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# Statement of Preliminary Issues

## EBOS / LifeHealthcare

**14 February 2022**

## Introduction

1. On 20 January 2022, the Commerce Commission registered an application (the Application) from EBOS Medical Devices Australia Pty Limited (EBOS or the Applicant) seeking clearance to acquire the New Zealand LifeHealthcare business (LifeHealthcare) (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 **28 February 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. EBOS is a distributor of human healthcare and animal care products in New Zealand and Australia, including a range of surgical supplies and medical devices used in orthopaedic surgery, spinal surgery and neurosurgery. In New Zealand, EBOS supplies its spinal equipment through its subsidiary, Pioneer.

7. LifeHealthcare is also a distributor of medical devices in New Zealand and Australia, including devices used in orthopaedic surgery, spinal surgery and neurosurgery. LifeHealthcare is part of the Pacific Health Group.

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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/. The Proposed Acquisition is part of a wider transaction across Asia-Pacific taking place by share sale, whereby EBOS will acquire 100% of the shares in Pacific Health Supplies TopCo1 Pty Limited, the ultimate holding company of LifeHealthcare.

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.

## Our framework

8. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.[3] As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.

9. 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).[4] This allows us to assess the degree by which the Proposed Acquisition might lessen competition.

10. 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:

    10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;

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

    10.3 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

11. 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 1986, as a matter of fact and commercial common sense.[5]

12. The Applicant submitted that the merging parties overlap in the supply of spinal medical devices and spinal biologics.[6]

    12.1 Spinal devices are specialised medical devices used in spinal surgery and include posterior and lateral spinal cages, spinal discs, bone screws and navigation aids.[7]

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

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

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

6 The Application at [70]. See the Attachment for more detail.

7 The Application at Appendix 3.

12.2 Spinal biologics are materials used, in conjunction with spinal devices, to assist in bone growth and include autografts and allografts using human and/or synthetic material.[8]

12.3 Spinal device and biologics are used by specialised spinal surgeons in both the public and private health system.

13. Both EBOS and LifeHealthcare supply devices used in orthopaedic surgery. The Applicant considers there is no relevant overlap in the supply of orthopaedic devices because the merging parties do not distribute any equivalent orthopaedic devices that would be used in the same procedure.[9]

14. EBOS submits that the relevant market is the national market for the import and distribution of spinal medical devices and spinal biologics.[10] It considers that spinal devices and biologics are in the same product market because:

14.1 suppliers of spinal devices and spinal biologics compete with one another to supply a full range of specialised equipment used in spinal surgery;[11] and

14.2 spinal surgeons require specialised spinal devices and biologics and so do not use equipment designed for use in another therapeutic area.[12]

15. We will consider whether this is the most appropriate market for assessing the competition effects of the Proposed Acquisition. In particular, we will consider whether:

15.1 there are separate product markets for spinal devices and spinal biologics;

15.2 there are separate product markets for particular types of spinal devices and spinal biologic product types;

15.3 different types of medical devices and biologics could be considered substitutes on both the demand and supply side; or

15.4 the product market(s) should be defined more broadly to include other products supplied by the merging parties (for example, bone screws and navigation aids used in orthopaedic surgery).[13]

16. We will also assess whether there are any other relevant markets affected by the Proposed Acquisition, such as the supply of orthopaedic devices.[14]

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8 The Application at Appendix 3.
9 The Application at [71].
10 The Application at [74].
11 The Application at [75].
12 The Application at [76-77].
13 Orthopaedic surgery is surgery focusing on the musculoskeletal system (ie, hips, ankles, knees and wrists).
14 An 'orthopaedic device' is any medical device that is used in the course of orthopaedic surgery.

17. At present no spinal devices or spinal biologics are manufactured in New Zealand. Rather, products are supplied to customers in New Zealand either directly by the original equipment manufacturers (OEMs), or via wholesalers such as EBOS and LifeHealthcare that have entered into supply arrangements with OEMs. We will consider the relevant functional level for any relevant products and the extent to which wholesalers compete with OEMs and/or other wholesalers in New Zealand.

18. Finally, we will also consider the relevant customer dimension and whether the Pharmaceutical Management Agency (PHARMAC), which purchases medical equipment on behalf of local District Health Boards, has special characteristics that mean it might have different alternatives to customers in the private health systems.

## Without the acquisition

19. We will consider what the merging parties would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or whether the Parties would seek alternative options, for example, finding a different buyer for LifeHealthcare.

20. As part of this, we will investigate whether, absent the Proposed Acquisition, either of the merging parties would be likely to enter other relevant markets, in competition with each other.

## Preliminary issues

21. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral, coordinated or vertical/conglomerate effects might result from the Proposed Acquisition. The questions that we will be focusing on are:

    21.1 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?;[15]

    21.2 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?; and

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

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

22. 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

[15] 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, ie, 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.

23. In the Application, EBOS submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the national market for the import and distribution of spinal medical devices and spinal biologics due to unilateral effects because:[16]

    23.1 the merged entity would face significant existing competition from both OEMs and other distributors;

    23.2 entry is a relatively straightforward process as shown by Pioneer's recent entry and expansion and suppliers are able to easily "poach" sales staff (who have existing relationships with surgeons, and technical knowledge) from other competitors;[17]

    23.3 PHARMAC and/or surgeons have the ability to constrain prices in both the public and private sector; and

    23.4 it is not uncommon for OEMs to supply some of their product range direct-to-market, even where they have relationships with distributors for other products, meaning that they could bypass the merged entity and supply directly, in the event of a post-Acquisition price increase.

