CMA
Competition & Markets Authority

ANTICIPATED MERGER BETWEEN CARGOTEC CORPORATION AND KONECRANES PLC

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups[1]

Introduction

1. On 13 July 2021, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated merger between Cargotec Corporation (Cargotec) and Konecranes Plc (Konecranes) (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).

2. In its provisional findings on the reference notified to Cargotec and Konecranes (the Parties) on 26 November 2021 (the Provisional Findings Report), the CMA, among other things, provisionally concluded that the Merger would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (the provisional SLCs) in the markets for the supply of:[2]

   (a) Rubber tyre gantry cranes;

   (b) Automated stacking cranes;

   (c) Shuttle carriers and straddle carriers;

   (d) Empty container handlers;

   (e) Heavy duty forklift trucks;

   (f) Reach stackers; and

   (g) Automated terminal tractors.

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[1] CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17 March, 2014 corrected November 2015 (CMA Rules).
[2] As defined in the Provisional Findings Report.

3. The CMA has provisionally concluded that the provisional SLCs may be expected to result in adverse effects, for example in the form of higher prices and/or reduced quality, range or service to UK customers than would otherwise be the case absent the Merger.[3]

4. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying, mitigating or preventing the provisional SLCs[4] and/or any resulting adverse effects identified in the Provisional Findings Report.[5]

5. The CMA invites comments on possible remedies by **17:00 GMT on 10 December 2021**.[6]

Criteria

6. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the provisional SLCs and any adverse effects resulting from it.[7]

7. To this end, the CMA will seek remedies that are effective in addressing the provisional SLCs and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.

8. The CMA will seek to ensure that no remedy is disproportionate in relation to the provisional SLCs and their adverse effects.[8]

Possible remedies on which views are sought

9. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the provisional SLCs or any resulting adverse effects.

10. In merger inquiries, the CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies designed to regulate the ongoing

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[3] Provisional Findings Report, published on 26 November 2021 https://www.gov.uk/cma-cases/cargotec-corporation-slash-konecranes-plc-merger-inquiry
[4] Elsewhere in this Notice, references to remedying the SLC are used as shorthand for the statutory reference to remedying, mitigating or preventing the SLC.
[5] See also sections 36(2) and 41 of the Act and rule 12.1 of the CMA Rules.
[6] Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings (CMA 2 Mergers: guidance on the CMA's jurisdiction and procedure, paragraph 13.1).
[7] Section 36(3) of the Act.
[8] *Merger Remedies: CMA87* (December 2018), paragraphs 3.3 and 3.4

conduct of merger parties or control market outcomes (for example, prices) following a merger,[9] because:

(a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;

(b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and

(c) structural remedies rarely require monitoring and enforcement once implemented.[10]

11. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the provisional SLCs or any resulting adverse effects.

12. The CMA notes that other competition authorities are investigating the Merger and may liaise with them in identifying actions which it might take for the purpose of remedying, mitigating or preventing the provisional SLCs and/or any resulting adverse effects.

Prohibition

13. Prohibition of the Merger would result in Cargotec and Konecranes continuing to operate under separate ownership as independent competitors. It would therefore prevent the provisional SLCs from arising in any relevant market. Our initial view is therefore that prohibition would be an effective remedy as it would represent a comprehensive solution to all aspects of the provisional SLCs we have provisionally found (and consequently any resulting adverse effects) and the risks in terms of its effectiveness are very low. Prohibition would also avoid the risks that would be associated with other possible remedies (discussed below).

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[9] *Merger Remedies: CMA87* (December 2018), see section 7 for further guidance on behavioural remedies.
[10] *Merger Remedies: CMA87* (December 2018), paragraph 3.46.

