STEPHENSON HARWOOD

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Siemens' proposed acquisition of Alstom facing in-depth antitrust scrutiny by EU and Australasia regulators

EC Statement of Objections and ACCC & CC Statement of Issues released

Following the European Commission's ("EC") opening of a Phase II investigation into Siemens' proposed acquisition of Alstom in July,[1] the proposed tie-up between the EU's largest train makers[2] is facing in-depth antitrust scrutiny both in the EU and abroad.

On 31 October 2018, the EC issued a confidential 'Statement of Objections' ("SO") to Siemens and Alstom which sets out its preliminary conclusions and competition concerns on the proposed merger. Further abroad, each of Australia's and New Zealand's competition regulators have formally published their competition issues on the proposed transaction. A final decision on the proposed tie-up is due to be taken by the end of January next year for the EC and towards the end of this year in Australia and New Zealand.[3]

Given the EC has now issued its SO and prior to the EC issuing its final decision on the proposed tie-up, now is the time for any strategic third party intervention. In particular, third parties may seek to strategically position themselves with the merging parties and the EC alike as desirable suitors for divestments (i.e. business/asset sales) that may be required to secure merger clearance. If this is of interest we can assist you in devising and executing such a strategy.

Finally, it is relevant to note that the Spanish Government has recently opened an investigation into a number of railroad manufacturers (including Siemens and Alstom) after uncovering anti-competitive practices in breach of competition rules. While any impact of this on the EC's review is not immediately evident, what is clear is that this is not at all well timed in the context of the proposed consolidation.

EC Merger Review – EC SO

In its SO issued on 31 October 2018 the EC has echoed the competition issues and concerns that it originally set out when it launched its Phase II investigation.[4] Specifically, the EC has set out its concerns and preliminary conclusions that the combined operator would have too much market power in the markets for train signalling systems and high speed trains with the effect being fewer suppliers for EU rail operators and price increases. With the issuance of the SO the EC has now invited the parties to respond to these concerns.

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[1] See briefing on the EC's opening of its Phase II investigation, https://www.shlegal.com/insights/european-commission-opens-phase-ii-investigation-into-proposed-acquisition-of-alstom-by-siemens

[2] Siemens and Alstom are global leaders in rail transportation with both companies holding a wide product portfolio and competing in tenders for manufacture and supply of: (i) high speed, mainline and urban rolling stock, and (ii) mainline and urban signalling solutions.

[3] Additionally, whereas the proposed merger has received competition clearance across Asia in each of China, Singapore, Taiwan and India, as well as clearance in Montenegro and Serbia, the merger is still awaiting the outcome of a merger review in Brazil.

[4] The EC's initial Phase I investigation found that the merged parties would create a strong competitor in rolling stock and rail signalling with a significant stronghold in several markets which may result in price increases as well as having a deterrent effect on innovation. In particular: (i) the merger would see the combination of the two largest suppliers of rolling stock and train signalling solutions in the EEA across both size of operations as well as geographic footprint in activities, and (ii) post-transaction Siemens-Alstom would be the global leader with nearly three times the market share of its closest rival for both rolling stock and signalling solutions markets and was unlikely to be constrained by competitors.

Representatives for each of Siemens and Alstom have confirmed receipt of the SO with Siemens adding, *"it would take the company some time to study all the objections and come up with remedies before a final decision is taken"* and Alstom confirming that, *"the company will continue to work constructively with the EC to explain the rationale and the benefits of the proposed merger".*

Helpfully for the merging parties, Governments of each of France and Germany have from the outset – and continue to - back the proposed merger. For these EU patriots the tie-up is seen to create an EU champion to challenge increasing competition from China's state-owned railway operator, China Railways Rolling Stock Corporation ("**CRRC**"). CRRC is currently the world's largest train maker and is looking to start selling into the EU market. However, the EC has continually questioned this rationale given that CRRC is currently barely present in the EU, and critically, Chinese competition is not considered to be likely in the foreseeable future. Moreover, the political pressure from Paris and Berlin has not proved to stifle Competition Commissioner Margrethe Vestager's opposition to the proposed merger. Indeed, earlier this year Vestager advised EU lawmakers that antitrust authorities *"have nothing against companies that become bigger and more successful…but, we simply cannot approve mergers that harm consumers and other businesses".* Further, in an EU Parliamentary hearing in October Vestager urged industry participants or stakeholders with concerns on the proposed merger to come forward to the EC and make those known.

