ME/6927/21

ANTICIPATED MERGER OF CARGOTEC CORPORATION AND KONECRANES PLC

RESPONSE TO PROVISIONAL FINDINGS

17 December 2021

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A. INTRODUCTION

1.1 The Provisional Findings (the ***PFs***) display a host of legal and factual flaws in terms of both the procedures followed by the Competition and Markets Authority (***CMA***) in carrying out its merger control inquiry and the provisional conclusions reached. These errors are fundamental and pervasive, and their impact on the overall assessment in the PFs so significant that not only are the provisional conclusions wrong as a matter of fact and law, they also fall outside the range of reasonable decisions available to the CMA.

1.2 The result is that the CMA fails to demonstrate – on the balance of probabilities – that the transaction will result in any substantial lessening of competition (***SLC***). In the interests of brevity, we do not purport to address all of the errors contained in the PFs on a line-by-line basis here. Instead, this response incorporates and adopts the Parties' Response to the European Commission's (***Commission***) Letter of Facts (sent to the CMA on 13 December 2021), their Response to the Commission's Statement of Objections (sent to the CMA on 11 November 2021) and their Responses to the CMA's Annotated Issues Statement and Working Papers (submitted to the CMA on 22 October 2021).

1.3 In **Section B** of this Response, we summarise the overarching flaws in the PFs namely in relation to:

- [✂];
- the CMA's approach to market testing;
- the competitive effects of State-owned Chinese market participants; and
- the overstatement of barriers to entry and expansion.

1.4 **Section C** then addresses a number of specific points arising in the PFs in relation to the finding of an SLC in the supply of rubber-tyred gantry cranes (***RTG***), automated stacking cranes (***ASC***), reach stackers (***RS***), heavy-duty forklift trucks of more than 10t lifting capacity (***FLTs***), empty container handlers (***ECHs***) as well as automated terminal tractors (***ATTs***). We make some concluding observations in **Section D**. **Annex 1** then identifies material errors in the CMA's approach to, and assessment of, the bidding data it uses to support its PFs.

B. OVERARCHING ERRORS IN THE PFs

2. [✂]

2.1 The PFs provisionally conclude that the most likely counterfactual in relation to [✂] is the prevailing conditions of competition. This assessment is vitiated by several procedural errors which, once corrected, would result in the conclusion that [✂]. In particular, the PFs:

- fail to have due regard to evidence on the CMA's file which clearly points to the fact that [✂]

- rely on irrelevant considerations when concluding that there is insufficient evidence that [✂]; and
- without justification, apply an inconsistent evidential standard when assessing [✂] as compared to [✂], and which is in any event higher than the standard described in the CMA's own Merger Assessment Guidelines (***MAGs***).

(a) Failure to have due regard to relevant evidence

2.2 The PFs fail properly to address ample evidence provided by Cargotec demonstrating that, [✂]. While the PFs briefly summarise Cargotec's main arguments, they fail to have due regard to: [✂]

2.3 Crucially, the PFs unjustifiably fail to give any weight to [✂].

(b) Reliance on irrelevant considerations

2.4 The PFs rely on irrelevant considerations when rejecting the ample evidence submitted by Cargotec as insufficient. For example, [✂]

2.5 Similarly, [✂]

(c) The PFs apply an inconsistent evidential standard

2.6 In assessing [✂], the PFs unjustifiably apply an evidential standard which is inconsistent with the standard applied to the review of [✂] and which departs from the CMA's own Merger Assessment Guidelines.

2.7 In particular, the CMA requires Cargotec to prove that [✂]. This is in contrast with the evidential standard applied with respect to [✂]:

- [✂]; and
- [✂].

2.8 If the PFs had applied this standard to [✂], it would have come to the conclusion that [✂]

2.9 In addition, the evidential standard applied in assessing [✂] departs from the CMA's own Merger Assessment Guidelines. [✂]

2.10 In summary, the assessment of [✂] in the PFs is vitiated by errors of fact and assessment which, when taken together, lead to an incorrect conclusion. In fact, the evidence presented by Cargotec demonstrate that [✂].

3. INADEQUACY OF MARKET TESTING

3.1 The CMA's market testing has failed to discharge the CMA's duty of sufficient inquiry, and is unreasonable both in terms of the process adopted by the CMA and, as a consequence, its assessment of the (limited) third-party feedback received. Furthermore, the CMA's refusal to present the Parties with sufficient information to enable proper representations falls short of the minimum standards of due process to which the CMA is subject. These failings are considered in turn below.

(a) The CMA's market testing fails to discharge the CMA's duty of sufficient inquiry, and is unreasonable both in terms of process and outcome

3.2 The PFs note that it is for the CMA "*to decide upon the reasonable steps that should be pursued in any investigation and in so doing, it has a wide margin of appreciation*.[1]" The Parties do not dispute this point as matter of principle but note that there are limits to the CMA's margin of discretion. In particular:

- The CMA has "*a common law duty to take reasonable steps to acquaint itself with material relevant to any decision it makes – and then properly to consider that information, with the other relevant information available to it – to enable it to make a properly informed decision.*"[2] What amounts to "reasonable steps" is a fact specific question, but it is subject to certain overarching principles including that the broader a public authority's discretion, the more important it is that it has all relevant material to enable it to properly exercise its discretion[3] and that in practice the duty of sufficient inquiry may require a public authority to consult outside bodies.[4]

- Similarly, both the process adopted by the CMA in reaching its decisions and the outcome of those decisions must be reasonable.[5] In both contexts, the assessment of "reasonableness" will, again, be context specific.[6]

3.3 As set out below, the CMA's market testing and the provisional findings it makes on the basis of its market testing do not meet these standards. The CMA has failed to gather sufficient market feedback (particularly from customers and distributors) to enable it to make properly informed decisions in particular given the size of this transaction and the "key role" container handling equipment plays in the smooth running of UK ports. As a result, the process of market testing adopted by the CMA in reaching its provisional findings was unreasonable as were the conclusions based on it.[7]

The CMA has sought and received insufficient feedback

3.7 The CMA has failed to take reasonable steps to obtain the information required to enable it to make a properly informed decision on whether or not the transaction will result in an SLC. As a consequence, the evidence cited in the PFs is based on very limited sample sizes and conclusions drawn from it are not representative or probative.

3.8 Firstly, as acknowledged in the PFs, despite finding that the relevant markets are all Europe-wide (or "at least" Europe-wide) in scope, and despite being put on notice of

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[1] PFs, para. 6.39 citing *BAA Limited v Competition Commission*, [2021] CAT 3, para. 20(3).

[2] *R (ASK) v SSHD* [2019] EWCA Civ 1239, para. 63-64, *per* Hickinbottom, J.

[3] *R (JP) v NHS Croydon Clinical Commissioning Group* [2020] EWHC 1470 (Admin), para. 9(iii), per Mostyn, J.

[4] *R (JP) v NHS Croydon Clinical Commissioning Group* [2020] EWHC 1470 (Admin), para. 9(iii), per Mostyn, J.

[5] *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649, para. 98.

[6] *R v Department for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, 1130B *per* Laws LJ.

[7] https://www.gov.uk/government/news/port-equipment-merger-raises-competition-concerns.

the issue by the Parties,[8] the CMA only sought feedback from UK customers. The CMA justifies this decision on the basis that these customers represented a substantial proportion of the Parties' recent UK sales in the relevant product categories.[9]

3.9 While the CMA is of course required to consider the impact of the transaction on UK customers, its decision to not seek feedback from non-UK customers that are active on the same purchasing markets as UK customers necessarily results in it only receiving a partial picture (at best) of the competitive dynamics on the relevant markets. As has been brought to the CMA's attention, a number of major European customers have provided the Commission with feedback that is relevant to the question before the CMA. For example [✂] informed the Commission that [✂]. The CMA cannot claim that it has obtained a representative sample of customer feedback on the relevant markets in circumstances where it has not spoken to any customers outside the UK, and nor can it reasonably reach a conclusion on whether the transaction would result in an SLC in the UK without having considered evidence relating to the competitive dynamics across the whole of the relevant geographic markets (as defined in the PFs).

3.10 Indeed, the PFs allude to the Parties' rivals' allegedly weaker positions in Europe to support its SLC findings. For example, the PFs' provisional conclusion on RS contains repeated references to, and emphasis on, Sany's position in Europe as a whole (where it has achieved proportionately fewer sales than it has in the UK), rather than the UK only.[10] The Parties accept that competitor activities in Europe (and indeed globally) should be relevant to the assessment, but it follows that the CMA cannot claim that it has taken reasonable steps to obtain the information necessary to enable it to make an informed decision in circumstances where it has not even solicited views, let alone received any evidence, from non-UK customers.

