

## Statement of Preliminary Issues

### EROAD / Coretex

9 September 2021

#### Introduction

1. On 24 August 2021, we registered an application from EROAD Limited (EROAD) seeking clearance to acquire all of the shares in Coretex Limited (Coretex) (the Proposed Acquisition).<sup>1</sup>
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.<sup>2</sup>
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 close of business on **23 September 2021**.
5. The Commission acknowledges that some interested parties may face challenges during some COVID-19 alert levels. This may impact their ability to submit within these timeframes. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) so that we can work with you to accommodate your needs where possible.

#### The parties

6. EROAD and Coretex both provide vehicle telematics solutions to customers in New Zealand, as well as in Australia and the United States. Vehicle telematics solutions allow commercial fleet owners to analyse and manage how their vehicles and drivers are performing.

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

<sup>2</sup> 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.

7. In New Zealand, EROAD provides vehicle telematics solutions to approximately 91,000 connected vehicles.<sup>3</sup> In terms of hardware, EROAD's Ehubo is an in-vehicle device that records, stores and transmits data via cellular networks.<sup>4</sup> EROAD also supplies other devices, including a dashcam, distance recorders and tracking devices.<sup>5</sup>
8. In terms of software, EROAD offers functionality for compliance and driver safety (including monitoring driver behaviour and speed), and asset tracking and management.<sup>6</sup> EROAD also offers a software solution that automates the management and payment of road user charges (eRUC).<sup>7</sup>
9. Coretex also provides vehicle telematics solutions in New Zealand.<sup>8</sup> Coretex's hardware solutions include an in-cab dongle and asset tracking devices.<sup>9</sup> Like EROAD, Coretex offers functionality for compliance and driver safety, and asset tracking and management. As with EROAD, Coretex offers an eRUC solution within its software suite. Coretex's solutions also include sensor and control functions that are used in sectors such as the food safety/refrigeration, construction and waste.

## Our framework

10. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>10</sup> As required by the Commerce Act 1986 (the Act), we assess mergers and acquisitions using the substantial lessening of competition test.
11. 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

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<sup>3</sup> The Application at [48].

<sup>4</sup> The Application at [50]; vehicle information gathered by the hardware solutions is processed by EROAD's server and made available to customers.

<sup>5</sup> These include: Clarity Dashcam, a dashcam that records and stores drive-time footage; Tubo, an electronic distance recorder for heavy vehicle trailers; EhuboLite, an electronic distance recorder for light diesel vehicles; Elocate, a tracking solution for vehicle and machinery not requiring road user charges; EROAD Where, an asset tracking solution to improve asset utilisation; and, ETrack Wired, a tracking and management solution for powered assets and equipment which do not require an in-cab device. The Application at [52].

<sup>6</sup> The Application at [49].

<sup>7</sup> Road User Charge (RUC) is a charge levied by Waka Kotahi on all heavy vehicles (>3500kg) and light vehicles that use diesel or other fuel not taxed at source. RUC charges are calculated based on type and weight of the vehicle and charged as a rate per 1000km travelled. All vehicles liable to pay RUC must be fitted with a tracking device. Paper RUC licences can be obtained from Waka Kotahi and through agents. They can also be purchased electronically through suppliers such as EROAD and Coretex. Electronic solutions such as those offered by EROAD and Coretex are referred to as eRUC.

<sup>8</sup> The Application at [67] – [68].

<sup>9</sup> Vehicle information gathered by the hardware solutions is processed by Coretex and made available to customers.

<sup>10</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

acquisition, often referred to as the counterfactual).<sup>11</sup> This allows us to assess the degree by which the Proposed Acquisition might lessen competition.

12. 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:
  - 12.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
  - 12.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
  - 12.3 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**

13. 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 Act, as a matter of fact and commercial common sense.<sup>12</sup>
14. EROAD submitted that the relevant market definition is the market for the supply of vehicle telematics in New Zealand.<sup>13</sup> However, as both EROAD and Coretex supply vehicle telematics in New Zealand, Australia, and North America, EROAD submitted that the market is arguably Australasian or global in scope.<sup>14</sup>
15. We will consider whether the most appropriate market for assessing the Proposed Acquisition is that suggested by EROAD, or whether the impact of the transaction is better assessed with reference to other markets. For example, we will consider:
  - 15.1 whether the Proposed Acquisition is better analysed by reference to narrower product markets, eg, based on:
    - 15.1.1 product features (such as eRUC);
    - 15.1.2 customer sectors (such as refrigerated transport, construction);
    - 15.1.3 other customer segments (such as small versus large companies or light versus heavy vehicles); and

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<sup>11</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>12</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>13</sup> The Application at [84].

<sup>14</sup> The Application at [86].

- 15.2 the degree of constraint that overseas rivals or potential rivals in neighbouring markets (telecommunication companies, ERP software platforms, vehicle manufacturers) impose on competitors in New Zealand.

### **Without the acquisition**

16. We will consider what the Parties would do if the Proposed Acquisition does not go ahead, as well as the likely competitive position of each. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo or an alternative without-the-acquisition scenario. For example, we will consider whether Coretex may become a weaker or stronger competitor absent the Proposed Acquisition.

### **Preliminary issues**

17. We will consider whether the Proposed Acquisition would be likely to substantially lessen competition in any relevant market(s) by assessing whether horizontal unilateral, coordinated effects, and/or vertical/conglomerate effects might result from the Proposed Acquisition. The questions that we will be focusing on are:
- 17.1 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?<sup>15</sup>
- 17.2 Coordinated effects: would the Proposed Acquisition change the conditions in the relevant market(s) so that coordination is more likely, more complete or more sustainable?
- 17.3 Vertical/conglomerate effects: would the Proposed Acquisition increase the merged entity's ability and/or incentive to engage in conduct that prevents or inhibits rivals from competing?

