NON-CONFIDENTIAL

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM027May20

In the matter between:

Alstom Société Anonyme	Acquiring Firm
and	
Bombardier Transportation (Investment) UK Ltd	Target Firm

Panel:	Mondo Mazwai (Presiding Member) Yasmin Carrim (Panel Member) Fiona Tregenna (Panel Member)
Heard on:	06 and 18 November 2020
Date of last submission:	18 November 2020
Order issued on:	19 November 2020
Reasons issued on:	12 March 2021

REASONS FOR DECISION

Approval

[1] On 19 November 2020, the Competition Tribunal conditionally approved the large merger between Alstom Société Anonyme ("Alstom") and Bombardier Transportation (Investment) UK Limited ("Bombardier"); an international transaction concerning the market for the manufacture of railway locomotives, rolling stock and mechanical & electronic signalling, safety & traffic control management.

[2] This is an international transaction taking place at the holding company level. Under the executed Share Purchase Agreement ("SPA"), Alstom Holdings, Alstom's wholly owned direct subsidiary, will act as the direct buyer in the Transaction[1] but Alstom will have sole control over Bombardier after the proposed transaction.

[3] The reasons for our approval follow.

Parties to the transaction and their activities

Primary acquiring firm

[4] The primary acquiring firm is Alstom, a French public company listed on the Euronext Paris Stock Exchange. Alstom's largest shareholder is Bouygues SA (15%). In South Africa, Alstom controls the following firms:

4.1. Alstom South Africa Holdings (Pty) Ltd ("ASAH");

4.2. Alstom Transport Holdings SA (Pty) Ltd ("ATHSA");

4.3. Alstom Ubunye (Pty) Ltd ("Alstom Ubunye");

4.4. Gibela Rail Transport Consortium (Pty) Ltd ("Alstom Gibela").

[5] In South Africa, Alstom engages in both rolling stock and signalling systems activities through various corporate entities as discussed below.

Primary target firm

[6] The primary target firm is Bombardier a United Kingdom (UK) company controlled by Canada-based Bombardier Inc. and Caisse de Depot et Placement du Quebec ("CDPQ"). Bombardier is the rail transport division of Bombardier

[1] See SPA Recitals.

Inc. Bombardier Inc's separate aviation business is not part of the proposed merger and will not be affected.

[7] In South Africa, Bombardier controls:

7.1. Bombardier Transportation South Africa (Pty) Ltd ("BT South Africa");

7.2. Bombela Maintenance (Pty) Ltd ("Bombela Maintenance");

7.3. Bombardier Transportation (Rolling Stock) South Africa (RF) (Pty) Ltd ("BTRS");

7.4. Bombela Electrical and Mechanical Works (Pty) Ltd ("BE&M");

7.5. Isithimela Rail Services (Pty) Ltd ("Isithimela").

[8] In South Africa, Bombardier is involved in both rolling stock and signalling systems activities through various entities as discussed below.

Proposed transaction and rationale

[9] In terms of the proposed transaction, Alstom intends to acquire 100% of the issued shares in Bombardier. Post transaction, Alstom will control Bombardier.

[10] The merging parties provide as the rationale for the transaction, product and geographic complementarities in their global rail businesses. Although the parties' rationale was not determined by their South African businesses, the merging parties submit that the South African market will benefit from the improved global competitiveness of the merged entity. Through this transaction, the merging parties hope to combine significant operational, technical, and research and development (R&D) resources that will allow Alstom to be better equipped to deliver more innovative and sustainable products in response to what is said to be ever-increasing demands for efficient and sustainable travel by customers around the world.

[11] The merging parties submit that these complementarities will result in cost savings, as Alstom's strong execution skills and financial management will also

allow Bombardier's activities to reach their full potential [redacted]

Alstom hopes to help Bombardier to achieve its full innovation and efficiency potential [redacted]

Third party participation in Tribunal proceedings

[12] We note that on the morning of the second day of the hearing, the Railroad Association (the "RRA"), approached the Tribunal via email and indicated an intention to participate in the proceedings. The RRA which had initially indicated to the Commission that it had no concerns with the transaction, submitted to the Tribunal that this position had changed based on new information which had come to light.

