Summary of Commission Decision

of 4 October 2016

declaring a concentration compatible with the internal market and the functioning of the EEA Agreement

(Case M.7801 — Wabtec/Faiveley Transport)

(notified under document C(2016) 6325)

(Only the English version is authentic)

(Text with EEA relevance)

(2018/C 113/07)

On 4 October 2016, the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) ([1]), *and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision, as the case may be in the form of a provisional version, can be found in English on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html*

I. **THE PARTIES**

1. Westinghouse Air Brake Technologies Corporation ('Wabtec') is a US-based international undertaking active in the manufacture and supply of railway equipment and in the provision of services in the railway sector. It is the market leader on the American continent.

2. Faiveley Transport SA ('Faiveley') is a French-based undertaking active in the manufacture and supply of integrated systems and services for the railway sector. Its activities focus on the European market.

3. Wabtec is hereinafter referred to as the 'Notifying Party' whereas Wabtec and Faiveley are collectively referred to as the 'Parties'.

II. **THE TRANSACTION**

4. The transaction consists in Wabtec acquiring within the meaning of Article 3(1)(b) of the Merger Regulation indirect sole control of the whole of Faiveley by way of purchase of shares (the 'Transaction').

III. **UNION DIMENSION**

5. The Parties have a combined aggregate worldwide turnover of more than EUR 2 500 million ([2]) (Wabtec EUR 2 292 million; Faiveley EUR 1 048 million). The combined aggregate turnover of the undertakings concerned is more than EUR 100 million and the aggregate turnover of each of them is more than EUR 25 million in each of Germany, France, Italy and the United Kingdom. Each of the undertakings concerned has a Union-wide turnover in excess of EUR 100 million (Wabtec EUR […] million; Faiveley EUR […] million) but they do not achieve more than two thirds of their aggregate Union-wide turnovers within one and the same Member State.

6. The concentration therefore has a Union dimension pursuant to Article 1(3) of the Merger Regulation.

IV. **PROCEDURE**

7. On 4 April 2016, the Commission received the notification in the case.

8. On 12 May 2016, the Commission adopted a decision pursuant to Article 6(1)(c) of the Merger Regulation, opening proceedings.

9. On 17 June 2016, the Commission adopted a decision pursuant to Article 10(3) of the Merger Regulation, extending the deadline for adopting a final decision by 20 days with agreement of the Notifying Party.

([1]) OJ L 24, 29.1.2004, p. 1.

([2]) Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

10. On 8 July 2016, the time limit for adopting a final decision was suspended in accordance with Article 10(4) of the Merger Regulation and Article 9 of Commission Regulation (EC) No 802/2004 ([1]) implementing the Merger Regulation. The suspension ended on 13 July 2016.

11. On 25 July 2016, the Notifying Party submitted commitments to the Commission ('First Commitments').

12. On 25 July 2016, the Commission launched a market test to assess whether the First Commitments were suitable to address the competition concerns identified by the Commission.

13. On 16 August 2016, the Notifying Party submitted revised commitments to the Commission ('Final Commitments').

V. **RELEVANT PRODUCT MARKETS** ([2])

a. **Original equipment market ('OEM') and independent aftermarket ('IAM')**

14. In the train industry, trade generally takes place on two levels: (i) sales to original equipment manufacturers ('OEMs'), including both rolling stock manufacturers and subsystem manufacturers; and (ii) sales in the independent aftermarket ('IAM') to train operators.

15. In line with the findings in a previous case ([3]), the Commission concluded that, since the IAM largely follows and mirrors the situation in the OEM market, it is adequate to assess the markets for train systems and subsystems at the OEM level. However, for components that need regular replacement during the life span of a train (for instance friction materials and brake discs), the Commission has assessed the IAM level separately.

b. **Pneumatic friction brake systems and their subsystems**

16. There are a number of different technical solutions to slow down or stop a train, such as friction brakes, magnetic brakes and dynamic brakes. Only friction brakes are relevant for the assessment of the Transaction.

17. In line with the findings in a previous case ([4]), the Commission concluded that the manufacture and supply of complete friction brake systems for rail vehicles constitutes a distinct market (as opposed to other types of brakes) and that a distinction can be drawn between pneumatic and hydraulic systems.