3.11 Secondly, in absolute terms, the CMA received insufficient responses to be able to claim that the feedback it received could be representative of the markets under investigation, or even that it had made reasonable efforts to obtain relevant feedback. By way of demonstration, **Table 1** below contrasts the number of third-party responses received by the CMA and the Commission as part of their respective market testing exercises.

Table 1: Responses received by the CMA and the Commission as part of their market testing

	Customers		**Competitors**		**Others (e.g. distributors and service providers)**	
	CMA	**EC**	**CMA**	**EC**	**CMA**	**EC**
Total	**20**	**135**	**13**	**37**	**3**	**97**

[8] Response to AIS, para. 6.3 and PFs, para. 6.39.

[9] PFs, para. 6.40.

[10] PFs, para. 9.98.

3.12 As can be seen, despite both the CMA and the Commission considering the geographic scope of each of the relevant product markets to encompass the EEA and, relatedly, despite the considerable duplication between the Parties' customers, competitors and other interested third parties in both the UK and the EEA, the CMA received strikingly less feedback across all three categories of third parties. A comparison of the numbers in and of itself suggests that the CMA has not taken "reasonable steps" to obtain information that is relevant to its decision in this case despite the fact that the CMA received the contact details provided to the Commission.[11] The CMA was therefore able to, and should have, sought third party views with respect to the European markets it was purportedly investigating or put itself in a position where it could avail itself of feedback provided to the Commission in relation to the same product and geographic markets through inter agency cooperation measures.

3.13 Indeed, the CMA received so few responses that it was unable to grant a (relatively standard) request made by the Parties on 15 November 2021 for the CMA to provide individual identifiers for the third parties cited in the Working Papers (at least partly) on the basis that to do so would carry "*a significant risk of reverse engineering given market concentration and characteristics of different customers and competitors*".[12] Not only does this demonstrate the inadequacy of the CMA's market testing, but it also undermines the Parties' basic right to be given sufficient information to enable proper representations (see further paras. 3.17-3.31 below).

3.14 In addition to the CMA's market testing in and of itself falling short of meeting the requisite legal standards, it also leads to unreasonable conclusions in the PFs on the substance of a number of material points. For example, the PFs conclude that there are very few distributors available in the UK with "*necessary coverage and expertise*" for the effective distribution of mobile equipment.[13] However, despite being provided with the names of over 90 distributors, the CMA only received feedback from three (each of which would have had an interest in underplaying their rivals' strengths) and only made attempts to contact a "*small sample*" of the other distributors identified by the Parties.[14] This not only demonstrates a failure to make sufficient inquiry of the market but also results in the CMA failing to take due account of several factors which render its conclusion unreasonable, including: the number of available distributors in the UK with the necessary coverage and expertise to assist an OEM wishing to enter or expand rapidly; the dynamic nature of the distribution market; and the frequency of switching, and the possibility of distributors multi-sourcing.

3.15 Against this background, the CMA's failure to carry out adequate market testing cannot be cured by self-serving and unsubstantiated assertions that the evidence the CMA received from third parties "*is, in the round, robust and of probative value*".[15] Rather, the CMA has simply failed in its duty to make sufficient inquiries.

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[11] See [✂] emails to [✂] of 10 March and 8 April 2021 and [✂] email to [✂] of 17 March 2021.

[12] See the letter from [✂] to Freshfields dated 24 November 2021.

[13] PFs, para. 5.155.

[14] PFs, para. 6.42.

[15] See e.g. PFs, para. 6.34.

(b) The CMA's approach to market testing fails to meet the minimum standards of procedural fairness

3.16 The Parties have a right to be informed of the case against them. In particular, they must know what evidence has been given and what statements have been made affecting them, and they must then also be given a fair opportunity to correct or contradict them.[16] While it may sometimes be sufficient to provide merger parties with the "gist" or "essence" of the case against them, the key point is that those parties are given an opportunity "effectively" to challenge the case against them.[17]

3.17 The CMA's refusal, partly as a result of its failure to collect sufficient market feedback, to present the Parties with sufficient information to enable proper representations in relation to the results of its market test infringes the Parties' basic right to be given sufficient information to assess the strength of the case against them and to enable proper representations. Similarly, the CMA's refusals to grant the Parties' external advisers with access to its file or to pay due regard to evidence presented to it by the Parties from the Commission's file is both unreasonable and has again denied the Parties the opportunity effectively to challenge the case against them.

The CMA has failed to provide the Parties with sufficient information to assess the strength of the case against them and enable proper representations

3.18 By a letter of 15 November 2021, the Parties explained that the wholly anonymised third-party responses cited in the Working Papers meant that they could not ascertain the full set of comments made by each third party, nor the spread of opinions across third parties. This in turn prevented the Parties from establishing whether the pattern of responses indicated potential bias and, as a consequence, from making meaningful representations as to the reliability and/or bias of the third-party evidence relied on in the Working Papers. As a potential solution, the Parties requested that the CMA substitute the names of third parties in the Working Papers with a unique initial.

3.19 As noted above, the CMA denied this request on the basis that to do so would carry *"a significant risk of reverse engineering given market concentration and characteristics of different customers and competitors*".[18] The CMA went on to justify this decision by saying that it did not consider that it was necessary to do so in order to inform the Parties of the gist of the case and that "*as a general proposition, the Inquiry Group does not anticipate that any single third-party views will carry particularly significant weight in its analysis, such that it may be necessary to provide the Parties, or their advisers, with individual identifiers as part of the provisional findings in order to identify apparent bias*." Not only did that general proposition turn out to be incorrect – in several instances the views of a single or only two respondents are relied upon in

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[16] *Kanda v Government of Malaya* [1962] AC 322, 337 *per* Lord Denning: "*If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them*".

[17] *In re A (Family Proceedings: Disclosure)* [2012] UKSC60 [2013] 2 AC 66, para. 34 *per* Lady Hale.

[18] Letter from [✂] to Freshfields on 24 November 2021.

the PFs as discussed in paragraph 3.21 *et seq* below - the CMA also provided no indication of how the Parties could verify whether or not this was indeed the case. In particular there was no basis on which the Parties could ascertain how much weight had been given to comments made by individual third parties, nor the spread of opinions across third parties.

3.20 These concerns have not been resolved through the publication of the PFs. Indeed, while the CMA claims that in reaching its provisional conclusions it took into account "*the interests of the party providing that information or view*" and "*the extent to which our view on the interpretation of a piece evidence is corroborated (or not) by other evidence available to us*", the limited third-party views available are heavily relied on in the PFs and are repeatedly described in such a way that it is impossible for the Parties to exercise an effective challenge.[19]

3.21 There are repeated instances in which the PFs fail to clarify whether a 'third party' source was a competitor, customer or other interested party, for example:

- At para. 2.54, the PFs refer to feedback from a single "third party" to support the position that it is important for container handling terminal productivity that there is a symbiotic relationship across its ECS and TOS, a point that goes to barriers to entry and expansion (see further Section 5 below);
- At para. 6.72, the PFs quote a single "third party" suggesting that customers may be averse to purchasing products from suppliers "*based in locations with whom the UK does not always have the easiest of strategic relationships*" which again goes to barriers to entry (specifically for Chinese suppliers);
- At para. 12.116, the PFs cite two "third parties" to support the position that there are few effective distributors in the UK.

3.22 In each of these cases the CMA should have provided, at the very least, an indication of the category of third party providing the feedback. This would have allowed the Parties to consider the evidential weight of the quote and more effectively to challenge it if necessary, and at the same time would not have provided the Parties with sufficient information to reverse engineer the identity of the third party.

3.23 There are also repeated instances in which the PFs quote individual customers but provide no indication of how significant these customers are, or how reflective their views are likely to be of the overall market. For example, at para. 7.86, the PFs cite four responses received from RTG customers of whom two thought that the merger would have a negative impact on competition in the supply of RTG, whereas two thought that the impact would be neutral. Precisely the same issue arises at para. 7.189 where the PFs note that of two customers that responded, one had negative views of the transaction whereas the other was neutral. In both cases, it is impossible to tell from the presentation of the customer feedback in the PFs how significant these customers are, both relative to one another and in the context of the overall market. Without this information, the Parties cannot effectively consider the evidential weight of the

[19] PFs, para. 6.7.

negative comments received or why the CMA would prefer those views over the equal number of neutral responses received.

