence of an intention to bid for London projects, the CMA has applied a lower evidential test. This is deficient in two crucial respects.

3.46.1 First, the CMA has sought to construct a more indirect argument around Hitachi Rail's purported likelihood of bidding for complex brownfield CBTC projects *in general*. The premise of this approach is questionable given that the decision of whether or not to bid for a project is highly tender-specific, and London projects are particularly unique.<sup>176</sup> Given the diminished probative value of any such indirect evidence, it would need to be sufficiently strong and certain to serve as any evidence that Hitachi Rail is likely to bid for future London projects, and even then its value is necessarily limited due to its generality; and

3.46.2 Second, the CMA has put the burden on Hitachi Rail to positively prove [REDACTED].<sup>177</sup> The CMA unduly focuses on what the documentary evidence purportedly does *not* show, rather than demonstrating a positive case.

3.47 In any case, the documentary evidence presented by the CMA in support of this SLC finding is at best anecdotal and tenuous, and in fact generally unsupportive, as set out below:

*Documents on corporate strategy*

3.47.1 [REDACTED]

<sup>176</sup> See *e.g.*, Parties' submission on CBTC signalling projects for metros in the UK, dated 23 March 2023, section 4.

<sup>177</sup> See, *e.g.*, PFs, para 10.134.

<sup>178</sup> Annex H.Q10.012.

<sup>179</sup> PFs, para 10.128.

<sup>180</sup> [REDACTED]

<sup>181</sup> [REDACTED]

<sup>182</sup> See Hitachi Rail response to CMA RFI of 27 April 2023, submitted on 5 May 2023, Question 2 and

[REDACTED]

3.47.2 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

3.47.3 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

3.47.4 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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183 Annex H.Strategy.04 and Annex CO S.5.4.A29, referenced at PFs, para. 10.132.

184 PFs, para. 10.132.

185 Annex H.RFI8.001, slide 21. As the CMA notes at para 10.133.

186 [REDACTED]  
[REDACTED]  
[REDACTED]

187 PFs, paras 10.138 – 10.142.

188 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

189 PFs, para. 10.156.





[REDACTED]

3.47.5 [REDACTED]

3.47.6 [REDACTED]

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

[REDACTED]

<sup>190</sup> See Parties' Response to Annotated Issues Statement and Working Papers, submitted on 2 May 2023, Section B, para 2.5 and Response to CMA RFI of 27 April 2023, submitted on 3 May 2023 Annex Q4.

<sup>191</sup> Annex CBTC H.WP.005 (translated).

<sup>192</sup> Annex CBTC H.WP.010, slides 8 and 33.

<sup>193</sup> Annex H.RFI8.012, slides 6 and 7.

<sup>194</sup> Annex H.RFI8.010.

3.47.7

3.47.8

(b) *The Target's views of Hitachi Rail as a competitor*

3.48

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<sup>195</sup> PFs, para 10.170.  
<sup>196</sup> See Annex E to the Parties' response to the AIS and WPs.  
<sup>197</sup> PFs, para. 10.269. In relation to Paris, TfL specifically cites the "line signalled by Thales".  
<sup>198</sup> PFs, para 10.174, citing Annex HRL0021639.  
<sup>199</sup> See *e.g.*, Questions 3 and 22 of Hitachi Rail's Response to the S109 notice dated 23 December 2022.  
<sup>200</sup> PFs, para 10.174.  
<sup>201</sup> PFs, para 10.246 (Annex PNRFI2\_Q18.4, Annex T. Q10.084 and Annex T.Q9.016).