[13] The RRA was granted an opportunity to address the Tribunal on this new information. After hearing the RRA it became clear that its concern was about the control structure of Alstom Gibela. Given that this issue had been fully investigated by the Commission and formed part of the recommendation before the Tribunal, the RRA's request to participate in the proceedings was denied.

[14] The Department of Transport ("DoT") requested and was permitted to participate in the Tribunal proceedings. Mr Jan-David de Villiers made submissions on behalf of the DoT in which he raised concerns in relation to concentration and the refurbishment market.

Relevant markets

[15] The Commission identified and assessed the proposed transaction in the following broad markets:

15.1. The national market for rolling stock (this includes the manufacture and supply of EMUs and electric locomotives; maintenance and refurbishment services for EMUs and manufacture and supply of inputs for electric locomotives); and

15.2. The national market for signalling systems (which includes the maintenance and supply of spare parts for signalling systems for mainlines, which consist of both EMU and electric locomotives).

[16] Given that only mainline rolling stock and signalling systems are operated in South Africa, the Commission's investigation was primarily focused on this type of rolling stock and signalling systems.

[17] Both Alstom and Bombardier are active in the rolling stock and signalling systems markets.

Rolling Stock

[18] Alstom's participation in South Africa's rolling stock activities is through two companies called Alstom Gibela and Alstom Ubunye.

[19] Alstom Gibela is a consortium between Alstom and two B-BBEE shareholders (61%), Umbambalo Rail (Pty) Ltd ("Umbambalo") (30%) and New Africa Rail (9%). In 2012, Alstom Gibela won the Passenger Rail Agency of South Africa ("PRASA") tender to renew its mainline rolling stock fleet. The Alstom Gibela trains are electric multiple units ("EMUs"). These EMUs are used in commuter passenger services on suburban routes. At the end of the ten-year period (i.e. in 2028), the Gibela consortium will be dissolved and the entire Gibela manufacturing facility will be handed over to PRASA.

[20] Prior to it being purchased by Alstom in 2016, Alstom Ubunye was a company called Commuter Transport Locomotive Engineering ("CTLE").[2] Alstom Ubunye had previously provided *maintenance* and *refurbishment* services to diesel and

[2] As such, CTLE and Ubunye are the same company.

electric rolling stock including locomotives, coaches, EMUs and traction systems. Since being acquired, Alstom Ubunye has transitioned from supplier of rolling stock refurbishment services to a manufacturer of rolling stock components, to [redacted].

[21] In its investigation the Commission found Alstom's participation in the South African rolling stock market to be limited to the Gibela-PRASA tender for the renewal of its mainline rolling stock.

[22] In relation to Bombardier, BT South Africa is involved in the manufacture of traction systems for electric locomotives (for freight use) for supply to Transnet Freight Rail ("TFR"), a division of Transnet SOC Ltd (collectively referred to as "Transnet"), pursuant to a 2014 tender. The parts designed by Bombardier [redacted] are assembled by Transnet Engineering and Rolling Stock Repair Services (Pty) Ltd ("Transnet Engineering") in South Africa. BT South Africa, through Transnet Engineering, also supplies limited and indirect spare parts to PRASA.

[23] Bombela Maintenance provides repair and maintenance services for the [redacted]s rolling stock pursuant to a [redacted] with the [redacted], which will end in [redacted] Bombela Maintenance provides rolling stock maintenance services in South Africa [redacted]

Signalling Systems

[24] In 2004, Alstom ceased its participation in the South African signalling systems sector when it sold off this portion of the business to a local firm, Actom (Proprietary) Limited ("Actom"). Although Alstom has stopped participating in the signalling systems tenders, it continues to supply some of its products in South Africa [redacted]

[redacted]

[25] Alstom has an indirect 20% interest in Transmashholding Group ("TMH") [redacted] when taken together, may confer negative control over TMH. In 2018, TMH acquired indirect control over the business of DCD Rolling Stock through its South African subsidiary, TMH Africa (Pty) Ltd ("TMH Africa"). This acquisition included a 45,000 square metre rolling stock facility in Boksburg, South Africa. TMH Africa offers rolling stock assembly, refurbishment, modernisation, and maintenance services, as well as manufacturing certain components such as bogies and car bodies. [redacted]. During the hearing, Alstom's control over TMH was clarified. There is a minority shareholding at the global level whereby Alstom holds a minority share in TMH. However, the nature of the minority rights that Alstom has in TMH at the global level does not filter down to the South African entity. Thus, Alstom's minority shareholding does not provide it access to any disaggregated information relating to the business of TMH in South Africa.[3]