3.24 Equally, there are a number of examples of the CMA reaching a provisional conclusion apparently solely on the strength of uncorroborated statements made by the Parties' competitors, for example, in relation to the claim that interoperability is an important consideration for SC/ShC customers (discussed at para. 5.9 below).

3.25 Taken together, these examples suggest that the CMA has, contrary to its assertion at para. 6.7 of the PFs, failed to take account of "*the interests of the party providing that information or view*" and "*the extent to which our view on the interpretation of a piece evidence is corroborated (or not) by other evidence available to us*".[20] Despite this however, in many respects it remains impossible for the Parties to make effective representations challenging the evidence against them due to the degree of anonymisation in the PFs.

3.26 The CMA's position is, therefore, both unreasonable and infringes the Parties' basic right to be informed of the case against them. The CMA's failings in this regard are all the more egregious given that any risk of being able to reverse engineer the feedback is largely a result of the CMA's failure to make due inquiries of the market.

The CMA's refusals to give the Parties' external advisers access to its file or to take account of evidence presented to it from the Commission's file is both unreasonable and has denied the Parties the ability effectively to challenge the charges against them

3.27 Concerns about the overlapping nature of the CMA's and Commission's market testing exercises were raised by the Parties on a call with the CMA on 16 July 2021 (i.e. 3 days after the CMA's Phase 2 reference was made), in which the Parties also asked to be given access to the CMA's file. This was intended to avoid an artificial position in which the Parties' advisers had been given access to the third-party feedback on the Commission's file but were not able effectively to challenge the CMA's reliance on what would presumably be substantially identical feedback received by the CMA from the same third parties as part of its own market investigation.

3.28 The CMA ultimately declined the request for the Parties to be given access to its file on 15 October 2021 on the basis that there is no general right of access to file in CMA merger control proceedings, with the CMA's obligation to give reasons being discharged by way of providing the gist of the case in its provisional findings. The CMA's denial of the Parties' request has now led to precisely the issue flagged by the Parties at the outset of the Phase 2 investigation.

3.29 By a letter of 15 November 2021 (and with the permission of the Commission), the Parties sent the CMA their response to the Commission's Statement of Objections, together with a summary of some of the third-party feedback received by the Commission and which, on any reasonable basis, would be considered directly relevant to the questions before the CMA. For example, the letter included feedback from major customers active in both the UK and Europe, such as [✂] who noted that [✂] and [✂] who similarly noted that "[✂]". The letter also included feedback from major competitors active in both the UK and Europe such as [✂] who confirmed that "[✂]",

[20] PFs, para. 6.7.

[✂] who noted that "[✂]" and [✂] who noted in relation to mobile equipment that "[✂]". The letter went on to note that the positions adopted by the CMA in its Working Papers were hard to reconcile with the CMA's interpretations of (what was presumably) substantially identical feedback that it had received from the same third parties.

3.30 The response to these submissions in the PFs was that the CMA was unable to rely on "*isolated quotes from minutes of meetings between the Commission and third parties or from responses provided by third parties to Commission questionnaires without full access to the underlying documents because it is unable to verify, assess the context and meaningfully interrogate the information provided.*"[21]

3.31 This position is, however, unjustified:

- Firstly, precisely these limitations were raised by the Parties in their call with the CMA on 16 July 2021 and a potential solution proposed. The Parties' rights of defence cannot now be undermined by the CMA's prior unreasonable refusal to deny the Parties' advisers with access to its file or otherwise to put itself in a position where it had secured adequate market feedback.

- Secondly, the Parties asked the CMA in their letter of 15 November 2021 to explain how it reconciled this evidence with its Working Papers or if the third-party feedback received by the CMA materially differed from that received by the Commission (which in itself would be a cause for further inquiry on the part of the CMA). The PFs do not address any of those questions.

- Thirdly, the CMA failed to take reasonable steps to align its process with the Commission which could, for example, have sought waivers from third-party respondents to allow the CMA to review the Commission's file. The CMA's purported inability to "verify, assess and meaningfully interrogate" the information provided, which is also what the Parties are entitled to do with the information on the CMA's file (see para 3.18 *et seq* above), was therefore self-inflicted and cannot reasonably be relied upon.

- In any event, there can be no dispute that the information provided by the Parties is verifiable – a brief interaction with the Commission would have given the CMA any needed assurances. It was moreover incumbent on the CMA to pursue any disparities or gaps in its investigation in light of that further information given the substantial and substantive differences in market views evident from the Commission's market testing. There is, however, no suggestion at all in the PFs that the CMA took any steps to remedy its previous procedural shortcomings and indeed it compounded them in its failure properly to address its mind to the issues arising from the feedback on the Commission's file.

4. UNREASONABLE ASSESSMENT OF STATE-OWNED OR STATE-BACKED CHINESE RIVALS

4.1 Throughout the CMA's investigation, the Parties have made clear that they do not face a level playing field when competing with Chinese State-owned or State-backed rivals.

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[21] PFs, para. 6.44.

While the Parties compete with a range of tough and successful rivals driven by "standard" commercial imperatives, the entry of Chinese rivals has had a disproportionately greater impact on the relevant markets and the Parties' ability to compete. In particular:

- Chinese rivals benefit from access to significant financial resources and State subsidies, including cheaper inputs, as a result of their State-sponsorship, resulting in material cost advantages over the Parties and the ability to enter 'new' markets with 'risk-free' capital being injected by the Chinese State. For example, Sany is able to price its MEQ products at a price point that is on average [✂] cheaper than the Parties, and ZPMC is able to price its cranes at a price point that is on average [✂] cheaper than the Parties.

- Chinese suppliers are not only cheaper than the Parties but are also becoming more technologically advanced than them, including through cooperation with European firms. On 11 October 2021, ZPMC and the global terminal operator APM Terminals (one of the largest in Europe) concluded a strategic alliance regarding the *joint* development and deployment of a wide range of automated solutions, including automated container handling equipment. Equally, Sany has a range of technological cooperation agreements with European specialists in areas such as engines or batteries for electrical vehicles.

4.2 Feedback received from the Parties' customers highlight Chinese rivals' disproportionate impact on the relevant markets, and their anticipated trajectory for growth. For example, [✂] Similar feedback was received by the Commission from customers active in the UK in the context of its market investigation, and subsequently submitted by the Parties to the CMA in their letter of 15 November 2021.[22] For example, [✂].

4.3 The disproportionate impact of Chinese rivals is also reflected in the Parties' ordinary course business documents which contain increasingly prominent and prevalent references to the existential threat posed to them by Chinese competitors. Indeed, the internal documents cited in the PFs consistently indicate that the Parties consider their Chinese rivals to have had a disproportionately greater impact on competition.

4.4 It is worth stressing that the documents cited in the PFs are by no means unique:

- Even going as far back as 2018, Konecranes's internal documents show that it considered that [✂].

- In a [✂] presentation [✂], Konecranes mentions that "[✂]". Konecranes concludes in the same document that [✂].

- Regarding ZPMC, Konecranes' [✂] describes ZPMC as "[✂] Further, Konecranes notes in [✂]

4.5 Likewise, Cargotec, in its internal documents, consistently describes the [✂] of having to compete against State-backed Chinese players like ZPMC and Sany.

[22] See paragraph 3.29 below.

- In [✂]; Cargotec notes that [✂]
- Cargotec also makes clear in another document that the [✂]
- Another Cargotec internal document says that [✂]
- [✂]

4.6 Finally, feedback received both by the CMA and the Commission from these same Chinese rivals indicates that they intend to continue to expand in the relevant markets, thereby acting as an increasing competitive constraint on the Parties post-Merger. For example, [✂] , [✂] informed the CMA that [✂] Similarly, as noted above, [✂] confirmed to the Commission (and presumably also to the CMA) that [✂].