18. The Commission further concluded that the market for complete friction brake systems is likely at least differentiated between electronically controlled ('electro-pneumatic') and non-electronically controlled systems, and that it cannot be excluded that further differentiation could be made according to the type of rolling stock in question (e.g. high-speed, regional, underground etc.). The Commission did not however conclude on this question as the outcome of the competitive assessment remained the same under all alternatives.

19. In addition, the Commission concluded that separate markets exist for subsystems of pneumatic friction brake systems: (i) bogie brakes; (ii) brake controls; and (iii) air-supply units. The Commission further noted that, for brake controls, similar considerations between electronic and non-electronic brake controls would apply as for complete pneumatic friction brake systems. For bogie brakes, disc brakes ([5]) and tread brakes ([6]) likely constitute separate markets. The Commission did however not conclude on the exact product market definitions as the outcome of the competitive assessment remained the same under all alternatives.

([1]) Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1).

([2]) In addition to the markets described in this section, the Parties' activities overlap with respect to (i) train doors; (ii) energy meters; and (iii) event recorders. However, the Parties' combined market shares in train doors and energy meters in the EEA will remain below 20 % and will thus not give rise to affected markets. With respect to event recorders, the Parties' combined market share will, under one market delineation alternative, reach [20-30] % but the market share increment will remain at only [0-5] percentage points. Therefore, those markets are not discussed further in this note.

([3]) M.7538 — *Knorr-Bremse/Vossloh*, paragraph 36.

([4]) M.7538 — *Knorr-Bremse/Vossloh*, paragraph 48. The question was ultimately left open in decision.

([5]) A disc brake consists of a brake disc and a brake caliper unit, which typically combines a brake cylinder, brake rigging and a slack adjuster. A disc brake causes the brake action by pressing a friction material (called 'brake pad') against the brake disc that is mounted either on an axle of the bogie or on a wheel.

([6]) A tread brake typically consists of a brake cylinder, brake rigging, a slack adjuster and a brake shoe holder. A tread brake causes the brake action by pressing a friction material (called 'brake shoe' or 'brake block') directly against the surface of a wheel tread.

c. **Pantographs and contact strips**

20. A pantograph is the equipment used to transfer electric current from overhead lines (catenaries) to a rail-operated vehicle ([1]). On the top of the pantograph head, a contact strip is placed for the actual contact with the catenary.

21. The Commission concluded that the relevant market should be either the manufacture and supply of pantographs for all types of rolling stock, or that the market should be segmented according to the type of rolling stock in question. The market investigation showed indications that, in particular, pantographs for high-speed trains may constitute a distinct market (as opposed to, for instance pantographs for mainline and regional EMUs). The Commission did not however conclude on this question as the outcome of the competitive assessment remained the same under all alternatives.

22. In addition, the Commission concluded that a distinct market exists for contact strips.

d. **Friction materials**

23. Friction brake systems cause a train to slow down or stop by converting kinetic energy into heat. Friction materials are essential parts of such a brake system that, when pressed against a brake disc or wheel tread, provide the required friction for the conversion of the energy form.

24. Friction materials for train applications primarily come in two different compositions: organic and sintered ([2]). They also take two main shapes: brake pads for disc brakes (pressed against a brake disc) and brake shoes/blocks for tread brakes (pressed directly against a wheel tread).

25. The Commission concluded that separate product markets exist for (i) organic pads; (ii) sintered pads; (iii) organic blocks; and (iv) sintered blocks. Each of these markets should also be segmented between OEM and IAM sales. The Commission left open as to whether a market for sintered pads should be further segmented between rigid and flexible pads as well as between pucks and pads.

e. **Brake discs**

26. Brake discs are components of a mechanical bogie brake. Brake pads are pressed onto the brake discs, causing kinetic energy to transform into heat in order to slow down or stop the train.

27. The Commission concluded that brake discs constitute a distinct market. The market should also be segmented between OEM and IAM sales.

VI. **RELEVANT GEOGRAPHIC MARKETS**

28. The Commission concluded that the relevant geographic markets for all products concerned by the Transaction are EEA-wide.

VII. **ASSESSMENT**

a. **Significant impediment to effective competition**

29. The Commission has reached the conclusion that the Transaction would significantly impede effective competition in the markets for

(i) IAM sintered brake pads;

(ii) IAM sintered brake blocks

30. Effective competition in those markets would be significantly impeded by the Transaction for the following main reasons.