[26] Commuter Transport Engineering ("CTE") is a company active in the rail sector in South Africa and specifically in the refurbishment and modernisation of passenger trains. [redacted]

[27] Bombardier's activities in the South African signalling systems market, are mainly limited to the maintenance of signalling systems, supply of spare parts and re-signalling positions.

[3] Tribunal Transcript of proceedings LM027May20 (6 November 2020) at p28.

[28] Bombela Maintenance maintains the Gautrain signalling system under an existing contract.

[29] Bombela Maintenance had two prior signalling activities in South Africa. In 2018, PRASA terminated its contract with Bombela Maintenance regarding the re-signalling and operation of PRASA's network in the Durban region. [redacted]

Refurbishment market

[30] The Commission found no overlap between the merging parties in the market for the provision of refurbishment services [redacted]

[31] Alstom Ubunye (previously CTLE) was involved in the provision of maintenance and refurbishment services for diesel and electric rolling stock including locomotives, coaches, EMUs and traction systems for PRASA and Transnet. [redacted]

[32] However, concerns were raised by the DoT about potential competition in this market by the merged entity and possible impact on local players. We address this under the public interest section.

Impact on Competition

[33] The Commission found that the proposed transaction would result in a horizontal overlap in each of the relevant markets above. This is discussed in more detail below.

[34] The Commission also identified a pre-existing vertical relationship between the merging parties in which Alstom Ubunye provides driver desks to Bombardier for use in its locomotives which it supplies to Transnet. This is done on an exclusive basis whereby Alstom Ubunye exclusively supplies driver desks to Bombardier and Bombardier exclusively procures driver desks from Alstom Ubunye. Given that the driver desks are not supplied to any third parties but exclusively to Bombardier, the Commission was of the view that the proposed transaction was unlikely to result in any foreclosure concerns. The Commission did not assess this overlap further.

Market shares and market concentration

[35] In South Africa, the rolling stock market and signalling systems market can be characterized as bidding markets with large and infrequent tenders. Further, most suppliers are active in each of the relevant markets and can provide a wide range of services in the rolling stock and signalling systems market. Given this characteristic, the Commission was of the view that market shares would not be a particularly useful indicator of competition dynamics in the market. Hence the Commission assessed the tenders in the rolling stock and signalling markets that have taken place in South Africa over the last ten years.

[36] With respect to the rolling stock market, the Commission found that the merged entity would have a post-merger market share of less than 20% in terms of the tenders awarded over the last 10 years. Further that although both Alstom and Bombardier were competitors and bidders in the market, there were several

other large competitors in the market such as Siemens,[4] GE Wabtec,[5] CRRC[6] which would continue to exert a competitive constraint on the merged entity.

[37] With respect to the signalling systems market the Commission found that the merged entity would have a post-merger market share of less than 20% in terms of the number of tenders awarded over the last 10 years. However, the merged entity would continue to be constrained by the presence of other large players in the market such as Hitachi Rail,[7] Actom, Siemens, Thales[8] and GE Wabtec.

[38] Based on the above, the Commission was of the view that the proposed transaction was unlikely to result in a substantial lessening of competition in either of the relevant markets in South Africa.

Global Context

[39] Although, the Commission concluded that the proposed transaction was unlikely to result in a substantial prevention or lessening of competition in any relevant market in South Africa the Commission noted that globally the proposed transaction raised concerns in both the international rolling stock and international signalling systems markets.

[40] The Commission found that the proposed transaction mainly raised concerns in sub-markets and specific products which include the market for very high-speed rolling stock, mainline EMUs market and the market for legacy OBUs in the EU and high-speed rolling stock and propulsion system markets in the US.

[41] The Commission was unable to collect independently verifiable market share figures for each of the sub-markets and therefore analysed the broad markets for rolling stock and signalling systems.