4.7 Despite this wealth of evidence, the PFs conclude that "*notwithstanding that Chinese suppliers might benefit from cost advantages, the evidence considered clearly shows that the Parties are able to compete effectively against Chinese suppliers, and does not support that Chinese suppliers have a 'disproportionately greater impact' on the relevant markets or that we should 'ascribe "a plus" to the Chinese competitors' in the competitive mix.*[23]"

4.8 This conclusion is not only wrong, but also falls outside the range of reasonable responses available to the CMA[24] for several reasons, including:

- Firstly, the PFs unreasonably ignore and discount the Parties' internal documents, which unequivocally establish that the Parties do not see their Chinese rivals as "normal" competitors, but rather as extensions of "China Inc.," capable of exerting a disproportionate competitive constraint on the Parties. The CMA justifies doing so on the basis that:
  - Chinese suppliers allegedly face high barriers to entry and expansion – a point undermined by the flaws in the assessment of barriers to entry and expansion (see Section 5 below);
  - the PFs claim to have not seen evidence that the [✂] notwithstanding that this is not the legal standard that must be met. As the MAGs note, the relevant threshold is whether entry or expansion by rivals is "likely";[25] and
  - the Parties allegedly believe that [✂]

  Further, even if the CMA could substantiate these points, it would remain the case that the Parties [✂]
- Secondly, the PFs unreasonably discount relevant feedback from customers and the Parties' Chinese rivals supporting the Parties' position. For example, the PFs dismiss [✂] The CMA goes on to conclude that it has not seen

[23] PFs, 6.73.

[24] *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649, para. 98.

[25] MAGs, para. 8.31(b).

anything to indicate that there will be a material change to the level of competitive constraint they pose in the future.[26] This is unreasonable: [✂].

4.9 The PFs not only fail to properly take into account the wealth of evidence presented by the Parties or otherwise available to the CMA that demonstrates the disproportionate impact that Chinese rivals are already having and will continue to have on the relevant markets, but also rely on weak or questionable evidence to support the justifications for not ascribing a 'plus' to the Parties' Chinese rivals in its competitive assessment. Taken together, these errors lead to a position in the PFs that is unsustainable and unreasonable.

5. BARRIERS TO ENTRY AND EXPANSION ARE OVERSTATED

5.1 The PFs provisionally conclude that there are a number of "significant" barriers to entry and expansion in all of the relevant markets.[27] For the reasons set out below, this position is unreasonable and is premised on serious logical and methodological flaws. The reality is that potential competition is an important competitive constraint on the Parties and will continue to be so post-Merger.

The assessment of the costs of entry is unreasonable, and is premised on serious logical and methodological errors

5.2 Across each of the product markets under consideration, the PFs reach the view that significant levels of investment over a long period of time are necessary to enter the market.[28] This assessment not only relies on material of little to no probative value, but also fails to take account of relevant evidence put before it. Accordingly, the provisional conclusion is not only wrong but also unreasonable.

5.3 Firstly, the third-party evidence relied upon in the PFs across each of the markets is inconsistent and suggests a lack of clarity regarding the question being asked. Whatever the reason, it is unreasonable for the PFs to rely on these statements as evidence of the costs and time taken to enter the relevant markets. To take some examples:

- In relation to MEQs, the PFs conclude that the combination of the initial investment and time needed to set up production and servicing capabilities, and economies of scale, in aggregate, constitute a high barrier to entry.[29] This position is not, however, supported by the evidence provided in the PFs. For example, only three respondents (two distributors and a competitor) provided an estimate of the financial investment needed to achieve a 5% share of supply in MEQ. The distributors' estimates were relatively close to one another (GBP 200,000 and GBP 500,000 respectively) and roughly accord with the Parties' view. Similarly, both distributors and the Parties estimate that it would take 2 years to achieve a 5% share of supply. This level of investment (both in terms

[26] PFs, para. 9.280 [✂]

[27] PFs, para. 12.160.

[28] PFs, paras. 12.36, 12.78, 12.123.

[29] PFs, para. 12.123 and earlier paragraphs.

of finance and time) would not be a significant barrier to entry in the context of this market. By contrast, the third respondent, a competitor of the Parties, estimates that it would cost between GBP 5 million and GBP 10 million and would take 3 – 5 years to achieve a 5% share of supply. For completeness, a fourth respondent, also a competitor, also estimates that it would take 3 – 5 years but does not provide an estimate of the costs of doing so. In summary, the majority of the third-party feedback is consistent with the Parties' submissions on financial costs of entry and half the third-party feedback is also consistent with the Parties' submission on the time involved suggesting that neither consideration would be a significant barrier to entry. While the low number of responses mean that all of these figures should be treated with caution, the PFs' apparent dismissal of the majority of the respondents' feedback on costs in favour of a wildly pessimistic estimate provided by a single competitor is unreasonable.

- Similarly, in relation to yard cranes, the PFs conclude that significant levels of investment over a long period of time are required to develop yard cranes and set up the necessary production facilities.[30] Again, the PFs' position on costs and time taken to enter the market specifically is based on the feedback from just two competitors which cannot be a robust sample. Moreover, one of those competitors has provided no estimate on costs of entry and it is not even clear if they were new entrants or existing suppliers. As the Parties have made clear to the CMA, major suppliers commonly use sub-contractors to design and manufacture crane components that are common to multiple types of yard cranes, including to RTGs. None of these relationships are exclusive, and as far as the Parties are aware, these subcontractors typically work with several manufacturers. Under this business model, the costs are significantly lower than indicated in the PFs, as no upfront investment is required to develop manufacturing capacity. While the PFs refer to the Parties' submissions on this point, there is no evidence of the CMA having considered this point at all as part of its assessment. Nor is there any consideration of the relevant market context – each crane sold is worth more than EUR 1 million, therefore several million euros would not be a disproportionate investment to enter the market.

5.4 Secondly, the PFs also unreasonably fail to take account of the specific considerations that would apply to Chinese State-backed or State-owned rivals, or established competitors in adjacent markets.

5.5 Even putting to one side the PFs' conclusion that the Parties' Chinese State-owned or State-backed rivals do not have a disproportionately greater impact on competition (discussed above), it is nevertheless undeniable that such companies: (i) are not necessarily driven by "standard" commercial drivers, but often by wider geopolitical considerations;[31] and (ii) have greater access to financial resources than "independent" companies. It follows from this that even if there were "significant" costs of entry

[30] PFs, paras. 12.33 – 12.38.

[31] See the Parties' response to the AIS, para. 1.3; Response to the Working Paper on cranes (responding to paras. 28 and 29); and Response to the Issues Statement, para. 3.8, as well as the Parties' internal documents cited at paras. 4.4-4.5 above.

(which, as set out in Section 4 above, the Parties dispute), these are highly unlikely to deter Chinese rivals given their access to capital and the broader strategic imperatives of the Chinese State in this sector.

5.6 Despite this and despite the Parties having made repeated submissions on this point,[32] the PFs unreasonably fail to consider whether the barriers to entry that the CMA alleges exist would deter entry or expansion by the Parties' actual and potential Chinese rivals. Given the prevalence and importance of Chinese rivals in the container handling equipment sector, this represents a serious error.

5.7 Indeed, the clear evidence of the growth in supply by Chinese competitors to UK customers in particular clearly refutes any notion that Chinese rivals are inhibited by barriers to entry or otherwise deterred from entering. Key examples include ZPMC's success in supplying STS cranes globally (including the UK), ZPMC's success in supplying RTG in the UK, Sany's entry and significant growth in RS (accounting for [✂] as well as its growth in ECH, and Shacman in conjunction with ZPMC winning a very significant order for electronic TTs from HPH Felixstowe in 2021.

The PFs overstate incumbents' advantages despite clear and consistent evidence that this is not a determinative factor

5.8 The PFs claim that interoperability can be a barrier to expansion for suppliers of yard cranes and SC/ShC with a narrow portfolio of container handling equipment, and similarly that it is difficult for potential competitors in the MEQ sector to win market share from incumbent suppliers, and particularly those with a broad portfolio.[33]

5.9 There are some common weaknesses in the PFs across all three sectors, which highlight the flaws in the reasoning and the provisional conclusions in the PFs.

- Firstly (and as indicated in Section 3 above), the CMA has not received sufficient feedback from customers to be able to claim that the views it cites are representative of the overall market. In both yard cranes and mobile equipment, the CMA appears to have received feedback on interoperability from just three customers, whereas in SC/ShC the PFs do not appear to have received any customer feedback at all (instead seemingly basing its conclusions purely on competitor feedback). Further, where the CMA has received customer feedback, it does not give an indication of the importance of the customers concerned on the relevant purchasing markets or indeed their experience in assessing interoperability of products. This omission prevents the Parties from assessing the evidential weight of the feedback and, if necessary, effectively challenging the PFs' reliance on it. For example, if the customers that are averse to multi-sourcing account for only a small proportion of potential sales, their preference will not be a barrier to entry or expansion on the relevant markets.
- Secondly and in any event, the third-party feedback is mixed, rather than negative. For example, of the three customers quoted in the yard cranes

[32] See e.g. the Parties' Response to the Working Paper on countervailing factors (MEQ), pages 3 and 4.

