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Determination

Siemens AG and Alstom S.A. [2018] NZCC 22

The Commission:	Sue Begg Anna Rawlings Dr Jill Walker Sarah Court
Summary of application:	An application from Siemens AG to combine its rail mobility business with Alstom S.A.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed merger.
Date of determination:	17 December 2018

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

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The proposed merger

1. On 25 October 2018, the Commerce Commission (the Commission) registered an application (the Application) under section 66(1) of the Commerce Act 1986 (the Act) from Siemens AG (Siemens) seeking clearance to combine its rail mobility business with Alstom S.A. (Alstom) (the Proposed Merger). The Application relates to a global merger that has been notified in a number of overseas jurisdictions, including the European Union and Australia.

2. Siemens and Alstom (the Parties) are both international suppliers of rail mobility products and systems. In New Zealand Siemens and Alstom are involved in the supply of rail signalling systems and products.

Our decision

3. The Commission gives clearance to the Proposed Merger insofar as it relates to New Zealand as it is satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Our framework

4. Our approach to analysing the competition effects of the Proposed Merger is based on the principles set out in our Mergers and Acquisitions Guidelines.[1]

The substantial lessening of competition test

5. As required by the Act, we assess mergers using the substantial lessening of competition test.

6. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[2]

7. We make a pragmatic and commercial assessment of what is likely to occur in the future, with or without the merger, based on the information we obtain through our investigation and taking into account factors such as market growth and technological changes.

8. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),[3] or reduce non-price factors such as quality or service below competitive levels.

9. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.

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1 Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2013).

2 *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

3 Or below competitive levels in a merger between buyers.

10. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.[4]

When a lessening of competition is substantial

11. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[5] Some courts have used the word 'material' to describe a lessening of competition that is substantial.[6]

12. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

13. A substantial lessening of competition is 'likely' if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility but does not mean that the effect needs to be more likely than not to occur.[7]

The clearance test

14. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[8] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

Key parties

Siemens

15. Siemens is a global industrial manufacturing company that is listed on the Frankfurt am Main and Xetra stock exchanges and is headquartered in Munich. Of relevance to the Proposed Merger is Siemens' rail mobility business division (Siemens Mobility), which is an international supplier of rail signalling systems and standalone signalling products.

16. Siemens' business in New Zealand is conducted mainly by Siemens (N.Z.) Limited (Siemens NZ), with support from its shareholder Siemens Ltd in Australia.[9] In New Zealand, Siemens provides signalling systems and various standalone signalling products.

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4 Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].
5 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].
6 Ibid at [129].
7 Ibid at [111].
8 Section 66(3)(a).
9 The Application at [4.3].

17. While Siemens Mobility also supplies rolling stock (vehicles that travel on rail networks and tracks) and conducts railway infrastructure activities (eg, track construction, civil engineering and rail electrification) internationally, it does not currently provide these products or services in New Zealand.[10]

Alstom

18. Alstom is a French société anonyme listed on the Euronext Paris Stock Exchange and is headquartered in France. Internationally, Alstom is a supplier of a range of products and project services to the rail mobility industry, including signalling systems and products. Like Siemens, while Alstom supplies rolling stock internationally, it does not do so in New Zealand.[11]

19. Alstom's current activities in New Zealand arise from its 2015 acquisition of General Electric's global signalling business.[12] Since 2015, Alstom has supplied point machines (a standalone signalling product) to KiwiRail but has not tendered for any signalling projects in New Zealand.[13] Alstom does not have a direct New Zealand presence and [ ].[14]

Other relevant parties

Other suppliers

20. There are a number of other global suppliers of rail signalling systems and equipment, including CAF, Bombardier Inc (Bombardier), Ansaldo STS/Hitachi Ltd (Ansaldo), HIMA Paul Hildebrandt GmbH + Co KG (HIMA) and Thales Group (Thales).