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

18. Unilateral effects can arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses.<sup>16</sup>

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<sup>15</sup> 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, innovation, range or any other element of competition (ie, it could increase quality-adjusted prices).

<sup>16</sup> As noted earlier, the form of harm could extend beyond price increases. Competitive harm from the Proposed Acquisition (should it occur) could result in higher prices, less innovation and/or a reduction in the range of products. For example, the merged entity might reduce the supply of Coretex's specialist solutions used in sectors such as the food safety/refrigeration, construction and waste sectors. This could reduce consumers' range and reduce competition in specialist product markets and customer verticals.

19. EROAD submitted that the Proposed Acquisition would not have, or be likely to have, the effect of substantially lessening competition in:<sup>17</sup>
- 19.1 the market for vehicle telematics in either Australasia or New Zealand; or
  - 19.2 any narrower markets for the supply of vehicle telematics to customers (eg, a market for providing electronic logbooks or a market for eRUC solutions).
20. EROAD submitted that the Proposed Acquisition would not give EROAD any greater influence or power over its competitors such that it could increase retail price of vehicle telematics. EROAD considered this to be primarily because:<sup>18</sup>
- 20.1 the increment to EROAD's market share as a result of the Proposed Acquisition is low;
  - 20.2 the parties face strong competition from a range of suppliers active in the supply of vehicle telematics in New Zealand, with a growing number of global competitors increasing their presence in New Zealand;
  - 20.3 Coretex is not a significant competitive constraint in the New Zealand market as a result of its decision to prioritise overseas opportunities; and
  - 20.4 EROAD and Coretex are not close competitors (even if narrower market definitions are adopted).
21. We will consider:
- 21.1 the degree of competitive constraint that EROAD and Coretex impose upon one another. To the extent that any constraint is material, we will assess the extent to which the lost competition between the merging parties could be replaced by rival competitors;
  - 21.2 the degree of constraint that existing competitors would impose on the merged entity;
  - 21.3 how easily rivals could enter and/or expand in response to a price increase by the merged entity in any relevant market, and whether any entry and/or expansion is likely to occur in a timely manner; and
  - 21.4 whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

**Coordinated effects: would the Proposed Acquisition make coordination more likely?**

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

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<sup>17</sup> The Application at [128].

<sup>18</sup> The Application at [128] – [128.6].

increase across the market. Unlike a substantial lessening of competition through unilateral effects, which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.

23. EROAD submitted that the Proposed Acquisition will not, and will not be likely to, enhance the ability of the merged entity to coordinate its activities with its rivals.<sup>19</sup> EROAD submitted that the relevant market is not vulnerable to coordination, and this would not likely change following the Proposed Acquisition because:<sup>20</sup>
- 23.1 a number of strong and innovative competitors would remain following the Proposed Acquisition;
  - 23.2 there are few barriers to entry or expansion, and a number of international telematics providers that could readily enter the New Zealand market and disrupt any potential coordination;
  - 23.3 telematics features/functions are highly differentiated and therefore not amenable to coordination;
  - 23.4 the telematics industry is characterised by innovation and technological developments; and
  - 23.5 the Proposed Acquisition will not increase the merged entity's visibility of the other players' competitive positions.
24. We will assess whether the Proposed Acquisition would change the conditions in the relevant market(s) so that coordination is more likely, more complete or more sustainable, and in particular whether:
- 24.1 there are factors that make the relevant market(s) vulnerable to coordination; and
  - 24.2 the merger is likely to change conditions so that coordination is more likely, including whether one or both of the parties are currently acting as a destabilising competitor.

**Vertical and conglomerate effects: would the merged entity be able to foreclose rivals?**

25. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively (which we refer to as "foreclosing rivals").

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<sup>19</sup> The Application at [217].

<sup>20</sup> The Application at [217] – [217.5].

26. EROAD submitted that the Proposed Acquisition will result in no vertical integration.<sup>21</sup> We will assess whether the Proposed Acquisition would be likely to give the merged entity the ability and incentive to foreclose rivals (known as “vertical effects”) for the supply of telematic devices or adjacent markets.<sup>22</sup> In particular, we will consider whether:
- 26.1 the merged entity would have control over an important input;
  - 26.2 the merged entity would have the incentive to impede its rivals by refusing to supply the input or only supplying at a higher price; and
  - 26.3 such behaviour would substantially lessen competition.
27. We will also assess whether the merged entity is likely to bundle (ie, provide together at a discount) or tie (ie, only provide one service with another) complementary products, so that competitors are unable to provide a competitive constraint on the merged entity (known as “conglomerate effects”). As part of our assessment of the conglomerate effects of the merger, we will consider:
- 27.1 whether the merged entity would have the ability to foreclose, through having market power for at least one complementary product;
  - 27.2 whether the merged entity would have the incentive to foreclose, through earning additional profit from the strategy; and
  - 27.3 whether the competition lost from the foreclosed competitors is sufficient to have the likely effect of substantially lessening competition.

### Next steps in our investigation

28. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **19 October 2021**. However, this date may change as our investigation progresses.<sup>23</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
29. 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

30. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference “EROAD / Coretex” in the subject line of your email, or by mail to

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<sup>21</sup> The Application at [128.6].

<sup>22</sup> For example, the merged entity could reduce competitors’ ability to compete for additional services such as analysis and insights of the data collected from vehicle telematics.

<sup>23</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **23 September 2021**.

31. 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.
32. 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.