Partial divestiture

14. The objective of a partial divestiture of Cargotec and/or Konecranes would be to create similar competitive conditions in each of the relevant markets (as set out in the chosen counterfactual)[11] in which we have provisional SLCs (see paragraph 2 above). Partial divestiture would require splitting up the Cargotec and/or the Konecranes business, and divesting the businesses and assets necessary to remedy the provisional SLCs that we have provisionally found in the relevant markets. These separated assets would then need to be capable of competing effectively under separate ownership.

15. Our initial view is that any partial divestiture could only be considered effective if it could be demonstrated that it could be appropriately configured to attract a suitable purchaser and to allow a purchaser to operate as an effective competitor in the relevant markets.

16. Moreover, as with any partial divestiture, we would need to be confident that it comprehensively remedied the provisional SLCs and had an acceptable risk profile. While our information-gathering on potential remedies remains at an early stage, we currently hold some doubts about the effectiveness of a partial divestiture and would need to ensure that any remedy of this type had an acceptable risk profile, in particular, in relation to composition risks.[12]

17. We consider that there is also a risk that:

    (a) A suitable purchaser of a partial divestiture package may not be available.[13]

    (b) The competitive capability of a partial divestiture package could deteriorate before completion of the divestiture (for example, through the loss of customers or key members of staff).[14] We consider that there would be a material degree of risk associated with any partial separation of Konecranes and/or Cargotec, particularly if there are not existing standalone businesses that already hold all of the assets and capabilities necessary to effectively remedy the provisional SLCs. Material risks could also arise from any transitional service arrangements between the

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[11] See chapter 4 (the Counterfactual) of the Provisional Findings Report.
[12] These are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market. *Merger Remedies: CMA87* (December 2018), paragraph 5.3 (a).
[13] *Merger Remedies: CMA87* (December 2018), paragraph 5.3 (b).
[14] *Merger Remedies: CMA87* (December 2018), paragraph 5.3 (c).

merged entity and a purchaser of the divested business that might be necessary.

18. Our initial view is that a partial divestiture may involve a high level of risk in terms of its effectiveness, in particular in relation to composition risks and purchaser risks. If these risks could not be addressed, a partial divestiture would not represent an effective remedy. The CMA will consider any partial divestiture remedies put forward as part of this consultation.

Behavioural remedy

19. As stated above, the CMA has a preference for structural remedies. Given the nature of this case and the provisional SLCs, a behavioral remedy does not appear to be appropriate.[15]

20. Behavioural remedies generally give rise to risks around specification, circumvention, market distortion and/or monitoring. The CMA's initial view is that in this case a behavioural remedy, by itself, is very unlikely to be an effective remedy to the provisional SLCs. For example, we currently consider that it would not be possible to specify the form of conduct required to effectively address any such SLCs with sufficient precision in relation to non-price outcomes (for example, the provision of local servicing), particularly in the context of an industry trend towards the automation of CHE.

21. The CMA will however consider any behavioural remedies put forward as part of this consultation, including behavioural remedies that may be deployed to support a partial divestiture.

22. The CMA will consider any other practicable remedies that the Parties, or any interested third parties, may propose that could be effective in addressing the provisional SLCs and/or the resulting adverse effects identified in the Provisional Findings Report.

23. In particular, we note that one of the provisional SLCs, in relation to the supply of automated terminal tractors, arises in large part because of the contractual link between Konecranes and Terberg. The CMA will therefore consider whether a remedy based on the removal of that contractual link would be effective in addressing that provisional SLC.

24. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural

[15] The circumstances in which behavioural remedies are more likely to be used as the primary source of remedial action are set out in *Merger Remedies: CMA87* (December 2018), paragraph 7.2.

remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the provisional SLCs and any resulting adverse effects.