[4] Siemens Mobility GmbH
[5] GE Transportation (of General Electric), since purchased by Wabtec Corporation.
[6] CRRC Corporation Limited
[7] Hitachi Rail Limited.
[8] Thales Group

[42] In the global market for rolling stock, the Commission found that the merged entity would have a market share of less than 30% with an accretion of between 10 and 15% globally. In addition, the merged entity would continue to be constrained by other players in the market including CRRC (<35%), Siemens (<15%), Hitachi (<15%) and GE Wabtec (<10%).

[43] In the signalling systems market, the Commission found that the merged entity would have a market share of less than 15% with an accretion of between 5 and 10% globally. This translated to the following post-merger market shares for competitors: CRRC (<25%), Siemens (<20%), Thales (<15%) and Hitachi (<10%).

[44] Based on the above estimates, the Commission concluded that the behaviour of the merging parties would continue to be constrained by the presence of several large players in each of the relevant global markets post-merger.

Barriers to entry

[45] The Commission found that barriers to entry in the markets for rolling stock and signalling systems were high. In particular, the Commission identified regulatory requirements and capital costs as the main barriers to entry in South Africa. Therefore most of the players which compete with the merging parties in the relevant markets tend to be large, international firms with significant resources.

[46] The Commission next considered the issue of countervailing power.

Countervailing power

[47] In conducting its analysis, the Commission considered: firstly the extent to which customers that procure rolling stock and signalling systems can credibly threaten to resort to alternative suppliers within a reasonable period of time; secondly, whether the customer would be able to refuse to buy products or delay purchases from the supplier.

[48] The Commission found that given that the relevant markets were tender-based this conferred some countervailing power to customers who could then exercise some discretion when issuing new tenders or using existing suppliers. In addition, the Commission found that there are several firms that bid for rolling stock and signalling systems tenders such as Ansaldo,[9] Actom, Siemens and CRRC amongst others.

[49] In light of the above the Commission was of the view that the proposed transaction was unlikely to reduce the countervailing power of customers.

[50] As part of its analysis the Commission also considered whether the transaction would result in unilateral effects, coordinated effects and portfolio effects.

Unilateral effects

[51] In its assessment of unilateral effects, the Commission considered two issues. The first being the loss of a potential competitor and the second being whether the merged entity would enjoy an enhanced bargaining position post transaction.

[52] The Commission found that the merging parties are direct competitors and have at times competed for the same tenders. While the Commission acknowledged that the transaction would remove a credible competitor, Bombardier, it found that there are a number of large, sophisticated suppliers (competitors) present in the market which would continue to exert a competitive constraint on the merged entity. These suppliers were found to have competed directly with the merging parties and as such the Commission was satisfied that this would alleviate any potential competition concern which may arise as a result of the proposed transaction.

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[9] Ansaldo STS.

Coordinated effects

[53] As part of its investigation, the Commission considered the extent to which the proposed transaction would create a platform for the exchange of information given the structural links that exist pre-merger. The structural links are created by the fact that firstly; Alstom has an indirect interest in TMH, the holding company of TMH Africa. In South Africa, TMH Africa offers rolling stock assembly, refurbishment or modernisation and maintenance services. [redacted]

[54] However, given that this relationship was pre-existing, the Commission concluded that it was not merger specific and therefore did not assess this concern any further.

Portfolio effects

[55] In assessing portfolio effects, the Commission assessed whether the merging parties would have the ability and incentive to leverage and exclude rivals in the relevant markets.

[56] Recall that the Commission had found that the merged entity's market share would be less than 20% in all the relevant markets post-merger. Further that the markets comprised several significant competitors which would continue to constrain the behaviour of the merged entity post-merger.

[57] The Commission was therefore of the view that it was unlikely that the merged entity would have significant market power or the ability to foreclose its rivals, the merger was unlikely to increase its portfolio power.

Third party concerns

[58] During the Commission's investigation, concerns were raised by third parties. The main concerns were that the merger would: (i) have a negative impact on future competition and the ability of other players, to interface with / integrate their signalling systems, ETCS OBUs, on the installed base of Alstom-Bombardier in commuter trains; and (ii) the merger would result in the non-availability of some parts and support in the signalling systems market. The concerns regarding the non-availability of some parts and support in the signalling systems market are dealt with under the public-interest assessment.