24. We will consider:

    24.1 closeness of competition: the degree of constraint that EBOS and LifeHealthcare impose upon one another. To the extent that any constraint is material, we will assess whether the lost competition between the Parties could be replaced by rival competitors;

    24.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;

    24.3 entry and expansion: how easily rivals could enter and/or expand, including their ability to attract and retain skilled sales staff; and

    24.4 countervailing power: whether PHARMAC and/or surgeons 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?**

25. 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

[16] The Application at [98].
[17] The Application at [36], [106.1] and [108.2].

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.[18]

26. In the Application, EBOS submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the relevant market due to coordinated effects because:[19]

    26.1 a number of strong and innovative competitors will remain post-Acquisition in the relevant market;

    26.2 there is little to no interrelationship between competitors in the relevant market;

    26.3 prices and sales figures are not visible to competitors;

    26.4 OEMs and distributors operate in very different ways. It would be difficult for these companies to coordinate their behaviour where they have such distinct cost structures and size; and

    26.5 products are highly specialised with significant research and development, and innovation.

27. 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?**

28. 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.

29. In the Application, EBOS submitted that there would be no vertical or conglomerate effects as a result of the Proposed Acquisition. The key reasons for this are:[20]

    29.1 there would be no vertical integration as a result of the Proposed Acquisition;

    29.2 neither party has any "must have" products that could be bundled. Products are generally purchased individually, with surgeons choosing the most appropriate device for the specific therapeutic need. There is no situation where a particular product will always be required;

    29.3 no supplier produces all devices and biologics a spinal surgeon would require for a particular operation;

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18 *Mergers and Acquisitions Guidelines* above n3 at [3.84].
19 The Application at [127].
20 The Application at [123]-[126].

29.4 all competitors' product offerings are relatively comparable; and

29.5 there is no potential for conglomerate effects across therapeutic areas, as surgeons make purchasing decisions for their own therapeutic needs.

30. Both EBOS and LifeHealthcare distribute a wide range of different products, across a range of therapeutic areas. We will assess whether the Proposed Acquisition is likely to give the merged entity the ability or incentive to bundle or tie its products anticompetitively.

## Next steps in our investigation

31. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **18 March 2022**. However, this date may change as our investigation progresses.[21] In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.

32. 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

33. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference 'EBOS/LifeHealthcare' 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 **28 February 2022**.

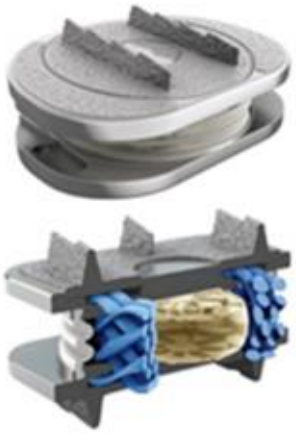
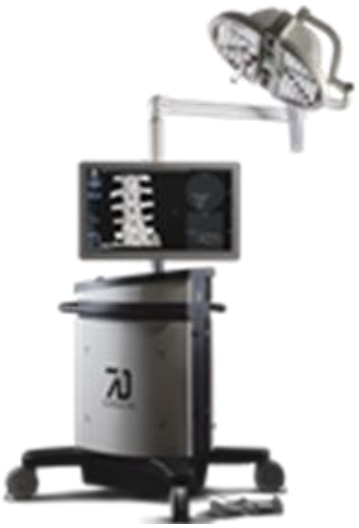
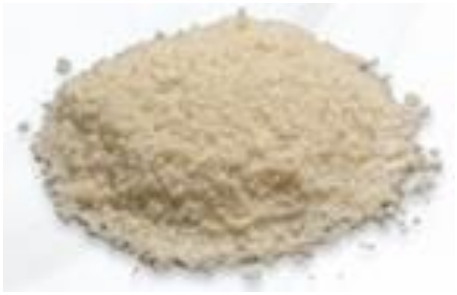
34. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.

35. 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.

[21] 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.

## Attachment: Spinal devices and biologics commonly supplied by the merging parties

| Device | Applicant's image |
|---|---|
| **Pedicle screws / bone screws** A pedicle or bone screw is used to hold vertebrae (individual bones which form the spinal column) and bone graft (bone tissue) together to promote healing as part of spinal fusion, where two or more vertebrae are fused together, immobilizing them to create a single, continuous bone. Spinal fusion treats broken vertebra, spinal deformities, spinal weakness, spinal instability, or chronic low back pain. Screws can be used alongside other products, such as cages or disk replacements. |  |
| **Plates and rods** - Metal plates and rods (together with screws) are used in spinal fusion surgery to help hold the vertebrae together, so that they can heal into one solid unit. |  |
| **Posterior/lateral cages** - Posterior or lateral cages hold bone graft during spinal fusion and act as a space holder between two vertebrae. They become part of the spine and are placed around a set of discs to encourage bone growth. Cages are made of plastic, carbon fibre or metal. |  |

| Device | Applicant's image |
|---|---|
| **Disc replacements** - Disc replacements are designed to replicate the anatomic structure and performance of a natural disc. |  |
| **Navigation aids -** Navigation aids help surgeons plan and carry out spinal surgeries. Surgeons can see where their instruments are and virtual images of the spine on a display. These aids enable surgeons to carry out surgeries with increased accuracy and less radiation exposure. |  |
| **Biologics -** Biologics are engineered materials designed to stimulate and promote the healing of fractures and other bone defects, such as bone grafts or bone graft substitutes to fill voids or gaps (for example in the space between two spinal vertebrae during spinal fusion surgery). They may be produced from the patient themselves (autografts), donated human tissue (allografts), demineralised bone and demineralised bone matrix (are effectively allograft bones that have been decalcified by acid extraction) or from synthetic alternatives. Different biologics can be used together and alongside other products as an accessory during procedures such spine surgery. |  <br>  |

Source: Application.