31. First, the Parties' combined market shares would be high: [60-70] % in sintered pads, with an increment of [10-20] percentage points, and [90-100] % in blocks, with an increment of [0-5] percentage points. The remaining competitors would be few — in practice only Federal Mogul and Knorr-Bremse — and they would be significantly smaller. Moreover, Knorr-Bremse's sales partially stem from sales of sintered materials by Wabtec to Knorr-Bremse.

([1]) In some applications, such as typically in underground trains, different technical solutions such as third rail collector shoes may be used. The Transaction only concerns overhead pantographs.

([2]) Earlier, also cast iron was extensively used but it is being replaced by sintered and organic materials due to, for instance noise regulations.

32. Second, the Parties are close competitors. They are often approved suppliers for the same rolling stock fleets and they compete fiercely for major projects. For instance, the Parties recently submitted numerous rounds of constantly decreasing prices when bidding against each other in a tender organised by the French train operator SNCF for the supply of sintered brake pads for its TGV fleet.

33. Third, suppliers of organic friction materials do not significantly constrain suppliers of sintered materials. Switching between sintered and organic friction material is rare and technically troublesome.

34. Fourth, entry barriers are high. Developing sintered friction materials requires significant investment and, as the products are key safety components of a train, they are subject to stringent regulatory requirements. Entry of new competitors post-Transaction looks unlikely.

35. Fifth, several market participants — including train operators, rolling stock manufacturers, friction material competitors and a brake system competitor — expressed concerns. They have submitted that the Transaction would result in reduced competition and increased prices in these markets.

b. **No significant impediment to effective competition**

Complete friction brake systems

36. The Parties' activities in complete friction brake systems only overlap if the potential segment of freight cars/(non-electro) pneumatic friction systems is assessed. However, the combined market share remains below 20 % and thus no affected markets arise.

37. With respect to passenger applications, the demand in the EEA consists of electro-pneumatic brake systems that have become a de facto standard in all new passenger rolling stock projects. The Parties' activities do not overlap with respect to such brake systems in the EEA as Wabtec lacks the kind of electronic brake control required in the EEA and thus cannot offer them ([1]).

38. After its phase I investigation, the Commission was nonetheless concerned that Wabtec could have been a potential entrant into the market for complete (electro-) pneumatic friction brake systems where Knorr-Bremse is currently the clear market leader (with at least [70-80] % of the market) and Faiveley is the sole competitor. Wabtec had been developing two electronic brake control systems, […] and […], and there was evidence that Wabtec had intended to launch them in the EEA. However, after the phase II investigation, the Commission concluded that its concerns were not fully substantiated and that significant impediment to effective competition could not be established according to the requisite legal standard. That was mainly for the following reasons.

39. First, Wabtec's […] product would be technically and commercially unsuitable for the EEA. The product had been developed as a US-led project without taking into account the technical requirements of the EEA-market, and it was also too […] compared to the competitors' products. Wabtec's internal documents further showed that Wabtec did not believe in the product internally.

40. Second, while […] would likely be technically and commercially more on par with the products competitors are currently selling in the EEA, it is still in early stages of development and will require significant further design effort to complete.

41. Third, contrary to the Commission's findings in phase I, technical innovation in the market is dynamic and not only incremental. During the phase II investigation, Faiveley disclosed to the Commission that it is launching a new brake control product in 2016. The product is technically and commercially significantly more advanced than Faiveley's current products. The Commission concluded that such development would make it even harder for Wabtec to enter as it would need not only to reach the current level on the market but meet the new developments of the existing competitors as well. It became likely that, for instance […] would be outdated and require significant new designing, making its entry less certain and in any event later than expected.

([1]) Wabtec offers electronic brake controls outside of the EEA, for instance in the US. However, the regulatory requirements and customer expectations are significantly different and more stringent in the EEA.

42. Fourth, suppliers of subsystems exert competitive pressure. While these suppliers cannot offer complete friction brake systems, many rolling stock manufacturers have the capability to integrate subsystems into complete friction brake systems and have used that as a negotiation tool in the past.

43. Fifth, while some market participants raised some concerns with respect to complete friction brake systems, others rather considered that the Transaction could be positive by enabling Faiveley to compete more strongly against the clear market leader Knorr-Bremse.

