ISBN 978-1-869459-39-0

Statement of Preliminary Issues

Cargotec Corporation / Konecranes Plc

1 October 2021

Introduction

1. On 7 September 2021, the Commerce Commission registered an application (the Application) from Cargotec Corporation (Cargotec) for clearance to merge with Konecranes Plc (Konecranes) (the Proposed Transaction).[1] The Proposed Transaction forms part of a global transaction which is currently being considered by a number of other competition agencies.[2]

2. The Commission will give clearance if it is satisfied that the Proposed Transaction 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.[3]

4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Transaction. We request that parties who wish to make a submission do so by close of business on **15 October 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 so that we can work with you to accommodate your needs where possible.

The parties

6. Cargotec and Konecranes (the Parties) both globally supply container handling equipment (CHE) and are also active in the development and sale of software for

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

[2] For example, the Australian Competition and Consumer Commission, the European Commission, the US Department of Justice and the UK Competition and Markets Authority.

[3] 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.

port logistics (Terminal Operating System, or TOS) and for equipment automation (Equipment Control System, or ECS).

7. Cargotec supplies products in three main areas:

   7.1 CHE and automated terminal equipment (eg, cranes, terminal tractors, straddle carriers and forklifts);

   7.2 on-road load handling equipment (eg, truck-mounted cranes); and

   7.3 maritime equipment (ie, equipment, spare parts and related services for merchant cargo and passenger ships, offshore oil, gas and renewables sites, fishery, research and marine sites and ships, and naval logistics and operations).

8. Cargotec operates its New Zealand business through its wholly owned subsidiary, Kalmar New Zealand Limited.

9. Konecranes specialises in the provision of lifting equipment, including cranes, terminal tractors, shuttle carriers, straddle carriers, container handlers and forklifts. In New Zealand, Konecranes sells equipment through its wholly owned Australian subsidiary, its German and Finnish offices, and a New Zealand-based distributor, Port Solutions Limited.

Our framework

10. Our approach to analysing the competition effects of the Proposed Transaction is based on the principles set out in our Mergers and Acquisitions Guidelines.[4] As required by the Commerce Act 1986 (Commerce 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 acquisition, often referred to as the counterfactual).[5] This allows us to assess the degree by which the Proposed Transaction might lessen competition.

12. If the lessening of competition as a result of the Proposed Transaction 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 post-Transaction;

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

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

12.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased post-Transaction; and

12.3 the countervailing market power of buyers – the potential constraint on a business from purchasers' abilities 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 a proposed acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.[6]

14. The Parties submit that the markets relevant to our assessment are those in which the Parties both made sales to New Zealand customers between 2017 and 2020, namely:[7]

14.1 the supply of straddle carriers in New Zealand; and

14.2 the supply of mobile equipment (specifically, empty container handlers and forklifts) in New Zealand.

15. In addition to the above, Cargotec also supplies 'spreaders'. A spreader is a piece of CHE that can be mounted on cranes and mobile equipment and used to grip containers.

16. The Parties do not consider the supply of spreaders to be a relevant market. Although Cargotec offers spreaders to third parties in New Zealand (via a wholly-owned subsidiary, Bromma), the Parties are aware of only one instance in the 2017-2020 period where Konecranes sold equipment in New Zealand that included a Bromma spreader.[8]

17. Similarly, Cargotec asserts that, while the parties both provide spare parts and software to third parties, these are only sold in conjunction with the Parties' own equipment.[9]

18. As discussed below, we will be considering whether the Proposed Transaction could give rise to vertical effects in relation to the supply of spreaders, parts or software.

6 Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].
7 The Application at [97], [113].
8 The Application at Appendix 2 [2.4].
9 The Application at [72].

19. The Parties submit that the supply of CHE has many characteristics that strongly point towards defining global markets, including:[10]

    19.1 many major suppliers of mobile and/or horizontal transport equipment supply CHE to customers around the world;

    19.2 CHE is often produced in a limited number of production facilities and is shipped across countries and continents;

    19.3 global expansion is common and has been achieved by many suppliers; and

    19.4 transport costs are not an obstacle to inter-continental shipments.

20. We will consider whether the product markets proposed by the Parties are appropriate, or whether other relevant markets are impacted by the Proposed Transaction, including:

    20.1 whether there is any overlap (either actual or potential) between the Parties in other areas or types of equipment such as gantry cranes, quay cranes, parts, servicing, software or ECS/TOS;

    20.2 whether it is appropriate to consider automated equipment separately from manually operated equipment; and

    20.3 whether, absent the Proposed Transaction, the Parties would be likely to introduce other products into New Zealand.

Without the transaction

21. The Parties submit that the relevant without the merger scenario is the status quo (ie, that Konecranes and Cargotec will continue to operate as two independent businesses).[11]

22. We will consider what the Parties would do if the Proposed Transaction 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.

Preliminary issues

23. We will investigate whether the Proposed Transaction would be likely to substantially lessen competition in the relevant market(s) by assessing whether horizontal unilateral, coordinated and/or vertical effects might result. The questions we will be focusing on are set out below.