[REDACTED]

### **C. Conclusion**

- 3.49 In conclusion, there is no plausible basis for the provisional finding that the Proposed Transaction would give rise to an SLC in respect of CBTC signalling in the UK.
- 3.50 In its assessment of the market for London Underground projects, the CMA has made a similar error to that apparent from its analysis of the market for UK mainline projects in assuming that the four largest OEMs operating in Europe are (or will be) automatically the four closest competitors for the relevant UK market without having sufficient regard to the local conditions, local capabilities and the specific opportunity.
- 3.51 Further, there is no evidential basis upon which the CMA can reasonably conclude that the counterfactual in 2035 will, on the balance of probability, involve Hitachi Rail bidding as a credible competitor.
- 3.52 *First*, the CMA has no basis to disregard the clear statement that [REDACTED], particularly given that the basis for this statement is entirely consistent with and supported by the contemporaneous record that:
- 3.52.1 [REDACTED]
- 3.52.2 Hitachi Rail has no track record with TfL.

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202 Annex D to Parties' Response to the Annotated Issues Statement and Working Papers, dated 2 May  
203 2023, Section B, paras 6-8 and 13.  
204 PFs, footnote 994.  
205 PFs, para 10.323.  
PFs, para 10.31.

3.52.3

[REDACTED]  
[REDACTED]  
[REDACTED]; and

3.52.4 TfL itself has been advised by the KMPG report to prioritise existing technical expertise and experience when procuring signalling projects on its notoriously complex infrastructure.

In contrast, the evidence cited by the CMA in connection with its speculation is either taken out of context (*e.g.*, informal and optimistic estimates by salespeople) or misapplied (*e.g.*, Hitachi Rail's consideration of brownfield projects in general).

3.53 *Second, even if* Hitachi Rail were a competitor for future London CBTC projects in 2035 [REDACTED] it would only incrementally constrain the Target (compared to Siemens and Alstom) if the Target might reasonably attribute a significant probability to Hitachi Rail being at least as credible as *both* Siemens and Alstom.

3.53.1 Based on the evidence, this is highly unlikely to be the case: By the CMA's own admission, the barriers to entry for new entrants in London are high, and Hitachi Rail has no experience or CBTC resources in London. By contrast, Siemens and the Target have significant competitive advantages in terms of experience of, knowledge and existing technological solution used on the London Underground. Alstom likewise has a strong track record on large and complex brownfield projects as well as an existing relationship with TfL. Even if Hitachi Rail is expected to gain a number of additional brownfield projects and experiences in the next 5 years, the CMA has not shown that this will be sufficient to become a *more* credible competitor than *both* Siemens and Alstom, who will likewise continue to gain experience and references. In particular, since the DTUP Siemens has delivered the CrossRail project, while Hitachi Rail [REDACTED] to deliver the Brussels and Glasgow projects, which [REDACTED]  
[REDACTED]  
[REDACTED]

3.53.2 This conclusion is underscored by (i) TfL's statements that it is [REDACTED]  
[REDACTED] as regards the Proposed Transaction and that it considers that [REDACTED]  
[REDACTED]<sup>206</sup> and (ii) the statements from Alstom and Siemens (who, according to the CMA are the only other relevant competitors for any future tenders) that [REDACTED]

<sup>206</sup>

PFs, paras 10.314 – 10.315 and 11.47.

- 3.54 It would be incorrect to make a finding of an SLC in a hypothetical market which may or may not exist in ten to fifteen years from now, in an area where the acquiring party has no relevant local footprint or current market share, is severely disadvantaged vis-à-vis its global competitors, and [REDACTED]. Moreover, the sole customer has expressed support for the transaction and stated clearly that it has [REDACTED] about future competition.
- 3.55 A multitude of speculative conditions would need to be met for the SLC provisionally identified by the CMA to arise. None of these conditions is likely to be met individually, and the prospect of all of them coming true is highly unlikely and a long way from the necessary standard for the CMA to identify an SLC in its Final Report.
- 3.56 In light of the above, the Proposed Transaction would not give rise to (and by extension, the Provisional Findings are unable to cogently show) an SLC for CBTC in the UK on the balance of probabilities.

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<sup>207</sup> Alstom, at PFs, para 10.317.

<sup>208</sup> Siemens, at PFs, para 10.316.