The Commerce Act

Mergers and Acquisitions – Merger Assessment

This document should be read in view of amendments to the Commerce Act made in August 2017. The Commission will update the document in the near future to reflect changes made under the Act.

This fact sheet explains when and why a merger has the potential to substantially lessen competition in a market. It is designed to give businesses an understanding of how the Commerce Commission assesses mergers.

Mergers can bring many benefits to the economy by making it possible for businesses to be more efficient and innovative. But some mergers can harm competition by giving the merged businesses market power, which could result in higher prices and reduced choice or quality for consumers. Under the Commerce Act, the Commission can prevent anti-competitive mergers from going ahead.

When considering a proposed merger, the Commission must decide whether the competition that is lost in a market when two businesses merge is substantial. We will give clearance to a proposed merger only if we are satisfied that the merger is unlikely to substantially lessen competition in a market.

What is the market?

First we need to define the appropriate market so that we can assess whether the proposed merger is likely to result in a substantial lessening of competition in that market.

A market includes only those products or services that are seen as close substitutes for each other by customers, competitors and suppliers. We look at whether or not products can be substituted for each other in a common sense and commercial way.

EXAMPLE

To decide if butter and margarine are substitutes for each other, we would ask whether a small increase in the price of butter would make customers switch from using butter to using margarine. If enough customers would switch, then we would consider that butter and margarine are in the same market.

Defining the market is a technical exercise and the outcome may be different from how the public or the industry views the market.

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What factors indicate a substantial lessening of competition?

Every market is assessed separately. We will be concerned if a number of the following factors are present.

- *There is a high combined market share*

  If the merging businesses have a high combined market share, this might reduce competition in the market. To assess whether market share is a concern, we look at the market share of the combined entity. We also look at what the market share of the three largest businesses would be if the proposed merger went ahead.

- *Entering the market is difficult*

  If competitors cannot easily expand their operations, or new businesses cannot easily enter the market, then the merger may reduce competition. To assess the degree to which competition is reduced, we look at the conditions of entry, including how much it would cost and how long it is likely to take to enter the market.

- *Buyers have limited power*

  Large customers can sometimes prevent merging businesses from raising prices or reducing quality following a merger. This might be because of the customer's large size and importance to the merged business. It might be because the customer has the ability to import a similar product directly from overseas. We will be concerned if the merged entity is able to charge higher prices than they could in a competitive environment – unless buyers have the power to stop this from happening.

- *There is an increased potential for coordinated behaviour*

  Following a merger, it may be easier for competitors in a market to coordinate their behaviour. This may be because there are fewer businesses in the market or a vigorous competitor has been eliminated through the merger. Price fixing is an example of coordinated behaviour and is illegal under the Commerce Act.

Can businesses still merge if there is the potential for a substantial lessening of competition?

If a business is concerned that its proposed merger with a competitor might be viewed as anti-competitive, it can seek the Commission's approval for the merger to proceed. This is known as a clearance.

If the Commission grants a clearance, the merger is protected from legal action under New Zealand's competition laws. The business applying for clearance has one year from when the clearance is granted (or confirmed by a court) to carry out the merger without the risk of the merger being stopped on competition grounds.

For more information on the clearance application process read our fact sheet *Mergers and Acquisitions – Applying for a Clearance* at **www.comcom.govt.nz/mergers-and-acquisitions**

What happens if a merger takes place without a clearance?

Sometimes, businesses merge and do not apply for a clearance. If there is no likely substantial lessening of competition as a result of the merger, there is no problem. However, if the Commission has concerns that a substantial lessening of competition is likely, we can take enforcement action under the Commerce Act. This can result in significant penalties and the court may order the merger to be reversed.

For more information

- Visit our website for guidelines, previous clearance applications and Commission decisions **www.comcom.govt.nz/mergers-and-acquisitions**
- To discuss a possible merger, email the Mergers and Authorisations Manager at **msgmanager@comcom.govt.nz** or call 04 924 3600
- To apply for a merger clearance, contact the Registrar at **registrar@comcom.govt.nz**

To check for updates to this fact sheet visit: **www.comcom.govt.nz/mergers-and-acquisitions**
This fact sheet is part of a series looking at the Commerce Act and anti-competitive practices.
Other fact sheets can be downloaded from **www.comcom.govt.nz/business-competition**

Contact Us

Contact the Commerce Commission with information about possible breaches of the Commerce Act.

Phone: 0800 943 600
Write : Contact Centre, PO Box 2351, Wellington 6140
Email : contact@comcom.govt.nz