In addition, British state-owned railway operator, Network Rail has recently called on the EC to intervene in the proposed merger arguing that the deal *"stands to do great harm to the railways in Great Britain"*. Additionally, in late October Network Rail issued a letter to the EC stating that the proposed merger constituted, *"one of the most significant threats to our operations at present"* and that the combined business would have *"93% of the UK's signalling market in 2016-17"*. In particular, Network Rail has put forward to the EC that if the merger cannot be prohibited then the only appropriate remedy to restore competition (that would be lost from the proposed tie-up) would be a structural divestment (likely Siemens' signalling business).

Moreover, the UK's Office of Rail and Road regulator supports Network Rail's intervention.

EC Merger Review – Next Steps

Siemens and Alstom now have the opportunity to respond to the SO over the course of the coming weeks and will have until mid-December to potentially offer remedies to allay the EC's competition concerns in order to secure a merger clearance. These remedies may include asset or business sales or otherwise competitor access to key technologies (including intellectual property) or services. Importantly, the proposed remedies would be subject to significant EC scrutiny including stakeholder input from customers and competitors alike.

With the issuance of the SO it is difficult to deny that the EC clearly has significant competition concerns that are yet to be resolved and would need to be prior to any clearance decision being given. Against this background and short of Siemens and Alstom being able to robustly counter the EC's concerns that the combination may lead to reduced competition, there is a likely prospect that Siemens and Alstom will have to make substantial divestments to win regulatory approval for their proposed business combination.

Certainly, the potential for significant divestments is well within Siemens' contemplation following issuance of the SO with Siemens' Chief Executive, Joe Kaeser commenting on 8 November 2018 that Siemens was *"willing to make concessions"* in order to secure EU approval. However, Mr Kaeser added that while in Siemens' view the proposed tie-up was the *"best solution"* if the proposed merger failed then Siemens would find *"other solutions".* Ultimately, the EC and Siemens and Alstom will need to find an acceptable common ground on any potential remedial action to ensure that the parties' commercial interests and the EC's competition concerns can be reconciled. While Mr Kaeser also stated that the parties have *"important and right arguments*" on the significance of their planned tie-up for customers, it will be the parties' ability to convince the EC of these arguments - and in particular, benefits for consumers flowing from the merger - that will seal the fate for the potential Franco-German rail champion.

The EC is due to take a final decision on the proposed merger by 28 January 2019.

Australasia Merger Reviews – Issues Statements & Next Steps

On 6 September 2018 Australia's Competition & Consumer Commission ("**ACCC**") expressed its preliminary concerns on the proposed Siemens-Alstom combination in its 'Statement of Issues' ("**ACCC SI**"). The ACCC's key concern is that the merger may substantially lessen competition in the supply of heavy rail signalling systems for passenger rail networks in Australia (particularly in interlocking systems and automatic train protection systems) and ultimately, result in price increases as well as lower levels of service, quality or innovation.

Siemens and Alstom issued a joint statement in response to the ACCC SI: *"We will continue to work closely and constructively with the ACCC to explain the rationale and the benefits of the proposed combination, as well as the complex dynamics of the relevant markets and the reasons why the proposed combination will not substantially lessen competition"*.

