

Statement of Preliminary Issues

Siemens A.G. / Alstom S.A.

5 November 2018

Introduction

1. On 25 October 2018, the Commerce Commission registered an application (the Application) from Siemens A.G. (Siemens) to combine its mobility business with Alstom S.A. (Alstom) (the Proposed Acquisition).¹ The Application relates to a global merger that has been notified in a number of overseas jurisdictions including the European Union and Australia.
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.²
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **16 November 2018**.

The parties

5. 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 Acquisition is Siemens' mobility business division (Siemens Mobility), which is an international supplier of rail mobility products and systems. In New Zealand, Siemens Mobility supplies rail signalling systems, products and related project services.
6. 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 for the rail mobility industry, including signalling systems and products. In New Zealand, Alstom supplies signalling products.

¹ A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>.

² The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

Our framework

7. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.³ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
8. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁴ This allows us to assess the degree by which the proposed acquisition might lessen competition.
9. If the lessening of competition as a result of the proposed acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
 - 9.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
 - 9.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 9.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

Market definition

10. We define markets in the way that we consider best isolates the key competition issues that arise from the proposed acquisition. 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 Commerce Act, as a matter of fact and commercial common sense.⁵
11. In the Application, Siemens submitted that the relevant markets are the national markets for the supply of:⁶
 - 11.1 signalling projects (the Projects Market), a bidding market which involves project specific engineering, development, and project management, systems integration, installation, testing, and in most cases, a period of maintenance;⁷

³ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at www.comcom.govt.nz

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁵ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁶ The Application at [1.9].

⁷ The Application at [6.3].

- 11.2 signalling products on a standalone basis (the Products Market). For example, a rail network operator may purchase individual products outside of a project in order to replace components of previously installed systems.⁸
12. We will consider whether it is appropriate to define narrower projects markets, if for example:
- 12.1 there are signalling projects of different value or complexity, or that involve differing technologies;⁹ and
- 12.2 there are different competitive constraints for the supply of different project types.
13. Similarly, we will consider whether it is appropriate to consider separate markets for individual signalling products. For example, as the Applicant identified that the parties previously overlapped in the supply of point machines in New Zealand, we will consider whether the supply of point machines in New Zealand should be assessed separately to other products.

Without the acquisition

14. We will consider what the parties would do if the proposed acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or whether the parties would seek alternative options, for example, finding an alternative buyer.

Preliminary issues

15. We will investigate whether the proposed acquisition would be likely to substantially lessen competition in the relevant markets by assessing whether horizontal unilateral effects or coordinated effects might result from the proposed acquisition. The questions that we will be focusing on are:
- 15.1 unilateral effects: would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?¹⁰
- 15.2 coordinated effects: would the proposed acquisition change the conditions in the relevant markets so that coordination is more likely, more complete or more sustainable?

⁸ The Application at [5.28].

⁹ For example, signalling projects for the installation of interlocking systems could involve different technology and expertise to signalling projects relating to automatic train protection systems.

¹⁰ For ease of reference, we only refer to the ability of the merged entity to “raise prices” from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

Unilateral effects: would the merged entity be able to profitably raise prices by itself?

16. Where two suppliers compete in the same market, a merger of the two would remove a competitor that would otherwise act as a competitive constraint, potentially allowing the merged entity to raise prices.
17. A merger could also reduce competition if one of the merging firms was a potential or emerging competitor. In particular we are considering whether Alstom may expand its business in New Zealand in the future. In such a case, the merger may preserve the market power of the incumbent firm.
18. In the Application, Siemens submitted that the proposed acquisition would not be likely to substantially lessen competition due to unilateral effects because:
 - 18.1 significant signalling projects are typically awarded by tender and generally attract competitive tenders from a number of international rail mobility players such as CAF, Thales, Bombardier, Hitachi / Ansaldo, Wabtec, and CRSC. For example, Siemens notes that CAF, a Spanish-based supplier of rail mobility products, has won two projects in New Zealand in 2018 through competitive tenders;
 - 18.2 the competitive overlap in the supply of signalling products is minimal, with the supply of point machines being the only products in which overlap occurs between the merging parties;
 - 18.3 Alstom has not tendered for or delivered any signalling projects in New Zealand in the last five years, so is not a close competitor of Siemens;
 - 18.4 barriers to entry are not significant for large, established international rail mobility players because such firms do not require a local presence or existing supply arrangements to bid successfully for a major project; and
 - 18.5 KiwiRail, which is currently the sole purchaser in New Zealand of rail signalling projects and products, chooses which signalling systems are installed on its network and can support new entry or expansion by altering its procurement strategies, including through KiwiRail structuring its tender processes in different ways to reach a competitive outcome, and/or through expanding its own ability to self-supply signalling projects and products.
19. We will consider:
 - 19.1 the closeness of competition between Siemens and Alstom and whether any competition lost between them is likely to be replaced by rivals;
 - 19.2 the degree to which other global suppliers compete or could compete for KiwiRail's signalling projects, including CAF, which has recently won two tenders for signalling projects for Auckland's City Rail Link;

- 19.3 the ability of international suppliers in the rail mobility industry to enter and/or expand, and the likelihood of that occurring given the small size of the New Zealand market; and
 - 19.4 whether KiwiRail (or any other customers) could exercise any countervailing power in the event that it raised prices.
20. In respect of the assessment of KiwiRail’s ability to exercise countervailing power we will consider:
- 20.1 KiwiRail’s ability to self-supply; and
 - 20.2 KiwiRail’s ability to sponsor entry or expansion, for example by changing the structure of the contracts it puts to tender.

Coordinated effects: would the proposed acquisition make coordination more likely?

- 21. We will assess whether any of the relevant markets are vulnerable to coordination, and whether the proposed acquisition would change the conditions in the relevant markets so that coordination is more likely, more complete or more sustainable.

Next steps in our investigation

- 22. The Commission is currently scheduled to make a decision on whether or not to give clearance to the proposed acquisition by **20 December 2018**. However, this date may change as our investigation progresses.¹¹ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
- 23. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

Making a submission

- 24. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference “Siemens /Alstom” in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **16 November 2018**.
- 25. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission’s website.
- 26. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

¹¹ The Commission maintains a case register on our website at <https://comcom.govt.nz/case-register> where we update any changes to our deadlines and provide relevant documents.