21. Signalling systems are also sometimes provided by civil engineering companies, which partner with original equipment manufacturers (such as the suppliers above) to deliver these projects, such as United Group Limited (UGL).[15]

22. Of these companies, only CAF (based in Spain) and UGL (based in Australia) have been active in recent years in the supply of signalling systems in New Zealand:

    22.1 CAF has recently won tenders to supply on-board signalling systems for commuter trains in Auckland.[16]

    22.2 UGL has previously competed in New Zealand to supply signalling systems[17] [ ].[18]

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10 The Application at [4.5].
11 Commerce Commission interview with Alstom (22 November 2018).
12 Ibid.
13 Commerce Commission interview with KiwiRail (9 November 2018).
14 Commerce Commission interview with Alstom (22 November 2018)
15 Australian Competition and Consumer Commission (ACCC) "Statement of Issues" (6 September 2018).
16 Commerce Commission interview with Auckland Transport (15 November 2018).
17 Commerce Commission interview with KiwiRail (9 November 2018).
18 Commerce Commission interview with Siemens (22 November 2018).

23. [ ].[19]

24. Some suppliers, such as Bombardier and Ansaldo do not currently provide signalling systems or equipment in New Zealand but are active suppliers of signalling systems and equipment in many countries including Australia.[20]

KiwiRail Limited (KiwiRail)

25. KiwiRail is the state-owned enterprise that owns and operates New Zealand's rail network. As the owner of New Zealand's rail network, KiwiRail is currently the major customer of signalling systems and products.

Auckland Transport

26. Auckland Transport is an organisation controlled by Auckland Council responsible for Auckland transport projects and services. While KiwiRail owns the entire New Zealand rail network, Auckland Transport operates Auckland's commuter rail service using KiwiRail's network. Auckland Transport owns and operates the trains used on the rail network in the Auckland region and is therefore responsible for the signalling systems on-board its trains.[21]

City Rail Link Limited (CRLL)

27. CRLL is a company that was set up in 2017 to deliver the City Rail Link (CRL) project, which involves construction of a new underground railway line in central Auckland (between Britomart and Mount Eden stations). The company is jointly owned by the New Zealand Government and Auckland Council.

28. As part of its functions, CRLL is responsible for procuring signalling for the new railway line in partnership with KiwiRail, which is participating as a delivery partner for the CRL project.

Industry background

Rail signalling

29. Signalling systems are used on rail networks to manage train traffic and prevent collisions.

30. There are several signalling sub-systems that combine to provide safety and traffic controls on the New Zealand rail network. While these systems are interrelated, they can be separated into four general categories: interlocking systems; automatic train protection systems (ATP systems); operations and control systems (OCS); and level crossing systems. We discuss each of these below.

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19 "KiwiRail Response to Commerce Commission Questions – November 2018" attached to an email from KiwiRail to the Commerce Commission (24 November 2018).

20 Australian Competition and Consumer Commission (ACCC) "Statement of Issues" (6 September 2018).

21 Commerce Commission interview with Auckland Transport (15 November 2018).

Interlocking systems

31. Interlocking systems are physically located on and alongside sections of track. They detect the location of a given train on a section of track, determine whether it is safe for that train to proceed onto the next section of track, and provide the route and the movement authority for that train to proceed.

32. Interlocking systems include a number of components, such as:

    32.1 sensors, which detect the location of trains on the track;

    32.2 point machines, which move sets of rails to allow trains to transfer from one track to another;

    32.3 signals, which provide the movement authority for trains to proceed onto the next section of track; and

    32.4 interlockings, which control other trackside equipment, set routes for the safe transit of trains, and control access to sections of track to prevent trains from colliding.

ATP systems

33. ATP systems are safety systems that are integrated into an individual train's on-board system. ATPs receive information from interlocking systems, and:

    33.1 ensure that trains obey the movement authorities provided by signals; and

    33.2 provide fail safe mechanisms in case of human error (such as emergency brakes or alarms).

OCS

34. OCSs are computer-based platforms that facilitate the overall management of the rail network. They enable the integration, control and monitoring of other signalling sub-systems, operate networks of interlockings, and provide a user interface for the signalling system.

Level crossing systems

35. Level crossing systems control the intersection of railway tracks and roads or paths by lowering barriers or activating signals to prevent collisions between trains and cars or pedestrians.

How sales are made

36. A rail network operator such as KiwiRail may procure the installation, upgrade or maintenance of signalling systems either by calling for tenders for the entire project or by selecting and offering a party a contract to supply a signalling system (and the associated engineering, installation and maintenance services) without going to tender.

37. As well as procuring entire signalling systems, network operators also purchase individual items of signalling equipment as replacement parts. In New Zealand, KiwiRail sometimes carries out its own signalling projects and accordingly may purchase individual signalling equipment items for these projects.