Friction brake subsystems

44. The Commission concluded that the Transaction would not give rise to competition concerns related to friction brake subsystems.

45. With respect to mechanical bogie brakes, the Parties' activities overlap in the supply of disc brakes where they achieve a combined market share of approximately [30-40] %. However, the other main competitors, Knorr-Bremse and Dako, remain strong. A majority of rolling stock manufactures also considered they would have adequate alternatives even post-Transaction.

46. With respect to brake controls, the Commission concluded that the same considerations as for complete (electro-) pneumatic friction brake systems apply.

47. With respect to air-supply systems, the Parties activities do not overlap in the EEA as Wabtec does not currently offer such systems. The Commission also did not find evidence of Wabtec being a potential entrant into this market.

Pantographs and contact strips

48. In pantographs, the Parties' combined market shares reach [30-40] % if looking at all types of rolling stock together. For some potential subsegments, the market share would be higher, for instance [40-50] % in high-speed trains and [60-70] % in locomotives. Nonetheless, for the following main reasons, the Commission concluded that the Transaction does not give rise to competition concerns in respect of pantographs.

49. First, the Commission concluded that market shares alone are not completely descriptive of the market participants' positions. That is, for instance due to the low number of tenders per year (particularly in high-speed trains) and the resulting volatility in the market shares. In addition, the volume of sales and thus the market shares largely depend not on the pantograph manufacturer but on the success of the train platform (standardised trains sold in series, typical for instance for locomotives) on which the pantographs are installed.

50. Second, the Parties do not appear to be very close competitors and in the majority of tenders they do not meet. They seem to be strong in pantographs for different types of rolling stock, Faiveley focussing on high-speed while Wabtec is stronger for instance in mainline.

51. Third, a number of competitors will remain (such as Schunk, Contact, Richard, EC Engineering and Sécheron). Even the smaller competitors seem motivated to and capable of developing their products further and thus increasing their presence throughout the different potential segments.

52. Fourth, rolling stock manufacturers appear to have a significant role in pantographs: They have collaborated with pantograph suppliers to develop pantographs for new trains in the past, and many of them indicated that they could start in-house production or sponsor pantograph suppliers if needed. In general, rolling stock manufacturers seem to have purchasing power.

53. Finally, the Commission notes that contact strips would not give rise to horizontal overlaps as Faiveley does not produce them. The Commission further concluded that the Transaction would not give rise to vertical concerns. This is mainly due to the fact that (i) Wabtec's market share in contact strips remains low at less than [10-20] %, indicating no ability for input foreclosure; and (ii) the Parties' already source [50-60] % of their contact strip demand from Wabtec. A number of significant suppliers would remain in the market, including Schunk as well as a number of independent suppliers with no pantograph production of their own (such as Morgan and Mersen).

Vertical links created by friction materials

54. The Transaction gives rise to vertical links between (i) the upstream supply of friction materials (OEM); and (ii) the downstream supply of brake systems (as well as bogie brakes). For the following reasons, the Commission concluded that those vertical links do not give rise to significant impediment to effective competition.

55. Concerning input foreclosure, the Commission concluded that the merged entity would neither have the ability nor incentive to foreclose, and that input foreclosure would likely not have significant detrimental effect on competition downstream.

56. In particular, the merged entity would lack the ability to foreclose its downstream competitors as the main competitor — and the only such competitor to be concerned by foreclosure — Knorr Bremse, has friction material production capacity (via its ICER joint venture) and could increase production. The Commission also noted that Knorr-Bremse has entered into an agreement with Wabtec whereby […], allowing Knorr-Bremse time to develop its own production.

57. The Commission further concluded that the merged entity would lack the incentive to engage in input foreclosure as it would unlikely be able to increase its downstream sales adequately to recoup lost upstream profits.

58. Finally, the Final Commitments — aimed at dispelling horizontal competition concerns in sintered friction materials — would also provide for a potential alternative source of supply for downstream competitors.

59. With respect to customer foreclosure, which would mainly relate to organic friction materials, the Commission concluded that the merged entity would neither have the ability or incentive to foreclose, and that customer foreclosure would likely not have significant detrimental effect on competition downstream.