Issues to be considered in relation to a divestiture remedy

25. In evaluating possible divestitures as a remedy to the provisional SLCs it has provisionally found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies:

    (a) The scope of the divestiture package;

    (b) Identification of a suitable purchaser; and

    (c) The effectiveness of the divestiture process.[16]

The scope of the divestiture package

26. To be effective in remedying the provisional SLCs, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.[17]

27. In defining the scope of a divestiture package that will satisfactorily address the provisional SLCs, the CMA will normally seek to identify the smallest viable, standalone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.[18]

28. The CMA will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, to the divestiture of part of a business or a collection of assets. This is because divestiture of a complete

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[16] *Merger Remedies: CMA87* (December 2018), paragraph 5.2.
[17] *Merger Remedies: CMA87* (December 2018), paragraph 5.3(a).
[18] *Merger Remedies: CMA87* (December 2018), paragraph 5.7.

business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.[19]

29. Our current thinking is that an effective divestiture package may be difficult to design due to the following key factors, in particular:

    (a) The competition concerns raised by the Merger are wide-ranging, with provisional SLCs arising from horizontal unilateral effects in several types of container handling equipment (CHE);

    (b) The complex value chain, particularly in relation to the servicing of CHE;

    (c) The importance customers place on suppliers of CHE having a strong track record, a large product portfolio, and established customer relationships in order to compete effectively.

30. Our initial view is, therefore, that there is a significant risk inherent in carving-out, replicating, transferring and/or integrating elements that may be necessary to comprise an effective divestiture package. We currently consider that the scope of the package would require to constitute, as a minimum, a whole CHE division. This could comprise, for example, Cargotec's Kalmar division or Konecranes' Port Solutions division, although this would be subject to those divisions: (i) being standalone businesses with the assets and capabilities necessary to effectively remedy the provisional SLCs; and (ii) being appropriately configured to attract a suitable purchaser and allow a purchaser to operate as an effective competitor in the market.

31. Based on our current knowledge of the Parties' businesses, our initial view is that a divestiture package would be required to have the following tangible and non-tangible assets and attributes (amongst others):

    (a) Manufacturing and assembling facilities for the production of CHE, including organisational capital and other knowhow;

    (b) Appropriate capabilities for the maintenance and servicing of CHE which has already been sold to customers and is needed in order to make future sales;

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[19] Purchaser risk refers to the risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser; composition risk refers to the risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market; *Merger Remedies: CMA87* (December 2018), paragraph 5.3 and 5.12.

(c) Contractual and non-contractual relationships with suppliers, subcontractors, distributors, and customers (including warranty and servicing agreements);

(d) Staff, who may be based in a number of different countries, transferring to a new entity, in line with relevant labour laws, and with an acceptable risk to staff retention;

(e) Brands and a proven track record;

(f) Customer lists and customer relationships, including knowledge of customers' purchasing requirements;

(g) Economies of scale and buyer power (so the divestiture assets would likely form a single package, rather than assets relating to each, or smaller groups, of the provisional SLCs being divested to separate purchasers);

(h) Inventory, including partially assembled CHE;

(i) Appropriate capabilities and systems for remote CHE monitoring and servicing;

(j) Intellectual property rights and ongoing into research (including the development of new types of CHE, equipment control systems, and automated processes); and

(k) Contracts and relationships with other key suppliers (eg payment providers, IT service providers).

32. The CMA invites views on whether a structural divestiture short of prohibition would be effective, and if so:

(a) what package of assets would need to be divested, and how this would be sufficient to comprehensively remedy the provisional SLCs and/or the resulting adverse effects;

(b) whether the Parties can divest a mixture of assets from both Parties (sometimes referred to as a 'mix and match' approach), and whether such an approach would result in additional risks to the remedy;[20]

[20] The CMA has a preference for avoiding 'mix-and-match' remedies as this may create additional composition risk such that the divestiture package will not function effectively; *Merger Remedies: CMA87* (December 2018), paragraph 5.16.

(c) whether there are any risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market; and

(d) any other elements that may be required.