[33] PFs, paras. 12.65, 12.102 and 12.144-145.

section, one noted that it selects suppliers based on price (where Chinese rivals would have an advantage) and that it is generally able to 'mix and match' between different suppliers even if it is still coming to grips with interoperability, while another noted that "[it] *is possible to combine one manufacturer's ECS with software from other manufacturers*". As set out in the Parties' SO Response (sent to the CMA on 11 November 2021), several customers that responded to the Commission's market testing did not consider interoperability to be a competitive advantage for suppliers. For example, [✂].

5.10 In addition, the delivery data does not support the PFs' claim that there is an incumbency advantage. Many customers (particularly port customers) seek to purchase equipment from different suppliers so as not to be dependent on any one OEM. For example:

- Felixstowe (UK) has purchased RTG from ZPMC and Konecranes;
- HHLA Hamburg (Germany) ordered ASC from both Cargotec and Kuenz;
- Klaipeda Container Terminal (Lithuania) ordered RTG from Cargotec, Konecranes and Paceco Espana (now Mitsui-Paceco);
- Gdansk Deepwater CT (Poland) ordered RTG from Cargotec, Konecranes and Liebherr; and
- APMT Algeciras (Spain) has purchased RTG from Konecranes and ZPMC.

5.11 Taken together, the above factors show that the PFs have unreasonably overstated the barriers to entry faced by potential competitors and the strategic advantages incumbents have on the market. Indeed, as Cargotec's position in STS cranes [✂] demonstrate, it is possible for new entrants to rapidly take over a market over a relatively short period of time, particularly where the new entrants are able to undercut incumbents on price.

The PFs overstate relevance of strong local track record

5.12 Across each of the relevant markets, the PFs conclude that having a strong and local track record is an important competitive advantage, which represents a barrier to entry for both non-European rivals and for potential rivals. This assessment relies on third-party feedback that is, at best, mixed, as well as documents that are of little to no probative value. The PFs also unjustifiably dismiss relevant evidence. Accordingly, the conclusion in the PFs is not only wrong but also unreasonable.

5.13 As is a recurring theme throughout the PFs, the CMA received insufficient responses from third parties to be able to claim that the feedback it received could be representative of the overall markets, or even that it had made reasonable efforts to obtain adequate feedback. For example, the PFs quote feedback from only one customer in support of its conclusion that a strong track record and established reputation are "very important" parts of generating sales as a supplier of mobile equipment.[34] Moreover, not only do the PFs not indicate how representative or significant this customer is or what types of mobile equipment it purchases, but this

[34] PFs, para. 12.133.

customer in fact made no such reference to the need for a strong track record let alone a strong local track record.[35] There is therefore no basis for the PFs' conclusion in this regard. Similarly, for SC and ShC, the PFs quote feedback from just two customers in support of its conclusion and provides no indication of how significant those customers are on the relevant purchasing market.[36] Further, the feedback actually quoted in the PFs again makes no reference to the need for a strong local track record.[37] There is therefore no evidential basis for the conclusion on this issue in the PFs.

5.14 The assessment of internal documents relied upon in the PFs to support the conclusions is also unreasonable. Indeed despite the Parties submitting well over one million unique documents to the CMA, the CMA justifies its conclusion by placing repeated reliance on a single pitch document produced by [✂] , a management consultancy, that refers [✂]. In justifying the heavy reliance on the document, the PFs note that [✂] claim to have [✂]. There are a number of points that can be made here: firstly and most obviously, the document is a pitch document to win work – any statements represent [✂] views as a management consultant, rather than those of the Parties as industry experts; secondly, the document is a marketing document, promoting [✂] services, rather than an advisory document to be relied on by the Parties. The heavy reliance on this single document is unreasonable, particularly given the volume of internal documents received from the Parties.

5.15 Finally, the PFs also unjustifiably dismiss evidence put before the CMA which counters the conclusion that a strong local track record is required. Perhaps the most telling example is that while the PFs acknowledge that ZPMC has managed to enter the European cranes market without having a previous track record, it goes on to say that this does not diminish "*the scale of this barrier which must be overcome*".[38] The PFs provide no justification as to why this is the case. As a matter of logic however, either the barriers to entry and expansion are not high enough to deter entry and expansion, or ZPMC has a distinct advantage over other potential rivals. The CMA cannot maintain its position on barriers to entry without conceding that Chinese State-backed and State-owned rivals do in fact have a disproportionately greater impact on the relevant markets.[39]

5.16 As a consequence of the abovementioned flaws in the analysis (whether considered individually or collectively), the provisional conclusion in the PFs that barriers to entry and expansion on the relevant markets are "significant" is unreasonable and falls outside the range of reasonable responses available to the CMA.[40]

5.17 This conclusion has important consequences for the PFs' overall assessment of the relevant markets, leading the PFs to portray the relevant markets as far less dynamic, and the market players far less constrained by potential competition, than is actually

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[35] PFs, para. 12.130(c).

[36] PFs, para. 12.88.

[37] PFs, para. 12.85(b) and (c).

[38] PFs, para. 12.50.

[39] See section 4 above.

[40] *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649, para. 98.

the case. As ZPMC's recent rapid expansion in, and ultimately domination of, the STS cranes market vividly demonstrates, the container handling equipment sector is characterised by dynamic competition and little customer loyalty. As the Parties' internal documents (cited above) demonstrate, the threat of actual or potential competitors either expanding or entering the markets on which the Parties are active already constrains the Parties' competitive conduct, and this dynamic will not change post-Merger.

C. SPECIFIC ERRORS IN THE PROVISIONAL FINDINGS

6. RTG and ASC

6.1 The PFs provisionally find that there is an SLC as a result of horizontal unilateral effects in the supply of RTG and ASC. The PFs' assessment is vitiated by numerous procedural and factual errors that materially impact its provisional findings, which are addressed in turn below.

(a) Summary of the CMA's position in the PFs

6.2 The PFs conclude that the relevant geographic markets for RTG and ASC are European (including the UK) due to the different competitive dynamics in Europe compared with other regions of the world, taking into account differences in structures of supply, and factors such as transport costs and regulatory requirements and the importance of after sales presence.

6.3 In its competitive assessment, the PFs conclude that in each of RTG and ASC, the Parties compete closely, have a proven track record and face only two material competitors, based on market shares, bidding analysis, evidence from third parties and internal documents. [41]

6.4 The Parties strongly disagree with the PFs with respect to the geographic market and competitive dynamics in the markets for RTG and ASC. In this Response, the Parties will demonstrate *inter alia* that the paucity of the CMA's market investigation, its selective use of a (very) limited set of internal documents, and its contradictory use of UK-specific evidence do not allow it to come to a credible and defensible conclusion, let alone a reasonable one. With respect to ASC in particular, the PFs arrive at a directly contradictory conclusion to that of the Commission, despite the CMA having considered the same product, for the same geographic area, and despite it having access to the same group of third parties from which to obtain evidence.

(b) Bidding data

6.5 See **Annex 1** to this Response, which sets out the procedural and factual errors made in the bidding analysis with respect to RTG and ASC. In summary, and as previously explained to the CMA in the Merger Notice[42] (and subsequently reiterated in the Response to the AIS), the Parties' bidding data is highly incomplete and as such any bidding analysis based exclusively on this data would make it impossible to analyse several issues relevant to the assessment of closeness of competition. The CMA fails

[41] PFs, paras. 7.124 and 7.125.

[42] FMN, paras. 316-339.

to remedy this by collecting data from third parties, thus limiting its analysis to only the winners of the Parties' lost opportunities without further considering the competitive pressure exerted by unsuccessful bidders in these opportunities or the competitive dynamics in opportunities won by the Parties. The PFs' bidding analysis therefore fails to capture a wider picture of the competitive dynamics in yard cranes and, as a result, is insufficient and cannot be relied on to demonstrate that the Parties are close competitors.

(c) Procedural and factual errors

Failure to satisfy the CMA's duty of sufficient inquiry

6.6 As explained in section 3, the CMA's market testing fails to satisfy its duty of sufficient inquiry. Specific issues with the CMA's market testing for yard cranes include:

- **limiting its inquiry to UK customers despite its finding that the markets for RTG and ASC are Europe-wide (including the UK)**. The CMA received feedback from just seven yard cranes customers. Whilst the CMA acknowledges that its market investigation only covers "*a small number of customers*",[43] it seeks to brush over this by claiming that these seven respondents represent "*a large proportion of the relevant customers in the UK*".[44] Further, the CMA goes on to justify its approach by stating that "*[g]iven that the CMA is concerned with the effects of mergers in the UK, it is reasonable for us to focus our customer outreach on UK customers*".[45] As explained above, such a limited and UK-centric sample of customer feedback cannot form a credible basis for an assessment of European-wide (or as the Parties argue, global) markets. This is particularly the case in ASC, where only two UK customers were contacted (none of which purchased ASC from Konecranes).