[59] With respect to the first concern, the Commission took into account the interoperability of signalling systems and rolling stock as a factor of the merged entity's ability to foreclose rivals. Although there is a common understanding among different role players in the rolling stock and signalling market that signalling systems should be interoperable, the Commission found that ensuring that interoperability occurs can be difficult. This is because, for systems to be interoperable, manufacturers of signalling systems and rolling stock should exchange commercially sensitive information such as intellectual property (Information Technology software) and there should be collaboration between personnel.

[60] A competitor of the merging parties submitted that Alstom and Bombardier are the only two suppliers that have existing contracts for the manufacture, supply, and maintenance of commuter trains in South Africa. As such, the merger would be creating a monopoly in commuter trains in South Africa. As a consequence of creating a monopoly for commuter trains in South Africa, the competitor submitted that suppliers of OBUs would no longer be able to install their OBUs on the Alstom / Bombardier fleet as the combined entity would use its own components and would have the ability and incentive to refuse assistance to other OBUs suppliers to integrate their OBUs on the Alstom / Bombardier fleet.

[61] It should be noted that in the European Commission's consideration of this merger, similar concerns were raised and a behavioural remedy was imposed and accepted by the merging parties in this regard. The EU further found that Alstom was a clear market leader in the ETCS OBU segment in the EU. In order to address this concern, the parties agreed to a remedy requiring the merged entity to make information and support available to rival ETCS OBUs suppliers when seeking to retrofit legacy Alstom and Bombardier rolling stock with ETCS OBUs.

[62] In South Africa, the merging parties submitted that the ETCS standard is not yet in operation. Whilst customers are open to select ETCS in their discretion, none of the South African track-side signalling systems are equipped to comply with ETCS ATP today and there have never been any ETCS OBU retrofit projects in South Africa. In addition, the Commission found that the merged entity's combined installed base of rolling stock with legacy systems only comprise of [redacted] rains which accounts for less than 1% of all rolling stock in South Africa. As such, the Commission was of the view that there was no basis for a remedy to be imposed in this instance.

[63] At the hearing, after receipt of the Commission's confidential recommendation, the DoT, which had made submissions to the Commission during its investigation, refined its concerns about the merger, stating that the merger between Alstom and Bombardier will create a strong original equipment manufacturer (OEM) in South Africa. In DoT's view the risk this creates is that the merged entity may start purchasing existing local companies within the rail manufacture supply chain thus preventing or lessening competition in the local supply chain in the rolling stock sector in South Africa. This concern is fully canvassed below, under the public interest concern relating to a particular industry sector.

Public interest

Employment

[64] The merging parties submitted that the proposed transaction would not have a negative effect on employment because the target firms would continue to operate as is post-merger.

[65] Given that the merging parties made a firm statement that there would be no negative effects on employment in South Africa and the fact that none of the employee representatives and trade unions representing the employees of both the merging parties raised any concerns, the Commission was of the view that the proposed transaction was unlikely to have a negative impact on employment. It was clarified on the first day of hearing that employment levels would be maintained.[10]

Spread of ownership

[66] Alstom Ubunye is a level 4 B-BBEE contributor, as 49% of the shares in Alstom Ubunye are held by historically disadvantaged persons ("HDPs"). Alstom Gibela is a level 2 B-BBEE contributor, as 39% of the shares in Alstom Gibela are held by Umbambalo and New Africa Rail, which are owned and controlled by HDPs. On the other hand, the Commission found that Bombardier is a Level 2 B-BBEE contributor. The DTIC submitted that it was concerned about the impact of the proposed transaction on B-BBEE. The merging parties submitted that the merged entity would have no incentives to dilute its B-BBEE shareholding because of the tender bidding requirements. The Commission was of the view that the proposed transaction was unlikely to have a negative impact on the spread of ownership.

[10] Transcript (6 November 2020) above n 3 at p29.

