

Statement of Preliminary Issues

Lineage Logistics/Cold Storage Nelson

24 March 2022

Introduction

1. On 4 March 2022, the Commerce Commission registered an application (the Application) from Lineage Logistics New Zealand (Lineage) seeking clearance to acquire up to 100% of the shares in, or the assets of, Cold Storage Nelson Limited (CSN) (the Proposed Acquisition).¹
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.²
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 **7 April 2022**.
5. 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. Lineage and CSN (each a Party and together, the Parties) both supply cold storage services (including frozen and chilled storage, blast freezing,³ and various ancillary services⁴) in various locations in New Zealand. These services are used for temperature-sensitive products such as dairy, seafood, meat and frozen vegetables

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 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.

³ Blast freezing is the process of freezing fresh product very quickly by 'blasting' freezing air through it (the Application at [10.6]).

⁴ Such as transport and handling services, picking and packing service and wrapping and labelling services (the Application at [10.7]).

which require cold storage before they are exported, after they are imported, or before they are distributed domestically.⁵

7. Lineage is the New Zealand subsidiary of Lineage Logistics Holdings, LLC, a global cold storage and logistics company headquartered in the United States.⁶ Lineage entered New Zealand via its acquisition of Emergent Cold in 2020. Lineage operates in the Auckland, Waikato/Bay of Plenty, Hawke's Bay, Canterbury and Otago regions.⁷
8. CSN is a privately held New Zealand cold storage and logistics company based in Nelson, with operations in the Waikato/Bay of Plenty, Tasman and Canterbury regions.⁸
9. Lineage has submitted that the Proposed Acquisition represents an opportunity for it to acquire a complementary cold store network in New Zealand, in line with its wish to expand its infrastructure and improve what it can offer customers.⁹

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.¹⁰ As required by the Commerce Act 1986, 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).¹¹ 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

⁵ The Application at [1.2] and [10.2].

⁶ The Application at [2.1].

⁷ The Application at [2.3].

⁸ The Application at [3.3].

⁹ The Application at [5.1]-[5.2].

¹⁰ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz.

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

- 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 Commerce Act, as a matter of fact and commercial common sense.¹²
14. In the Application, Lineage submitted that the relevant product market for the purposes of assessing the Proposed Acquisition is the supply of ‘cold storage services’.¹³ This includes all types of customers and all services including frozen storage, chilled storage, blast freezing and other ancillary services.¹⁴
15. Lineage submitted that the relevant geographic market is regional and that the regions relevant to the Proposed Acquisition are:¹⁵
- 15.1 Waikato/Bay of Plenty, having regard to the products stored ultimately transiting via the Port of Tauranga; and
- 15.2 Canterbury (including Timaru), having regard to the products stored ultimately transiting via Lyttleton Port and the Port of Timaru.
16. We will consider whether these are the most appropriate markets for assessing the competitive effects of the Proposed Acquisition, or whether its impact is better assessed with reference to other markets. For example, we will consider whether:
- 16.1 there are specific customer markets, for example:
- 16.1.1 separate markets for customers of different sizes or those who procure cold storage services on a national basis rather than regionally; and/or
- 16.1.2 separate markets for customers that supply certain types of products, if their requirements differ from other customers (for example, products requiring special handling or colder temperatures);
- 16.2 there are separate markets for individual cold storage services eg blast freezing; and,
- 16.3 the relevant geographic markets could be defined:

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

¹³ The Application at [14.1].

¹⁴ The Application at [14.2].

¹⁵ The Application at [14.3]-[14.4].

16.3.1 more narrowly (for example, distinct Christchurch and Timaru geographic markets or markets based on proximity to a port); and/or

16.3.2 more broadly (for example, a geographic market that includes Auckland as well as the Waikato/Bay of Plenty region).

Without the acquisition

17. We will consider what the Parties would do if the Proposed Acquisition did not go ahead, as well as the competitive position of each Party. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the counterfactual submitted by the Parties or an alternative without-the-acquisition scenario.

Preliminary issues

18. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant markets by assessing whether horizontal unilateral, coordinated, vertical or conglomerate effects might result from the Proposed Acquisition.