38. KiwiRail most commonly procures individual items of signalling equipment from a preferred supplier. KiwiRail conducts competitive tenders to select preferred suppliers in respect of individual pieces of signalling equipment every three to five years.[22]

39. In our view KiwiRail is well informed about its options for signalling systems and equipment, and tailors its tenders for projects and preferred suppliers to provide as much competitive tension as possible.

Market definition

40. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

41. We define markets in the way that best isolates the key competition issues that arise from a merger.[23] In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services which fall outside the market but which would still impose some degree of competitive constraint on the merged entity.

Siemens' view of the relevant markets

42. Siemens submitted that the relevant markets are national and that the product/service components are:

    42.1 the supply of signalling projects, involving "project-specific engineering, development, project management, procurement and supply of necessary equipment, systems integration, installation, testing and, in most cases, a period of maintenance";[24] and

    42.2 the supply of signalling products on a standalone basis (signalling products), which "typically relate to spare parts and are not combined with any ancillary services". [25]

Market definition in other jurisdictions

43. Rail signalling has been considered in other jurisdictions. In its 2007 decision in Alstom UK/Balfour Beatty/JV,[26] the European Commission (EC) considered the

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22 Commerce Commission interview with KiwiRail (9 November 2018).

23 *Mergers and Acquisitions Guidelines* above n1 at [3.10-3.12].

24 The Application at [6.2].

25 Ibid.

market for signalling projects and the market for signalling products. The EC considered the possibility of defining narrower markets for both projects and products, but ultimately found in clearing the merger that it was unnecessary to reach a firm conclusion on the precise boundaries of the relevant markets.[27]

Our view of the relevant markets

44. We have not found it necessary to reach a view on the precise boundaries of the relevant markets for either rail signalling projects or products in New Zealand. For the purposes of our competition analysis, we have defined the relevant markets as the national markets for the supply of:

    44.1 signalling projects (the signalling projects market); and

    44.2 point machines (the points machine market).

45. We considered whether it was appropriate to define narrower markets than those proposed by Siemens for the purpose of assessing the Proposed Merger. In respect of signalling projects, we considered whether there are separate markets for installing, upgrading and/or maintaining signalling projects for interlocking systems, ATP systems, and OCSs. However, we ultimately decided to consider the competitive impacts of the Proposed Merger on a single market for signalling projects because the competitive conditions are largely similar for different signalling projects, and because it makes no difference to the outcome of our assessment whether we consider broader or narrower markets for signalling projects.

46. In respect of signalling products, we also considered whether there might be separate markets for individual signalling products, such as point machines and interlockings. Given that point machines are the only products in which any overlap arises from the Proposed Merger, we have confined our competition analysis to point machines. We also considered the likely impact of the Proposed Merger on signalling products other than point machines, but our investigation raised no competition concerns in respect of any of these products.

47. While the merging parties are involved globally in the supply of rolling stock and rail infrastructure, neither party participates in those activities in New Zealand. As the Proposed Merger does not lead to aggregation in the existing supply of rolling stock or rail infrastructure in New Zealand, and as there is no evidence that Siemens or Alstom intend to supply these goods and services in the future, we do not consider these activities any further in our analysis.

With and without scenarios

48. To assess whether a merger is likely to substantially lessen competition in a market, we compare the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if

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[26] Case No. COMP/M.4508 – *Alstom UK/Balfour Beatty/JV*, Commission Decision of 30 March 2007

[27] The EC took the same approach in its more recent 2013 decision on Siemens/Invensys Rail. See Case No. COMP/M.6843 – *Siemens/Invensys Rail*, Commission Decision of 18 April 2013.

the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[28]

49. As noted by the High Court in Woolworths, the Commission is required to consider each of the counterfactuals that are real and substantial prospects. A relevant counterfactual involves more than a possibility but it does not need to be "more likely than not".[29] We do not choose a counterfactual that we consider has the greatest prospects of occurring (ie, is the 'most likely'). Rather, a likely counterfactual is something that has a real chance of occurring.[30]

With the merger

50. With the merger, Siemens would combine its rail mobility division with Alstom. Based on evidence obtained from Siemens, we consider the merged entity would continue to be an active supplier of signalling projects and products in New Zealand.[31]

Without the merger

51. Siemens submitted that the relevant counterfactual is a continuation of the status quo.[32]

52. We consider that the relevant counterfactual is largely a continuation of the status quo, in which Alstom would remain an independent competitor that continues to provide point machines in New Zealand. Alstom may also compete for some upcoming signalling projects (discussed below at [67]).