Impact on a particular industrial sector or region and the ability of national industries to compete in international markets

<u>Refurbishment market</u>

[67] As discussed earlier the Commission did not raise any concerns about the refurbishment market. During the hearing, the Tribunal probed the Commission on whether it had investigated Alstom's reasons for [redacted].[11] [redacted].[12]

[68] Mr De Villiers provided some industry insights into how refurbishment and maintenance services were rendered. He explained that in the refurbishment market the best practice for trains is to do a general overhaul after every 10 years for three terms. When the trains get to year 30, there should be a total upgrade or refurbishment. After that the trains receive a general overhaul again for three 10 -year terms and then they leave the system when they get to year 60.[13] The PRASA renewal programme which Alstom Gibela is involved in [redacted][14]

[69] According to him the refurbishment market is also a tender market. Historically mainly local entities with high localization percentages have participated in bidding for refurbishment tenders. These firms included Wictra, Transport Rail Engineering, Naledi and CTE.[15] He could not foresee one bidder winning the

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[11] Tribunal Transcript of Proceedings LM027May20 (18 November 2020) at p42.
[12] Transcript above n 9 (18 November 2020) at p42-43.
[13] Transcript above n 9 (18 November 2020) at p20.
[14] Transcript above n 9 (18 November 2020) at p20.
[15] Transcript above n 9 (18 November 2020) at p30.

entire refurbishment contract.[16] The general duration of such refurbishment contracts is five years.[17] However, PRASA has not issued a refurbishment tender for the last two to three years.

[70] The concern of the DoT was that the merger between Alstom and Bombardier would create a very dominant OEM in South Africa which would have a negative impact upon local firms participating in the rolling stock refurbishment program.

[71] The DoT then proposed a condition that would in effect prevent the merged entity from entering the refurbishment market for 20 years, in order to protect local firms.

[72] The Commission, in response, reiterated that the merging parties did not overlap in relation to refurbishment, with Alstom Ubunye being seen as the only business active in refurbishment, [redacted] Bombardier was not active in this market. In light of this there was no market share accretion in relation to the refurbishment segment of the market.

[73] The merging parties submitted that the DoT's concerns were non-merger specific. Further that there were no facts supporting the theory of harm that the merged entity would have incentives to foreclose local rivals in the refurbishment segment. The merging parties submitted that the proposed remedy was too wide-reaching and would unduly prevent the merged entity from being able to compete against its well-resourced rivals in the future.

[74] The Tribunal was of the view that preventing the merged entity from bidding could have the perverse consequence of preventing competition, by lowering competitive rivalry, among the incumbent local firms. The Tribunal, after ventilation of the DoT's concerns with the parties was persuaded that there was no basis to impose any conditions in this regard. Furthermore, the tender-based characteristic of the market would mitigate against this concern.

[16] Transcript above n 9 (18 November 2020) at p29.
[17] Transcript above n 9 (18 November 2020) at p57.

[75] The DoT proposed a second condition, asking that the Tribunal impose a restriction that the merged entity may not purchase any shareholding in South African companies within existing local companies in the rail manufacture supply chain without approval from the Competition Commission. We were not persuaded that this would be an appropriate remedy. This is because such a condition would be redundant as the merger parties would have to, in any event, notify the Commission of any mergers that meet the notification thresholds. Further, the Commission has the power to call for small merger notifications, where thresholds are not met. The Commission also submitted that market participants often bring information to its attention in markets of interest.

<u>Non-availability of certain parts and support in the signalling systems market</u>

[76] During its investigation, the Commission received a concern from Transnet. Transnet is one of the major customers in the rail industry in South Africa and whose trains were already installed with the merging parties' products. The concern was that the merger would result in the unavailability of some parts in supporting the signalling systems market.

[77] More specifically, Transnet raised concerns in relation to the availability of three products post transaction. The first concern was with respect to the availability of the AGATE control system post-merger. Where "AGATE" refers to the advanced generic Alstom traction electronics solution produced in Alstom's facility in Villeurbanne, France, comprising a suite of components which have been supplied by Alstom to [redacted] and TFR previously.

[78] The second concern related to the continued availability, supply and support for Bombardier's Ebilock interlocking product, the design and software of which are developed by Bombardier Transportation Sweden, and its hardware components are produced by various suppliers worldwide, and which is part of Bombardier's Interflo signalling solution that has been approved by TFR for application in TFR tenders.