19. The questions that we will be focusing on are:

19.1 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?¹⁶

19.2 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?

19.3 vertical or conglomerate effects: would the Proposed Acquisition increase the merged entity's ability and/or incentive to foreclose rivals?

20. There are currently significant issues affecting the global supply chain largely as a result of the ongoing effects of the COVID-19 pandemic. In assessing the likely effect of the Proposed Acquisition, we will have regard to how these issues may affect competition in the relevant markets.

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

21. 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

¹⁶ 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 or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses.

22. The Parties currently overlap in the supply of cold storage services in the Waikato/Bay of Plenty and Canterbury regions.

Waikato/Bay of Plenty region

23. In the Application, Lineage submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the Waikato/Bay of Plenty regional market due to unilateral effects because:¹⁷

23.1 CSN does not currently provide a substantial competitive constraint on Lineage or other cold storage providers in the region;

23.2 the merged entity will face strong competition from multiple existing competitors;

23.3 the merged entity will face substantial constraint from the threat of new entry;

23.4 land is available for entry and expansion; and

23.5 the Port of Tauranga is highly incentivised to keep the supply chain competitive and cost efficient for its customers and Lineage anticipates it would apply pressure to reduce prices or assist customers to find alternatives if prices were increased by the merged entity.

Canterbury region

24. In the Application, Lineage submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the Canterbury regional market due to unilateral effects because:¹⁸

24.1 the transaction would result in minimal market share aggregation in the region;

24.2 the merged entity will face strong competition from multiple competitors; and

24.3 the merged entity will face substantial competitive constraint from the threat of new entry in the region.

¹⁷ The Application at [16.1]-[16.22].

¹⁸ The Application at [16.23]-[16.31].

Competitive constraints present in both regions

25. Lineage also submitted that the Proposed Acquisition would not be likely to substantially lessen competition in either the Waikato/Bay of Plenty or Canterbury regional markets due to unilateral effects because:¹⁹
- 25.1 customers have other options and strong countervailing power;
 - 25.2 customers can self-supply their cold storage needs; and
 - 25.3 multi-site customers can constrain attempts to exercise localised market power.
26. We will consider:
- 26.1 closeness of competition: the degree of constraint that Lineage and CSN impose upon one another. To the extent that any constraint is material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors;
 - 26.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;
 - 26.3 entry and expansion: how easily rivals could enter and/or expand;
 - 26.4 countervailing power: whether customers have special characteristics that would enable them to resist a price increase by the merged entity.
27. Aside from the overlap regions, Lineage operates facilities in the Auckland, Hawke's Bay and Otago regions and CSN operates two facilities in the Tasman region. We will consider whether the Parties may impose a constraint one another in those regions through the threat of entry.

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

28. An acquisition 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.²⁰
29. In the Application, Lineage submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the relevant markets due to coordinated effects because:²¹

¹⁹ The Application at [17.1]-[17.6].

²⁰ *Mergers and Acquisitions Guidelines* above n10 at [3.84].

²¹ The Application at [18.1]-[18.2].

- 29.1 prices are not transparent;
 - 29.2 the relevant markets consist of competitors of many different sizes, including global, regional and local players, with different cost basis and margin requirements;
 - 29.3 the Proposed Acquisition will not result in the removal of a maverick competitor; and
 - 29.4 the relevant markets are characterised by strong customers with a substantial degree of countervailing power.
30. We will assess whether any of the relevant market/s are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable.

Vertical or conglomerate 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 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.
- 32. In the Application, Lineage submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the supply of cold storage services because there are no relevant vertical or conglomerate relationships between the Parties.²²
- 33. We will assess whether any vertical or conglomerate effects might arise from the Proposed Acquisition.

Next steps in our investigation

- 34. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **4 May 2022**. However, this date may change as our investigation progresses.²³ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
- 35. 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

- 36. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Lineage/CSN" in the subject line of your email, or by mail to The

²² The Application at [19.1].

²³ 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.

Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **7 April 2022**.

37. 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.
38. 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.