How the merger could substantially lessen competition

53. We have considered two possible ways in which the Proposed Merger would be likely to have the effect of substantially lessening competition in the signalling projects and point machines markets:

    53.1 first, the merger could give rise to unilateral effects by allowing the merged entity to profitably raise prices or reduce quality by itself in one or both of the affected markets; and

    53.2 second, the merger could increase the potential for the merged entity to coordinate its behaviour with other suppliers, such that they could collectively exercise market power and increase prices in the signalling projects market.

54. We note that in the affected markets competition commonly takes place through bidding.[33]

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28 *Mergers and Acquisitions Guidelines* above n1 at [2.29].
29 *Woolworths & Ors v Commerce Commission* (HC) above n5 at [111].
30 Ibid.
31 Commerce Commission interview with Siemens (22 November 2018).
32 The Application at [7.1].

Signalling projects market

Competition analysis – unilateral effects

55. A merger can substantially lessen competition if it increases the potential for the merged entity to be able to unilaterally raise prices. Where two suppliers compete in the same market and the constraint from other competitors is limited, a merger could remove a competitor that would otherwise provide a competitive constraint, allowing the merged entity to raise prices. A merger could also reduce competition if the target was a potential or emerging competitor. In such a case, a merger could result in higher prices compared to the scenario without the merger.[34]

56. For the reasons set out below, we are satisfied that the Proposed Merger will not have, or would not be likely to have, the effect of substantially lessening competition in the signalling projects market due to unilateral effects.

Siemens' submission

57. Siemens submitted that the Proposed Merger is unlikely to result in a substantial lessening of competition in the signalling projects market because:

    57.1 significant signalling projects are typically awarded by competitive tenders which attract a broad range of international rail mobility firms, including CAF, Thales, Bombardier, Hitachi/Ansaldo and others;[35]

    57.2 Alstom has not tendered for or delivered any signalling projects in New Zealand in the last five years,[36] implying it is not a close competitor in this market;

    57.3 barriers to entry are not significant for large, established international rail mobility companies;[37] and

    57.4 KiwiRail exercises a high degree of countervailing power through its ability to support new entry/expansion by altering its procurement strategies,[38] and/or through expanding its own ability to self-supply signalling projects.

Closeness of competition between Siemens and Alstom

58. In order to assess the extent of competition lost due to the Proposed Merger, we have considered the closeness of competition between Siemens and Alstom in the New Zealand signalling projects market. Based on the information we obtained (discussed below), we consider that Siemens and Alstom are not close competitors for the supply of signalling projects in New Zealand.

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33 Our approach to assessing bidding markets is outlined in our *Mergers and Acquisitions Guidelines* at [3.76-3.79]

34 *Mergers and Acquisitions Guidelines* above n1 at [3.62-3.63].

35 The Application at [1.10(b)].

36 Ibid at [1.10(d)].

37 Ibid at [1.10(e)].

38 Ibid at [1.10(f)].

Siemens' activities in New Zealand

59. Siemens is currently the major supplier of signalling projects in New Zealand.[39]

60. In respect of projects for the supply, upgrade or maintenance of interlocking systems, Siemens is the only supplier that is currently active, other than KiwiRail which can self-supply some projects. Siemens has provided evidence showing it has participated in [ ] tenders for signalling projects since October 2014 and won [ ] of those tenders.[40] The evidence we have obtained suggests that UGL has previously competed with Siemens in this area,[41] and that some projects have been self-supplied by KiwiRail.[42]

61. We consider that Siemens has an incumbent advantage in respect of the supply of interlocking systems projects in New Zealand (particularly for projects on the Auckland metro network). This advantage stems from Siemens' longstanding relationship with KiwiRail and from Siemens' delivery of the Auckland electrification project in 2014, which led to its systems being embedded throughout the Auckland metro rail network.[43] Siemens also has some interlocking systems embedded in KiwiRail's network outside of Auckland and likely also has an incumbent advantage in respect of interlocking projects in these areas.