[79] Transnet's third concern was that the merged entity will have the ability and incentive to refuse to supply [redacted] with the Alstom's Integrated Vital Processor Interlocking component, produced in Alstom's facility in Rochester, U.S.A ("iVPI interlocking system"), [redacted] Alternatively, Transnet was concerned that Alstom may have the ability and incentive to continue to offer [redacted] he iVPI interlocking system on unfavorable terms and conditions.

[80] Transnet requested the merging parties to make a commitment that these products would not be adversely impacted by the merger.

[81] While the merging parties dismissed each of Transnet's concerns for various reasons, the Commission remained concerned that if the merging parties were to discontinue the supply of these parts, this would have a significant impact on the rail sector, an important industrial sector in South Africa.

[82] In response, the merging parties made the following commitments which were then imposed as conditions to the merger. The merging parties committed to make:

82.1. AGATE available in South Africa [redacted] for twelve years from the implementation date.

82.2. Ebilock and spare parts and support available to TFR in South Africa for twelve (12) years from the implementation date.

82.3. iVPI, including spare parts and support, available to [redacted] for a period of twelve (12) years from the implementation date.

[83] During the hearing the panel probed the specific mention of [redacted] and whether this could have any unintended anti-competitive effects at the level of distribution of Alstom iVPi. The representatives of Actom and the merging parties explained that Transnet, in the case of iVPI, [redacted]

[redacted] They argued that if, by reason of this merger, [redacted] could no longer access Alstom iVPI, an effective competitor would be removed from the market reducing the number of competitors from four to three. Thus, the condition was motivated as a condition aimed at preserving and maintaining the existing *status quo* in relation to existing agreements, providing Transnet and [redacted] comfort that there will be no change brought about in relation to those contractual obligations as a result of the merger. The intention was not to limit other parties, and the condition does not prevent any other supplier concluding agreements.[18] At the time of the merger hearing, there were four such approved products. At the end of this cycle, Transnet will go out to tender again and market players will be free to tender for the next cycle.[19]

[84] During the hearing it was confirmed that the duration of the conditions was linked to the obsolescence management program because over the duration of the conditions some products will have a limited lifecycle and/or become obsolete. In those circumstances the ordinary commercial terms that govern lifecycle product management principles and obsolescence management predetermined principles that are fairly standard in the market will become operable.

[85] The Commission also requested the merging parties to provide an undertaking that they will not reduce or discontinue any existing enterprise and supplier development programmes as a result of the merger. These programmes include merging parties' existing policies or programmes aimed at prioritising procurement from small local suppliers and providing technical and training support to such suppliers and other small businesses operating in the South African rail industry. This undertaking was provided.

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[18] Transcript (6 November 2020) above n 3 at p17-20.
[19] Transcript (6 November 2020) above n 3 at p22-23.

Conclusion

[86] In light of the above, we concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in any relevant market. However, the transaction would negatively impact the public interest in that it would have an impact on a particular industrial sector or region, in particular regarding the continued availability of certain parts and support in the signalling systems market. In this regard, we are of the view that the conditions adequately address this concern. Accordingly, we approved the proposed transaction subject to the tendered conditions, attached marked "**Annexure A**".

Signed by:Yasmin Tayob Carrim
Signed at:2021-06-10 13:20:21 +02:00
Reason:Witnessing Yasmin Tayob Carri

12 March 2021

Ms Yasmin Carrim **Date**

Ms Mondo Mazwai and Prof Fiona Tregenna concurring.

Tribunal case manager:	Mpumelelo Tshabalala
Tribunal economist:	Karissa Moothoo Padayachie
For the Commission:	Zintle Siyo assisted by Mogau Aphane and Yongama Njisane
For the merging parties:	Deanne Wood assisted by Neil Mackenzie of Fasken attorneys for Alstom also instructed by Judd Lurie of Bowmans attorneys for Bombardier
For the participants:	Sybrand Nel assisted by Peter Colborne for [redacted] Mesela Nhlapo for the RRA Jan-David de Villiers for the DoT