Identification of a suitable purchaser

33. The CMA will wish to be satisfied that a prospective purchaser:

(a) is independent of the Parties;

(b) has the necessary capability to compete;

(c) is committed to competing in the relevant market; and

(d) will not create further competition concerns.[21]

34. The CMA invites views on whether there are:

(a) any specific factors to which the CMA should pay particular regard in assessing purchaser suitability (for example, whether a proven capability of supplying CHE or similar is essential desirable, or whether a purchaser should have particular attributes or credentials to allow it to overcome any risks associated with the composition of a divestiture package);

(b) any specific purchasers or types of purchasers which should be ruled out as potentially suitable purchasers;

(c) risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser; and

(d) circumstances that would make it necessary to require an upfront buyer.[22]

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[21] *Merger Remedies: CMA87* (December 2018), paragraphs 5.20 and 5.21.

[22] Where the CMA is in doubt as to the viability or attractiveness to purchasers of a proposed divestiture package (ie composition risk) or believes there may be only a limited pool of suitable purchasers (ie purchaser risk), it may require the merger parties to obtain a suitable purchaser that is contractually committed to the transaction before it may accept Final Undertakings that the transaction will only proceed once a suitable purchaser is contractually committed. Source: *Merger Remedies: CMA87* (December 2018), paragraph 5.28.

Effective divestiture process

35. An effective divestiture process will protect the competitive potential of any divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale. The process should also allow prospective purchasers to make an appropriately informed acquisition decision.[23] The CMA invites views on the appropriate timescale for achieving a divestiture.

36. The CMA will consider what, if any, procedural safeguards may be required to minimise the risks associated with any divestiture.

37. The CMA invites views on whether:

    (a) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture;

    (b) Cargotec should be required to appoint a monitoring trustee to oversee the divestiture(s) and to ensure that the package to be divested is maintained during the course of the process; and

    (c) any divestiture remedy should be completed before the Merger is allowed to complete.

38. The CMA would have the power to mandate an independent divestiture trustee to dispose of any divestiture package if:

    (a) the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or

    (b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.

39. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of any divestiture process. The CMA invites views on whether the circumstances of this Merger necessitate such an approach in any divestiture process.

Cost of remedies and proportionality

40. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, of those remedy options that it

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[23] *Merger Remedies: CMA87* (December 2018), paragraph 5.33.

considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the provisional SLCs and any resulting adverse effects. If the CMA is choosing between two remedies that it considers would be equally effective, it will choose that which imposes the least cost or that is the least restrictive.[24]

41. The CMA invites views on what costs are likely to arise in implementing any remedy option(s).

Relevant customer benefits

42. In deciding the question of remedies, the CMA may have regard to the effect of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.[25]

43. Relevant customer benefits are limited by the Act to benefits to relevant customers[26] in the form of:

    (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom … or

    (b) greater innovation in relation to such goods or services.'[27]

44. The Act provides that a benefit is only a relevant customer benefit if:

    (a) it may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and

    (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.[28]

45. The CMA welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

[24] *Merger Remedies: CMA87* (December 2018), paragraph 3.6.
[25] *Merger Remedies: CMA87* (December 2018), paragraphs 3.15 and 3.16.
[26] For these purposes, relevant customers are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution and are therefore not limited to final consumers. See also section 30(4) of the Act.
[27] Section 30(1)(a) of the Act, see also *Merger Remedies: CMA87* (December 2018), paragraph 3.17.
[28] Section 30(3) of the Act, see also *Merger Remedies: CMA87* (December 2018), paragraph 3.19.

Next steps

46. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by **10 December 2021** (see Note (i)).

47. A copy of this notice will be posted on the CMA case page.

Martin Coleman
Inquiry Group Chair
26 November 2021

Note

(i) This notice of possible actions to remedy, mitigate or prevent the provisional SLCs and/or any resulting adverse effects is made having regard to the Provisional Findings Report announced on 26 November 2021. The Parties have until 17 December 2021 to respond to the Provisional Findings Report. The CMA's findings may alter in response to comments it receives on its Provisional Findings Report, in which case the CMA may consider other possible remedies, if appropriate.