- **erroneously drawing conclusions based on a limited and unrepresentative sample of responses from competitors**. The CMA claims it received responses from the Parties' main cranes competitors in the UK and in Europe.[46] However, in reality, only Liebherr and Kuenz responded to the CMA's questionnaires, and feedback from ZPMC with regard to cranes specifically was by way of a virtual meeting. In other words, the CMA received no substantive feedback from other global and European competitors such as Mitsui-Paceco and Sany. Such a limited set of competitor feedback, both in terms of geographic scope and overall scale, cannot be relied upon to form a credible conclusion on the competitive dynamics in European or global markets. Further, whilst the CMA claims that it is "*concerned with the effects of mergers in the UK*", it nonetheless selectively relies on certain UK specificities to inform its assessment of, in its view, a broader European market

[43] Annex D of the PFs, para. 12.

[44] *Ibid*.

[45] *Ibid*.

[46] PFs, para. 6.41.

and *vice-versa* when convenient.[47] Put simply, the CMA cannot have it both ways.

- **failing to investigate and assess the competitive constraints which may be imposed on the Merged Entity by a substantial number of other suppliers present globally and/or in Europe**. Both Sany and Mitsui-Paceco have an established presence in Europe, [✂]. The PFs also fail to give any weight to recent entry from suppliers such as Kuenz in RTG, based simply on the fact that Kuenz has not bid in UK RTG tenders over the past ten years.[48] This statement is somewhat of a *non sequitur*, in that Kuenz has only just recently entered this segment.

Failure to give due regard to relevant evidence

6.7 In a number of instances, the PFs fail to give due regard to the evidence available to the CMA.

- For example, the PFs conclude that it did not find evidence that any of the existing alternative suppliers have the necessary capabilities and intention to enter at scale or to substantially expand their RTG operations in Europe (including the UK) in the near future.[49] This is wholly inconsistent with available evidence. In response to the Commission's market investigation, [✂] confirmed that [✂]. Similarly, [✂] confirmed that [✂]. [✂] These confirmations directly contradict the PFs' conclusion.

- In another example, the PFs make no mention of competitors' or customers' views on the question of geographic market. However, the Parties understand that both Liebherr and Kuenz provided responses to the CMA's questionnaires, and a virtual meeting was held with ZPMC. It bears mentioning that, based on the Commission's market investigation, [✂]. In contrast, the PFs reference a single internal document which the CMA claims considers the competitive situation in different regions across the world, and that shares differ across regions, thereby supporting the CMA's contention that the markets for RTG and ASC are Europe-wide. This ignores the fact that the document (which is in any event a third party analyst report and not the Parties' own internal document) also provides a narrower assessment within Europe (for example, ZPMC is listed as the leading supplier of RTG in northern Europe with a share of 54% and of Southern Europe for ASC with a share of 48%) and is therefore not evidence of a European market.

Evidence relied on has not been scrutinised and/or does not support key elements of the assessment and PFs

6.8 In reaching its conclusion that the market for cranes is European-wide, the PFs rely on feedback from a limited number of competitors including [✂] and another (anonymised) competitor's claim regarding the difficulties in fulfilling European

[47] See e.g. para. 3.10 above.

[48] PFs, para. 7.126(c).

[49] PFs, para. 7.121.

regulatory requirements for Japanese and Korean suppliers.[50] [✂]. As regards the second claim, whilst the CMA did not directly get feedback from [✂], in its discussions with the Commission, [✂]. Similarly, [✂]

6.9 Further, the (limited) evidence cited in the PFs is at best mixed as regards the requirements for a local presence. As the Parties have explained in prior submissions, a local presence *e.g.*, for after-sales services is not a prerequisite, and is not indicative of a narrow geographic scope of the yard crane segment. Of just **two** customers cited, one confirmed that it has a "*strong in-house engineering function*" and the other stated that "*it undertakes routine maintenance itself*".[51] This aligns with the Parties' experience in that the vast majority of customers perform maintenance of cranes themselves (and in the UK there is a historical tendency for terminal operators to service cranes themselves, per para. 726 of the Merger Notice). Further, the reference at para. 5.51(b) of the PFs to the customer requiring the manufacturer to be "*available to be contacted*" is not conclusive or indicative of a local after-sales presence being an important factor. Of the two competitors cited in this context, neither supports the CMA's claim. The first competitor simply states that it needs to rely on a number of components from European suppliers. Given that the yard cranes business is an assembly business, so too do the Parties and every other supplier. This says nothing on the necessity of having a local after-sales service presence. Similarly, the second competitor describes delivery times which, again, is not relevant to the question of a local presence (and has, in any event, been addressed at length in prior submissions).[52]

6.10 Finally, the tender data used by the CMA to support a finding of close competition between the Parties does not support the CMA's findings. In the three tenders in which Konecranes competed against Cargotec, [✂] Further, in the one tender in which Konecranes was successful, [✂] It is therefore unclear to the Parties how the PFs can describe the results of this exercise as "*broadly consistent*" with its finding that the Parties compete closely for UK tenders. Quite the opposite is true. In any event, such a limited set of UK-specific tenders cannot inform an assessment of the competitive conditions on a European-wide basis. In fact, [✂], who features prominently in the CMA's tender cases studies confirmed to the Commission specifically with respect to RTG that [✂]

6.11 The inherent contradictions that are perhaps inevitable in light of the CMA's approach are most glaring in ASC. In support of its finding that the Merger is likely to result in an SLC in the supply of ASC, the PFs conclude that ZPMC is a stronger competitor for larger volume ASC tenders (where it competes strongly on price), than for smaller volume tenders.[53] As the CMA will be aware, the Commission [✂]. This conclusion, which is based on a much broader set of evidence, directly contradicts that of the CMA, and cannot be explained by any alleged UK-specificities given that Konecranes does not even supply ASC to the UK.

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[50] PFs, paras. 5.42 and 5.50.

[51] PFs, para. 5.51.

[52] See, for example, the Parties' response to the Working Paper on cranes.

[53] PFs, para. 7.226.

(d) Barriers to entry

6.12 The PFs conclude that potential entrants would be required to establish a strong track record and reputation, and this is likely to constitute a high barrier to entry. This finding, the PFs claim, is not diminished by the fact that ZPMC has managed to enter in Europe without having a prior track record in Europe.[54] The PFs (incorrectly) base this finding on a limited set of customer and competitor feedback.

6.13 The Parties will not reiterate here all the arguments and evidence advanced previously (as well as the comments set out in Section 5 regarding the flaws in the PFs' overall assessment of barriers to entry), but will nonetheless highlight the following factual points that are specific to cranes:[55]

- First, global port operators typically make purchasing decisions on a global basis. As such, demand is not differentiated based on any alleged regional specificities, and suppliers (including non-European suppliers) have established track records and reputations with these customers on a global basis. Indeed, as confirmed by the CMA's tender case studies, [✂]. This suggests either that (i) non-European suppliers [✂] are invited to tender and have established reputations and track records; or (ii) even if they don't, they are still invited to bid [✂] Either way, the feedback received by the CMA does not support its findings.

- Second, it is a fact that non-European suppliers are actively competing in yard cranes, and are set on further expansion. Aside from ZPMC and Sany, Mitsui-Paceco has participated in bids for STS cranes and A-RTGs for two Yilport sites in Portugal and one in Sweden, where Mitsui-Paceco was ultimately awarded the STS cranes contract (which, as the Parties have explained in prior submissions, is often used as a stepping stone into other cranes segments).

- Third, the PFs appear to dismiss the recent entry that has taken place, as well as the further expansion that is anticipated. Both Kuenz and Baltkran recently entered the RTG segment. Further, [✂]

6.14 In sum, notwithstanding the alleged barriers to entry, recent entry has occurred, [✂]

(e) Conclusion: RTG and ASC

6.15 To conclude, each individual component of the PFs' assessment on the competitive conditions for RTG and ASC suffers from material errors which, when taken as a whole, result in provisional conclusions that are materially deficient and therefore unreliable. For example, the PFs rely on the views of just seven UK customers, which represents a small proportion of players active in the European market for yard cranes. Similarly, the PFs selectively rely on the Parties' internal documents, such as citing only one document (which is not even an internal document of the Parties) to support its conclusion that the relevant geographic market is Europe-wide in scope and not global. The PFs also fail to give due regard to evidence demonstrating the presence of current and potential competitors in the supply of RTG and ASC such as Sany, Mitsui-

[54] PFs, para. 12.50.

[55] See, for example, the Parties' response to the Working Paper on cranes.

Paceco, Kuenz and Baltkran, and therefore fail to capture important aspects of future competition.

7. MEQ

7.1 The PFs provisionally find that there is an SLC as a result of horizontal unilateral effects in the supply of RS, >10t FLT and ECH. The PFs' assessment is vitiated by numerous procedural and factual errors that materially impact its provisional findings. These are addressed in turn below.

(a) Summary of the CMA's position in the PFs

7.2 The PFs conclude that RS, FLT and ECH constitute distinct product markets due to limited demand and supply-side substitutability, and that forklift trucks with a lifting capacity of more than 10 tonnes are part of a different product market from 'light' FLTs. In addition, the PFs find that the geographic market is no wider than Europe (including the UK) for mobile equipment with some important UK-specific aspects, noting the importance of a local track record in Europe, a sales and after-sales presence and the fact that "*there are very few distributors available in the UK with the necessary coverage and expertise for the effective distribution of* [mobile equipment]".[56]

7.3 The PFs find that the Merger is likely to result in an SLC in the supply of RS, FLT and ECH on the basis that: (a) the Parties compete closely in the supply of mobile equipment; and (b) competitors will impose only a limited constraint on the Merged Entity in the UK. In this respect, the PFs conclude that, in the UK:

- RS and ECH: only two material competitors will impose a constraint on the Parties, being Hyster and to a lesser extent Sany; and
- FLT: only three material competitors will impose a constraint on the Parties, being Hyster and to a lesser extent Linde and Svetruck, and some customers may have fewer than four competitive offers after the Merger.

7.4 The Parties strongly disagree with the PFs with respect to the geographic market and competitive dynamics in the markets for mobile equipment. In this Response, the Parties will demonstrate *inter alia* that the procedural failings in the CMA's investigation, its failure to draw conclusions based on the evidence on the file, the inconsistent approach to the competitive assessment of FLTs (coupled with a failure to make sufficient inquiry of the material required to enable the CMAto reach a properly informed decision) in the PFs as well as various material factual errors result in an unreasonable and indefensible conclusion.

(b) Bidding data

7.5 See **Annex 1** to this Response, which sets out the procedural and factual errors made in the bidding analysis with respect to mobile equipment as well as paragraph 6.5 for a summary of the key points set out in Annex 1.

(c) Procedural errors

[56] PFs, para. 5.155.

Failure to satisfy the CMA's duty of sufficient inquiry

7.6 As explained in section 3, the CMA's market testing fails to satisfy its duty of sufficient inquiry by, for instance:

- **limiting its inquiry to UK customers and distributors despite its finding that the market for mobile equipment is Europe-wide (including the UK)**. Even then, the sample of distributors and customers which the CMA contacted and received responses from was extremely limited. For example, the Parties submitted a list of at least 90 distributors with experience in mobile equipment in the UK in respect of which the CMA "*sent questionnaires to a small sample*".[57] Similarly, the CMA received responses from customers representing only [30 - 40]% of Cargotec's FLT sales in the UK over 2017–2020[58] which cannot be considered representative of the UK segment of the FLT market as whole, let alone the overall Europe-wide FLT market.

- **erroneously drawing conclusions based on a limited and unrepresentative sample of responses received from third parties**. For example, the PFs rely on responses from three distributors (including Konecranes' UK distributor, Impact) and only *one* manufacturer of FLTs to dismiss the Parties' arguments that manufacturers of 'lighter' FLTs are able to expand production to >10t FLTs.[59] Even then, this one manufacturer merely observes that FLTs with different lifting capacity have certain product specification differences (e.g. different tyres) without commenting on how this might impact its ability to supply FLT with different lifting capacities.

- **failing to investigate and assess the competitive constraints which may be imposed on the Merged Entity by a substantial number of other suppliers present in the UK and/or Europe**, namely: (a) suppliers present in the UK but which the PFs did not consider to be 'material competitors' (e.g. in respect of FLTs, Hyundai, Svetruck, Sany, and others); and (b) in light of the finding in the PFs that the market for mobile equipment is Europe-wide (including the UK), suppliers present in Europe but which have not made any sales (or any recent sales) into the UK. The CMA unjustifiably limits its inquiry and assessment to whether other suppliers currently exert a material competitive constraint on the Parties in the UK but does not consider whether these other suppliers may impose a *sufficient post-Merger competitive constraint by acting as an available option for customers*. There is no rational basis for ignoring the presence of these suppliers as potential competitive constraints on the Merged Entity, even if assessing the impact of the Merger on UK customers only. Indeed, the PFs state that "*what matters is that the customer has a number of possible suppliers*".[60]

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[57] PFs, para 6.42.

[58] Annex D of the PFs.

[59] See PFs, para. 5.123.

[60] PFs, para 6.90.

Failure to give due regard to relevant evidence

7.7 For example, in concluding at paragraph 9.277 that it "*did not find evidence that any of the existing alternative suppliers […] have the necessary capabilities or intention to enter at scale or to substantially expand into the supply of RS, HDFLT or ECH in Europe (including the UK), in the near future*", the PFs fail to give due regard to relevant evidence submitted by, among others, [✂]. Please see section 4 explaining why Chinese competitors not only have the ability to enter and rapidly increase their share of supply, but that they are able to do so on a scale that does not reflect normal conditions of competition. In particular, the PFs fail to give due regard to [✂]

Evidence relied on does not support key elements of the assessment and PFs

7.8 The PFs' conclusion that the evidence points to Sany imposing a lesser constraint on the Parties for RS and ECH in the UK because of quality concerns is not supported by the evidence set out in the PFs. For RS, the PFs primarily rely on the views of certain third parties, namely three UK distributors, one competitor but crucially only *two* UK customers, as well as the qualitative assessment of one tender to support its assessment. However, as noted in the PFs, "*the views from third parties on Sany were mixed*"[61] (including one customer that felt Sany "*has become a serious market contender*"[62]) and the PFs place limited weight on the qualitative tender case studies.[63] Evidence from the Parties' internal documents similarly do not clearly support the assessment in the PFs of Sany's weaknesses, with the PFs recognising that "*the evidence from internal documents concerning Sany is mixed*".[64] It is therefore irrational for the CMA to rely on these as evidence of limitations on Sany's ability to compete in the UK.

7.9 On the contrary, the PFs recognise at paragraph 9.22 that Sany's share of supply in the UK is rapidly increasing, stating that "*Sany had much higher UK sales in 2019 ([✂] units) and 2020 ([✂] units) as compared with previous years*". Any purported quality concerns have therefore not proven to be an obstacle for Sany's rapid expansion in the UK. [✂]

7.10 Similarly, other evidence identified in the PFs point to the opposite conclusion i.e. that Sany's market position in the UK is growing rapidly. For example, four out of eight customers surveyed by the CMA expected Sany to compete for future purchases, of which two expected it to rank first (either outright or joint). The PFs note that "[t]*his is in contrast to the ranking of suppliers in recent purchases, where Sany was not mentioned by any respondent*".[65]

Inconsistent approach to the competitive assessment

7.11 The assessment of FLTs in the PFs is vitiated by an inconsistent approach to the competitive assessment combined with a failure to make sufficient inquiry of the

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[61] PFs, para 9.65.

[62] PFs, para 9.66.

[63] PFs, para 9.36.

[64] PFs, para. 9.84.

[65] See PFs, para. 9.52.

material required to enable the CMA to make a properly informed decision. These shortcomings materially impact the PFs' conclusion on whether the Merger is likely to result in an SLC in the supply of FLTs.

7.12 An example of the CMA's inconsistent approach to its competitive assessment can be seen when the PFs discount the competitive constraint imposed by other suppliers in the overall market for >10t FLTs on the basis that they are not present or competitive in heavier lifting capacities (i.e. above 18 or 20 tonnes). For example, the PFs appear to conclude that Linde is less of a competitive constraint on the Parties and that an SLC partly arises in the supply of FLTs on the basis that Linde is not active in the supply of FLTs with a lifting capacity greater than 18 tonnes.[66] This is in direct contradiction to the CMA's own analysis of the Parties' bidding data which shows that [✂]. Similarly, the PFs seem to discount Hyundai and Doosan on the basis that, while third party views "*were mostly positive with regards to their ability to compete for HDFLT with a lifting capacity between 10 and 20 tonnes*", "*these players were not identified as being competitive at heavier lifting capacities*".[67]

7.13 The CMA should have conducted an investigation of, *inter alia*, (i) the significance of the >18t FLT segment relative to the overall market for >10t FLTs (e.g. the proportion of sales this segment accounts for), (ii) the competitive conditions in the >18t FLT segment and whether this has any impact on the overall market for >10t FLTs, and (iii) the extent to which suppliers in one sub-segment can exert competitive pressure on those in other sub-segments. The CMA did not, however, carry out this assessment and as such the decision is manifestly deficient and unreliable.

(d) Factual errors

7.14 The CMA makes several factual errors in its assessment of the market definition and competitive assessment for mobile equipment. For example, the PFs assert that "*there are very few distributors available in the UK with the necessary coverage and expertise for the effective distribution of* [mobile equipment]".[68] The PFs rely on: (a) the assertion that while many distributors exist in the UK, only a small number of them have been used by the main suppliers; (b) statements by two 'third parties' that there are few effective distributors in the UK; (c) statements from two distributors that they may find it difficult to serve another OEM or switch OEM; and (d) the observation that many of the distributors identified by the Parties appears to focus on light FLT only, and many do not have established customer relationships with port terminal operators.

7.15 This assessment is evidently and objectively incorrect based on the evidence on the CMA's file, which the PFs identify but fail to properly consider. For example:

- With reference to the list of dealers with which Cargotec's UK competitors for mobile equipment have a distribution relationship provided as an annex to RFI 1,[69] the 14 competing suppliers of >10t FLTs which are present in the UK via

[66] See PFs, paras. 9.177 and 9.180.

[67] PFs, para. 9.155.

[68] See PFs, para. 5.155.

[69] Annex 9.4 to RFI 1.

dealers use 13 different dealers. This demonstrates that competitors are able to partner with suitable distributors without, for the most part, having to use the same distributors as their competitors.

- Evidence previously submitted by the Parties indicates that mobile equipment OEMs can enter into successful partnerships with dealers with no (or less) experience in container handling equipment. In particular, Impact did not specialise in heavy port handling equipment prior to distributing Konecranes' products.[70] There is similarly also evidence of distributors switching OEMs, such as Cooper Handling which currently distributes Sany products but used to be Konecranes' distributor.[71]

(e) Conclusion: MEQ

7.16 In summary, the key sources of evidence relied on in the PFs to assess the competitive conditions in mobile equipment suffer from material errors which, when taken as a whole, result in PFs that are materially deficient and unreasonable. In particular, the PFs rely heavily on a bidding analysis that merely covers [✂]. Similarly, the PFs rely on views of a very limited set of UK competitors, customers and distributors. The PFs also fail to give due regard to the competitive constraints imposed (or which may be imposed in the near future) by a range of other suppliers currently active in the European and global markets for mobile equipment, and therefore fail to capture important aspects of competitive dynamics on the market.

8. ATT

8.1 The PFs provisionally find that there is an SLC as a result of horizontal unilateral effects in the supply of ATT. The PFs are vitiated by numerous procedural and factual errors that materially impact the provisional findings, which are addressed below.

(a) Summary of the CMA's position in the PFs

8.2 The PFs conclude that the Merger may be expected to result in an SLC as a result of horizonal unilateral effects in the supply of ATT in Europe, including the UK.[72] The PFs' conclusions are based on an assessment that: (i) Cargotec and Terberg are both likely to be "*amongst the most serious*" competitors in ATT in the UK; and (ii) there is a [✂] therefore softening competition between Cargotec and Terberg post-Merger.[73]

(b) Procedural and factual errors

8.3 The Parties note three key errors in the CMA's assessment, which materially impact the PFs:

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[70] As explained during the Parties' site visit.

[71] As explained during the Parties' site visit. See also the Parties' Response to the Issues Statement, para. 4.3.

[72] PFs, para. 1 of the Summary.

[73] PFs, paras. 71-78 and 81 of the Summary.

(a) **The PFs are based on limited evidence of uncertain probative value.** The PFs acknowledge that there will be no purchases in the UK for at least five years, it is uncertain how the market will develop, and the majority of customers do not consider themselves well informed about ATT. Notably, the 13 customers who responded to the CMA all confirmed that they did not envisage purchasing ATT in the next five years and seven of the 13 did not feel well informed about suppliers in the market.[74] The CMA itself acknowledges that it can only place limited weight on this evidence. The CMA's analysis relies primarily on its (selective) interpretation of the Parties' internal documents and competitor comments.

(b) **The PFs are selective in the use of market feedback to find that Cargotec is well placed to compete in ATT in the future.** For example, the PFs place weight on the integration capabilities of Konecranes and Cargotec referred to in their internal documents, although customers placed limited weight on the importance of interoperability or already having an installed base of equipment from a particular supplier when choosing ATT.[75] The PFs appear to place more weight on the comments of one competitor who notes that the most important factors in choosing a supplier are the fleet management and terminal operation system used by the terminal.[76]

(c) **The PFs attach excessive significance to the impact of the** [✂] **due to certain factual errors.** In stating that [✂] the PFs ignore the fact that the [✂] does not prevent competition between Terberg and Konecranes. [✂] The PFs do not take into account [✂].

D. CONCLUSION

8.4 As the CMA notes in the PFs, it has a wide margin of appreciation both in deciding how to conduct an investigation and in the decisions it ultimately reaches. However, this discretion is not absolute and the CMA must properly weigh the evidence received.

- Firstly, the CMA must show that the Transaction may be expected to result in an SLC. That means a degree of likelihood for such a result which is more than 50%, in other words: on the balance of probabilities. The legal onus is on the CMA to prove an SLC, on the balance of probabilities, and to do so based on evidence.

- Secondly, in carrying out its investigation and in reaching its decision, it is bound by principles of public law, including obligations to act reasonably both in terms of procedural approach and conclusions reached, to sufficiently acquaint itself with relevant information, which must be fairly presented and properly addressed, and to give the Parties a fair hearing.

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[74] PFs, para. 10.76.

[75] PFs, paras. 10.75(c) and 10.75(d).

[76] PFs, para. 10.67.

8.5 It is evident that the CMA has fallen short of the requisite standards in this case. As indicated above the conclusions of the PFs are reached on the basis of:

- ***Bidding data that is not fit for purpose***: the Parties' data does not bear the weight attributed to it and no inquiry was made of the relevant third parties to plug the significant data gaps to enable a robust bidding analysis to be constructed despite the fact that the Parties raised this issue in sufficient time for the CMA to remedy these shortcomings.

- ***Third-party responses***: as extensively detailed above, the CMA's market testing has been wholly inadequate and results in the PFs relying excessively on the uncorroborated views of one or two commentators whose position and significance in the supply chain is frequently also unclear. Where neutral or positive views about the Merger are expressed, these are discounted with no explanation, which given the paucity of responses overall to the CMA's market testing, is entirely unsupportable. Moreover, the PFs contain no answers to the contradictory information presented by market participants now on the CMA's file by way of the Parties' submission to the CMA of their responses to the Commission. It is not open to the CMA to seek to dismiss this evidence on the basis of its purported inability to verify and interrogate the material concerned when the CMA has put itself in that invidious and entirely avoidable position and taken no steps to remedy its shortcomings.

- ***Internal documents***: over one million documents are available to the CMA in this investigation as the CMA asked for the documents submitted to the Commission and over 6,000 documents were made available to the CMA through its s.109 process. Notwithstanding the large number of documents on all pertinent topics under the CMA's control, it has focused entirely disproportionately on a single document not created by either Party in its assessment of barriers to entry, while at the same time simply dismissing the numerous internal documents that consistently emphasise the extent of the competitive threat posed by the Parties' Chinese rivals.

8.6 The effect of these shortcomings on the CMA's overall assessment and the Parties' rights of defence are so significant that not only are the provisional conclusions wrong as a matter of fact and law but they also fall outside the range of reasonable decisions that were available to the CMA. Further, the PFs repeated the unsubstantiated claim that evidence has been considered "*in the round*",[77] which does not cure these flaws. The result is that the balance of probabilities test is not met, and the provisional finding of an SLC cannot stand.

[77] See e.g. PFs, para. 6.6 with regard to the CMA's approach to evidence generally. See also, para. 6.32, 6.34, 6.40, 8.53, 9.24 for similar comments relating to specific datasets.