62. Siemens has also previously supplied projects for the installation of on-board ATP systems on Auckland Transport's commuter trains. However, CAF has recently been contracted to replace Siemens' installed systems with its own.[44] Siemens does not have its on-board systems installed on any other trains in New Zealand.[45]

63. In respect of OCS, Siemens is the most recent party to have installed a system in New Zealand, having provided the R9000 OCS for the Auckland network as part of the 2014 Auckland electrification project. The only other OCS in use in New Zealand was supplied by Realflex in the late 1990's and is due to be replaced in the coming years.[46]
[ ].[47]

Alstom's activities in New Zealand

64. Alstom has not bid for or delivered any signalling projects in New Zealand in the last five years.
[ ].[48]

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39 Commerce Commission interview with KiwiRail (9 November 2018).
40 See Annexure 5 of the Application at 40-42.
41 Commerce Commission interview with KiwiRail (9 November 2018).
42 Email from KiwiRail to the Commerce Commission (24 November 2018).
43 See: Commerce Commission interview with Siemens (22 November 2018); and Commerce Commission interview with KiwiRail (9 November 2018).
44 Commerce Commission interview with Auckland Transport (15 November 2018).
45 Commerce Commission interview with Siemens (22 November 2018).
46 Commerce Commission interview with KiwiRail (9 November 2018).
47 Email from KiwiRail to the Commerce Commission (24 November 2018).
48 The Application at [4.12(b)].

65. [

].[49]

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].[50]

Conclusion on existing competition between the merging parties

66. We consider that Siemens is an active participant in the New Zealand signalling projects market. Alstom on the other hand has not been active in this market. Accordingly, we consider that Siemens and Alstom are not currently close competitors in the signalling projects market.

Future competition

67. Although Alstom has had limited activity in the New Zealand signalling projects market in recent years, we considered whether there would be increased competition between Siemens and Alstom absent the Proposed Merger. The evidence we have obtained suggests that [ ][51] [ ]. We have identified [ ] upcoming projects for which Siemens and Alstom may both compete absent the merger:[52]

[

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68. We consider these tenders are likely to be contested by other suppliers that would constrain the merged entity sufficiently to prevent any substantial lessening of competition. For example:

68.1 [

].[53]

68.2 [

].[54]

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49 Commerce Commission interview with Alstom (22 November 2018).

50 Ibid.

51 Commerce Commission interview with Siemens (22 November 2018).

52 Commerce Commission interview with Siemens (22 November 2018); Commerce Commission interview with Alstom (22 November 2018).

53 [ ]

68.3 [
].[55]
[ ].[56]
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69. We have not identified any evidence that these competitors would face any significant barriers to entry for these projects. There are several large international rail industry companies that are capable of entering new geographic markets to deliver signalling projects (and other rail-related projects). In particular, companies that are already active in Australia are likely to have the capability to bid for and deliver signalling projects in New Zealand such as Bombardier or Ansaldo.[57]

70. We consider that large rail industry suppliers are more likely to be incentivised to enter New Zealand by bidding for large, higher-value signalling projects. The projects discussed above are likely to be large enough to attract bids from such suppliers even though they currently have no presence in New Zealand. Indeed, KiwiRail expects that at least some of them will bid for its upcoming large tenders.

Conclusion on unilateral effects in the signalling projects market

71. We do not consider it likely that the Proposed Merger would substantially lessen competition in the signalling projects market, because:

    71.1 Siemens and Alstom are not (and are not likely to become) close competitors for signalling projects, so any loss of competition resulting from the merger is not likely to be substantial; and

    71.2 to the extent that the Proposed Merger would remove some competition in relation to tenders for certain projects, other credible, potential bidders would continue to impose competitive pressure on the merged entity sufficient to prevent a substantial lessening of competition.

Competition analysis – coordinated effects

72. A merger can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power such that quality reduces and/or prices increase across the market.

73. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the suppliers in the

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54 "KiwiRail Response to Commerce Commission Questions – November 2018" attached to an email from KiwiRail to the Commerce Commission (24 November 2018).

55 Ibid.

56 Commerce Commission interview with Alstom (22 November 2018).

57 [ ]; Commerce Commission interview with Alstom (22 November 2018).

market to be acting in a coordinated way. Such behaviour need not be unlawful and includes tacit collusion such as accommodating price responses or parallel conduct.

74. While the signalling projects market has some characteristics that may make it vulnerable to coordination, such as the relatively small number of suppliers globally, there are other characteristics that may make coordination more difficult, such as the lack of price transparency, the differentiation between different suppliers' products, and the relative infrequency of purchases.

75. We have not identified any evidence that suggests the merger will impact the ability of market participants to coordinate their behaviour in the signalling projects market. Accordingly, we are satisfied that the merger is unlikely to make coordination in the signalling projects market more likely, complete, or sustainable.

Conclusion on signalling projects market

76. Based on the available information, we have reached the view that the Proposed Merger is unlikely to substantially lessen competition in the signalling projects market due to unilateral or coordinated effects.

Point machines market

Competition analysis – unilateral effects

77. As noted above, the only market where there is direct overlap in the Parties' recent activities in New Zealand is in the point machines market.

Siemens' submission

78. Siemens submitted that the Proposed Merger is unlikely to result in a substantial lessening of competition in the supply of signalling products (including point machines, sensors, interlockings, and other signalling equipment)[58] because:

    78.1 signalling products can be readily sourced by KiwiRail from all of the major global signalling suppliers (including CAF, Thales, Bombardier, Ansaldo and CRSC);[59]

    78.2 barriers to entry or expansion are not significant; and[60]

    78.3 as the sole purchaser, KiwiRail has complete discretion over which signalling products it elects to install on its network, and that it has the ability to switch suppliers or sponsor new entry or expansion.[61]

79. In respect of the overlap in the parties' supply of point machines, Siemens submitted Alstom is the current preferred supplier of point machines, [ ]. Siemens states

58 The Application at [9.2(a)].
59 Ibid at [9.2(b)].
60 Ibid at [9.2(e)].
61 The Application at [9.2(f)].

[
].[62]

The framework agreement between Alstom and KiwiRail

80. Siemens submitted that, prior to February 2018, KiwiRail purchased point machines from both Siemens and Alstom, with Siemens being the [ ][63] and Alstom [ ].[64]

81. [ ].[65]
[ ]:[66]

81.1 [ ]

81.2 [ ]

81.3 [ ]

82. KiwiRail explained [ ].[67]

Current and future competition between Siemens and Alstom for the supply of point machines

83. [ ].[68]

84. We consider that absent the merger Siemens and Alstom would likely compete to supply point machines in the future [ ].

85. However, we consider that any potential future competition lost due to the Proposed Merger is unlikely to be substantial due to KiwiRail's ability and willingness

62 The Application at [9.7]; Commerce Commission interview with Siemens (22 November 2018).
63 The Application at [9.6].
64 Commerce Commission interview with Alstom (22 November 2018).
65 Ibid.
66 The Application at [9.6(a)-9.6(c)].
67 Commerce Commission interview with KiwiRail (9 November 2018)
68 [ ]

to source point machines from other suppliers. In reaching this view, we have given weight to the following evidence:

85.1 [ ].[69]

85.2 [ ].[70]

86. We have not identified any evidence that competitors would face barriers to entry in respect of supplying point machines in New Zealand. As for signalling projects, there are several rival suppliers of point machines that are large international companies capable of entering and supplying these products in New Zealand. There appear to be no major obstacles to supplying point machines as suppliers do not need to expend significant resources to supply these products.[71]

Conclusion on unilateral effects

87. We do not consider it likely that any competition lost in the point machines market due to the Proposed Merger would be substantial because there are other providers of point machines that could supply in New Zealand and which provide competitive constraint.

Competition analysis – coordinated effects

88. As for the signalling projects market, the point machines market has some characteristics that may make it vulnerable to coordination, such as the relatively small number of suppliers globally. However, as above, we consider there are other characteristics that may make coordination more difficult in this market, such as the lack of price transparency, the differentiation between different suppliers' products, and the relative infrequency of purchases.

89. Accordingly, we are satisfied that the merger is unlikely to make coordination in the point machines market more likely, complete, or sustainable.

Conclusion on point machines market

90. Based on the available information, we are satisfied that the Proposed Merger is unlikely to substantially lessen competition in the point machines market due to unilateral or coordinated effects.

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69 Commerce Commission interview with KiwiRail (9 November 2018).

70 Email from KiwiRail to the Commerce Commission (22 November 2018).

71 [ ]

Overall conclusion

91. We are satisfied that the Proposed Merger will not have, or would not be likely to have, the effect of substantially lessening competition in the national markets for the supply of:

    91.1 signalling projects; and

    91.2 point machines.

Determination on notice of clearance

92. We are satisfied that the Proposed Merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

93. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance to Siemens to combine its mobility division with Alstom.

Dated this 17th day of December 2018

Sue Begg
Deputy Chair