60. In particular, the merged entity would lack the ability to engage in customer foreclosure as the Parties are not the most important customers of OEM friction material suppliers (the most important customer overall being Knorr-Bremse with approximately [70-80] % of the downstream market). Moreover, up to 95 % of friction materials are sold on the IAM and not on the OEM. As IAM sales appear not to be totally dependent on OEM sales, suppliers of the merged entity, such as Federal Mogul, could continue to sell to the IAM that represents an overwhelming majority of the total market. For organic materials, dual-sourcing also occurs more often and is easier than for sintered materials. Therefore, customers could counter-act any foreclosure strategy by dual-sourcing.

61. The Commission further concluded that the merged entity would lack the incentive to engage in customer foreclosure as it would likely not be able to significantly benefit from such a behaviour on the upstream (due to the strong position of Federal Mogul and the presence of other organic friction material suppliers) or downstream markets (due, among others, to the strong position of Knorr-Bremse).

Brake discs

62. The Parties' activities overlap in the supply of brake discs in the IAM in the EEA. Nonetheless, the Commission concluded that the overlap does not give rise to significant impediment to effective competition.

63. In particular, the Parties' combined market share remains modest ([30-40] %) and a number of alternative competitors, such as Ibre and Kovis, will remain on the market. A majority of train operators also indicated that they would continue to have adequate alternative suppliers post-Transaction.

VIII. **COMMITMENTS**

a. **Description of the Final Commitments**

64. In order to address the aforementioned competition concerns in the markets for sintered friction pads and blocks/shoes in the EEA, the Notifying Party submitted Final Commitments on 16 August 2016. The Final Commitments included modifications to take account of the results of the market test the Commission conducted on the First Commitments.

65. In the Final Commitments, the Notifying Party proposes to divest Faiveley's entire friction material business, Faiveley Transport Gennevilliers ('FTG'), to a suitable purchaser ('Divestment Business'). FTG is the previous Carbon Lorraine business that Faiveley acquired in 2008.

66. The Divestment Business will include all tangible and intangible assets of FTG and its entire personnel. Sales relationships currently handled through other subsidiaries of Faiveley will be transferred to FTG, and the merged entity will, for an interim period, refer to the Divestment Business customer requests for friction materials that are currently produced by FTG. The merged entity will also sub-contract to the Divestment Business a part of the volume for the supply of TGV brake pads that Wabtec supplies to SNCF after winning a tender against Faiveley recently (subject to SNCF's agreement).

67. The Notifying Party further commits to ensure that: (i) at the purchaser's option, the purchaser will be able to acquire the intra-group debt of FTG at a set maximum price; (ii) the sale and purchase agreement will include an incentive scheme to incentivise the purchaser to make investments in the Divestment Business; and (iii) the purchaser will have an ability to sell internationally to railway industry customers.

b. **Assessment of the Final Commitments**

68. The Commission concluded that the Final Commitments are adequate and suitable to remove the competition concerns identified by the Commission. In particular, the commitments will remove all overlap between the Parties in the supply of sintered brake pads and blocks/shoes.

69. The Final Commitments include adequate measures to take into account the feedback received in the market test on the First Commitments. Notably, measures are included to (i) enhance the Divestment Business' capital structure by transferring to the purchaser at advantageous terms all intra-group debt currently owed by FTG to Faiveley; (ii) correctly incentivise the purchaser to invest in the Divestment Business; and (iii) require that the Divestment Business be purchased by someone that will have adequate access to international railway customers.

70. Finally, the Commission noted that the Divestment Business had been a viable competitor in the sintered friction materials market prior to its vertical integration with Faiveley. Therefore the Commission considered the Divestment Business can be a viable standalone business without being vertically integrated, and will continue to exert the same level of competitive pressure on the sintered friction materials market after the Transaction.

71. In its draft decision, the Commission has, therefore, reached the conclusion that the Transaction, as modified by the Final Commitments submitted by the Notifying Party, would not lead to significant impediment to effective competition with respect to the production and supply of sintered brake pads or blocks/shoes.

IX. **CONCLUSION AND PROPOSAL**

72. The draft concludes that, subject to full compliance with the Final Commitments, the proposed concentration would not significantly impede effective competition in the internal market or in a substantial part of it. Consequently, the concentration should be declared compatible with the internal market and the EEA Agreement, in accordance with Articles 2(2) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement.