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Your ref: Case ME/6971/21

[REDACTED]

[REDACTED]

[REDACTED]

Confidential

By e-mail

Mr Stuart McIntosh,
Panel Inquiry Chair
Competition and Markets Authority
The Cabot
25 Cabot Square
London, E14 4QZ

31 July 2023

Dear Stuart

Case ME/6971/21 – Observations on third party submissions in response to the CMA's Provisional Findings and Remedies Notice

1. We refer to the submissions by Network Rail, Construcciones y Auxiliar de Ferrocarriles ("CAF"), Wabtec and the National Union of Rail, Maritime and Transport Workers ("RMT") in response to the CMA's Provisional Findings and/or Remedies Notice as recently published on the CMA's website. The Parties do not intend to comment in detail but have made certain observations below in relation to each of these submissions.

Network Rail's Submission

2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹ Network Rail submission of 29 June 2023, page 1.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3. It would be highly unusual for the CMA to find an SLC in a market in which [REDACTED]
[REDACTED] The CMA stated in its Provisional Findings² that Network Rail's views were being discounted since "*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. We have considered Network Rail's views against this backdrop...Network Rail's view about the Merger appear to be based on the current conditions of competition and, [redacted], Network Rail also told us that there were few differences in the ultimate capabilities of the Parties, Siemens, and Alstom.*"
4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Further, even if Network Rail wished to avoid the public perception of having preconceived views of the competitiveness of potential bidders, this does not apply to the views it has shared with the CMA on a confidential basis. The CMA cannot therefore discount Network Rail's statements in response to the Provisional Findings.
5. While Network Rail's primary submission is clearly [REDACTED]
it also indicates that, should the CMA identify an SLC, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
6. We have already raised with the CMA our client's concerns about the non-publication of [REDACTED]³ We continue to believe that it is extremely important that the [REDACTED] is publicly known since it is a critical factor in the merger control assessment. We also have legitimate concerns that the nature of the redactions applied by the CMA are likely to mislead third parties into considering that [REDACTED]
[REDACTED]

² Paras 8.399-8.400.

³ [REDACTED]

CAF and Wabtec's submissions on the Remedies Notice

7. While neither CAF nor Wabtec endorse the CMA's substantive analysis, they both consider that, if an SLC were to be identified by the CMA, then it could be adequately addressed by a remedy. It should also be noted that each of them [REDACTED] [REDACTED] somewhat incentivised to be over-inclusive in describing what should constitute a potential divestment package.
8. The Remedy Package proposed by Hitachi Rail accords with Wabtec's submission as it is a single package incorporating relevant parts of Hitachi Rail's European rail signalling business and necessary IP licences. Importantly, Wabtec validates Hitachi Rail's belief that an appropriately crafted remedy *"would offer a company such as Wabtec a significant opportunity to expand its role in the market for mainline signalling in the UK and in particular to enter the CBTC sector"*⁴.
9. While the Parties agree with CAF's fundamental point that the Remedy Package should enable the remedy taker to compete effectively with the merged entity *"from day one"*, CAF overstates what is required for this purpose.⁵ It claims, for example, that a CBTC solution should include automatic train supervision (ATS) despite its (i) not being a safety-critical component, and (ii) being readily available for procurement on the open market [REDACTED] or procured directly by the customer as a separate package.
10. CAF's comments on the suitability of a licensing remedy are not applicable to the proposed transfer of technology within the Remedy Package. In particular the transfer of the core CBTC v6.6 (Orion) solution as part of the Remedy Package includes full rights to use, modify and update it. The remedy taker will therefore be able to use and modify the generic product or generic application, and will retain [REDACTED] rights to its own developments.⁶ This is complemented by the fact that the Divestment Business will own the IP and employ the people for the safety platform development and manufacturing, which is used for CBTC, mainline and onboard applications⁷ and will have a number of CBTC references where the Orion solution has been deployed. The divestment too of the backlog for the ongoing [REDACTED] will also allow the Divestment Business to build competency and experience.

⁴ Wabtec submission of 19 July 2023, para 25.

⁵ CAF submission of 22 June 2023, Section 2.

⁶ Hitachi Rail's response to the CMA's RFI 11, paragraphs 16.1 and 16.2.

⁷ Hitachi Rail's response to the CMA's RFI 11, paragraphs 16.1 and 16.2.

RMT Submission

11. The RMT Submission relates to its concerns over rail privatisation generally, rather than any issues specific to the merger. The Parties do, however, concur with the sentiment in the RMT submission regarding the danger of monopolies,⁸ and reiterate that the merger will create a viable challenger to the dominance of Siemens and Alstom (as endorsed by Network Rail's written submission to the CMA). While the merged entity will initially have a much smaller local presence than Siemens or Alstom-Bombardier (and likely most integrators too), the increased presence of the merged entity will allow it to better prioritise UK projects, retain and attract UK resources, and ultimately provide better pricing and services for the customer.⁹
12. Please let us know if it would be helpful for the Parties to elaborate further on any of the points made above.

Yours sincerely

the 1990s, the number of people in the United States who are 65 years of age or older has increased by 50 percent. The number of people 75 years of age or older has increased by 100 percent. The number of people 85 years of age or older has increased by 200 percent. The number of people 95 years of age or older has increased by 400 percent.

11/11/2016

11/11/2016

⁸ RMT Submission, page 3.

⁹ See Parties' Submission on the Benefits of the Merger, paragraph 1.3.

ANNEX 1

<p>[REDACTED]</p>	<p><i>Within remedy proposal?</i></p>
<p>[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>The [REDACTED] would be transferred to the remedy taker which would have all of the assets and support needed to be a credible supplier capable of satisfying the delivery obligations [REDACTED] for future Network Rail signalling supply opportunities.</p>
<p>[REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>
<p>[REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>[REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>
<p>[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>All of these elements are addressed within the scope of the proposed remedy.</p>
<p>[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>Please see the comprehensive provision of technology within the scope of the proposed remedy which is sufficient to ensure that the</p>

████████████████████ ████████████████████	remedy taker will be able to service existing and new opportunities.
████████████████████ ██████	The remedy taker will receive support under proposed TSA terms as outlined to the CMA
████████████████████	
████ ██████████ ██████████ ██████████ ████████ ██████████ ██████████ ██████████ ██ ██ ██ ██ ████████████████████	Hitachi Rail is confident that there would be multiple potential purchasers that would be interested in acquiring the proposed Divestment Business and would have all of these characteristics.
██████	
████████████████████ ████████████████████ ████████████████████	████████████████████ ████████████████████ In any event, Hitachi Rail would be pleased to work with Network Rail and the remedy taker to minimise any adverse timing impact ██████████ ████████████████████