Moreover, the ACCC's Chair, Rod Sims has stated, *"A combined Siemens-Alstom would be by far the largest supplier of heavy rail signalling in Australia".* In fact, the ACCC has also confirmed that it has, *"heard from many industry participants who have expressed competition concerns with the merger"* and the ACCC will therefore, *"continue to evaluate the competitive options available to passenger rail networks in Australia".* It is also worth noting that some of the EC's competition concerns may similarly arise in the ACCC's review of the proposed tie-up. Indeed, the ACCC itself has expressly contemplated this possibility with Sims confirming that it is, *"liaising closely with overseas competition regulators, as some of these potential competition issues may also arise in other countries".*

The ACCC SI invited interested parties to submit comments and information to assist the ACCC's assessment of the issues, the closing date for which was 20 September 2018. The ACCC is due to take a final decision on the proposed merger by 29 November 2018.

More recently, on 5 November 2018 New Zealand's Commerce Commission ("**CC**") published a 'Statement of Preliminary Issues' ("**CC SI**") in which it set out those issues it considered to be important in deciding whether or not to grant clearance. Similarly to the ACCC the CC will be investigating whether or not the proposed merger will reduce competition to such an extent that this would result in price increases or reduction in quality or innovation in the relevant markets as well as whether or not post-transaction coordination would be more likely or sustainable. The CC SI also invited interested parties to submit comments on the likely competitive effects of the proposed transaction, the closing date for which is 16 November 2018. The CC is due to take a final decision on the proposed merger by 20 December this year.

Potential Complication - Spanish Cartel Investigation

As outlined above, by way of additional context to the EC's merger review the Spanish Government has recently opened an investigation into numerous railroad manufacturers after it uncovered anti-competitive practices on its conventional and high-speed networks. The EC has, unsurprisingly, refused to offer comment on the Spanish competition probe into Siemens, Alstom and the other railroad manufacturers and any potential impact on its merger review.

However, it is clear that the investigation could not come at a worse time for Siemens and Alstom given they are seeking the EC's regulatory blessing on their proposed business combination. Indeed, it has been reported that, *"The EC's analysis as to why the merger will not harm consumers will have to be bulletproof, as the Spanish competition authority has now increased public scrutiny on some key aspects of the deal".*

This will remain an interesting space to watch in the course of the EC's assessment of the competitive effects of the proposed merger and their ultimate decision.

A Few Final Thoughts – Third Party Strategic Interests & Interventions

As already set out in the July briefing on the proposed Siemens / Alstom consolidation (see Fn 1), where a proposed transaction will make life difficult for other players to compete in the relevant market/s third parties may seek to strategically intervene at certain stages of the review process. This may include customers, suppliers, or, competitors in the marketplace that have a sufficient interest to do so.

Specifically, now that Siemens and Alstom have received the SO they will have a period of time to respond. During this time the parties may be able to consult the EC's case file and request an oral hearing. Crucially, the parties will have until mid-December 2018 to offer remedies (e.g. business/asset sales) which may address the EC’s competition concerns and thereby pave the way for merger clearance. As outlined above, any remedies would be subject to EC scrutiny and input from customers and competitors.

Given the EC's review timetable now is the time for interested third parties to consider:

- Actively corresponding with the EC on the proposed tie-up and ensuring they have responded to information requests the EC has issued and/or any non-confidential version of the SO provided to them as well as any participation in an oral hearing;
- Strategically positioning themselves through contacting the merging parties directly as potential suitors for any divestments that Siemens-Alstom may offer up and/or the EC may impose in order to secure merger clearance;
- Strategically responding to the EC where the EC tests potential remedies with third parties to either position themselves as potential acceptable suitors in the EC's eyes and/or in a bid to otherwise influence the outcome of any remedial action; and
- Proactively approaching the EC to set out objections and/or any suggestions for appropriate remedial action (i.e. divestments).

If you would like advice on how to proactively intervene in the EC's final stages of its review in order to protect your company and/or find some commercial advantage by seeking to be a potential purchaser for divestitures or otherwise influence a conditional clearance decision, we would be happy to assist.

Please feel free to contact us.

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