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[10] The Application at [128] to [129].
[11] The Application at [131].

23.1 *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?[12]

23.2 *Coordinated effects* – would the Proposed Transaction change the conditions in the relevant market(s) so that coordination is more likely, more complete or more sustainable?

23.3 *Vertical effects* – would the Proposed Transaction 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?

24. Unilateral effects 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.

25. The Parties submitted that the Proposed Transaction will not cause a substantial lessening of competition (SLC) in the straddle carrier market because:[13]

25.1 despite being a historically concentrated market, the Parties face significant and growing competition from Chinese suppliers, such as ZPMC, and other original equipment manufacturers like Liebherr. Consequently, historic market shares are not an adequate proxy for the Parties' and their competitors' current and future market positions;

25.2 customers exercise significant buyer power and can easily switch between suppliers;

25.3 there are no insurmountable barriers to market entry and expansion (as recently and notably shown with Liebherr and ZPMC). There are several players who already supply straddle carriers regionally, or who are active in neighbouring CHE and heavy machinery markets, who are well placed to enter and expand (such as Sany, XCMG and Suzhou Dafang); and

25.4 competition from other equipment types constrains suppliers of straddle carriers.

26. The Parties also submitted that the Proposed Transaction will not cause an SLC in the mobile equipment market because:[14]

12 For ease of reference, we only refer to the ability of the merged entity to "raise prices". This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, ie it could increase quality-adjusted prices.

13 The Application at [136].

14 The Application at [173].

26.1 there are many established players that currently provide mobile equipment (eg, Hyster and Sany);

26.2 global competition has increased in recent years due to the rapid expansion of Chinese players, which have a highly competitive cost position and are able to undercut other suppliers (including the Parties) for any mobile equipment type;

26.3 strong and sophisticated customers exercise significant countervailing buyer power; and

26.4 barriers to market entry and expansion are low, and there is supply side substitutability between various types of mobile equipment.

27. We will consider:

27.1 existing competition – the degree of constraint that existing competitors (such as ZPMC and Liebherr) would impose on the merged entity;

27.2 entry and expansion – whether competitors are likely to enter or expand on a sufficient scale and within a reasonable time period, such that they would constrain the merged entity; and

27.3 switching costs and aftermarkets – whether increased automation would make it difficult for customers to purchase from multiple container handling equipment providers or switch between them, and whether this could have any effect on any aftermarkets (eg, for parts or servicing).

Coordinated effects: would the Proposed Transaction make coordination more likely?

28. A transaction can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition 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.[15]

29. The Parties submitted that the Proposed Transaction will not result in coordinated effects as it does not enhance the ability for the Parties and other competitors to coordinate their behaviour, and that the market is not vulnerable to coordination. In particular, the Parties submitted that:[16]

29.1 a number of strong and innovative competitors will remain post-Transaction in the relevant markets;

[15] *Mergers and Acquisitions Guidelines* above n 5 at [3.84].
[16] The Application at [216] to [217].

29.2 expected new entry by Chinese competitors (as well as others), driven by low barriers to entry and expansion, will significantly disrupt any hypothetical coordination; and

29.3 in relation to straddle carriers specifically, market participants differ significantly in size and cost structure and supply is characterised by lumpy, infrequent sales, typically by tender.

30. We will assess whether any of the relevant markets are vulnerable to coordination, and whether the Proposed Transaction would change conditions so that coordination is more likely, more complete, or more sustainable. Factors we will consider include:

30.1 the number and strength of rivals providing competitive services in the relevant market post-Transaction;

30.2 whether the Proposed Transaction removes an aggressive or destabilising competitor;

30.3 how similar competitors are in terms of size and cost structure; and

30.4 entry and expansion conditions.

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

31. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in an SLC due to vertical (or conglomerate) effects. This can occur where a merger gives the merged entity a greater ability and/or incentive to engage in conduct that prevents or hinders rivals form competing effectively (which we refer to as “foreclosing competitors”).

32. As noted above, Cargotec has in the past supplied Konecranes with spreaders, which Konecranes has used in the manufacture of some of its cranes. In addition to spreaders, both Cargotec and Konecranes provide parts and/or software to third parties.

33. As noted above, Cargotec asserts that these spare parts and software are only sold in conjunction with the Parties’ own equipment,[17] and that sales of Cargotec spreaders (including to Konecranes) are minimal, with only four sold in the last five years in New Zealand.[18]

34. We will consider the extent to which the Proposed Transaction is likely to give rise to vertical effects through the restricted supply of key inputs such as spreaders, software and related spare parts.

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[17] The Application at [72].

[18] The Application at Appendix 2, [2.4].

Next steps in our investigation

35. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Transaction by **3 November 2021**. However, this date may change as our investigation progresses.[19] In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.

36. 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

37. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Cargotec / Konecranes" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **15 October 2021**.

38. 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.

39. 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 under the OIA to withhold certain information contained in a submission, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

[19] 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.