

Statement of Preliminary Issues

Pact Group Holdings Ltd and Flight Plastics Ltd

4 September 2020

Introduction

1. On 26 August 2020, the Commerce Commission registered an application (Application) from Pact Group Holdings Limited (Pact) to acquire the assets and business of Flight Plastics Limited in New Zealand and the packaging-related assets of Flight Extruded Plastics LP in Adelaide (together, Flight) (Proposed Acquisition).¹
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.²
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **18 September 2020**.

The parties

5. Pact is a packaging solutions business with over 100 sites and 6000 employees worldwide. Its primary focus is the manufacture and supply of rigid plastic packaging for customers in the food, beverage, chemical, industrial and agricultural sectors. In New Zealand, Pact manufactures and supplies plastic packaging products for a range of customers. In July 2019 it was announced that Pact had successfully applied to the Ministry for the Environment for a grant to build a recycled plastic flake decontamination line.³

¹ A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>. The Proposed Acquisition does not include Flight Extruded Plastics LP's plastic sheet/roll stock business based in Adelaide.

² The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

³ Pact Group "Pact Group receive New Zealand Government funding to transition to 100% recycled rPET in its food packaging range" (15 July 2019) <<https://pactgroup.com.au/news/pact-group-receive-government-funding-to-transition-to-100-recycled-rpet-in-its-food-packaging-range/>>

6. Flight is a manufacturer of plastics sheets and packaging in Australia and New Zealand, including for fruit and produce, bakery, meat and seafood, and nursery and horticulture.
7. The assets that Pact is acquiring from Flight are:⁴
 - 7.1 a plastic packaging plant in Wellington. The plant can process waste plastic collected locally and turn it back into food-grade plastic packaging; and
 - 7.2 a plastic packaging plant in Adelaide.

Our framework

8. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.⁵ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
9. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁶ This allows us to assess the degree by which the Proposed Acquisition might lessen competition. As Pact and Flight have applied for clearance under s 66 of the Act, not authorisation under s 67, the Commission may only consider factors that affect competition and may not take into account other benefits to the public such that the merger should be permitted despite any competition concerns.⁷
10. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
 - 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
 - 10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 10.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

⁴ The Application at [2].

⁵ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019 (the Guidelines). Available on our website at www.comcom.govt.nz

⁶ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁷ The Guidelines at [2.44].

Market definition

11. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.⁸
12. In the Application, Pact submitted that the Acquisition should primarily be assessed in the market for the supply of all small rigid packaging and alternatives.⁹ This market would include packaging made from materials such as plastic, cardboard, and corn starch.
13. In previous cases, the Commerce Commission has defined markets that included rigid packaging made of plastic, but did not include other materials.¹⁰ We will assess whether this approach to market definition is the appropriate one on which to conduct our competition analysis in this case, or whether packaging made from other types of materials also form part of the market. In particular, our assessment will consider:
 - 13.1 whether customers could easily switch to packaging made from alternative materials if faced with an increase in price for rigid plastic packaging; and
 - 13.2 whether suppliers of packaging of other types of material could easily switch to supplying rigid plastic packaging if there was an increase in price for rigid plastic packaging.
14. In previous cases, the Commerce Commission has identified that the relevant geographic area in which competition takes place is New Zealand.¹¹ Pact submitted that it faces competition from overseas rivals. We will assess the constraint from overseas rivals in our competition analysis.

Without the acquisition

15. We will consider what the parties would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or an alternate scenario such as, for example, another buyer acquiring Flight.

Preliminary issues

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

⁸ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁹ The Application at [6.1].

¹⁰ See for example *Tec Projects Limited and Tecpak Industries Limited* (18 November 2010) at [23].

¹¹ See for example *Tec Projects Limited and Tecpak Industries Limited* (18 November 2010) at [23].

- 16.1 Unilateral effects: would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?¹²
- 16.2 Coordinated effects: would the Proposed Acquisition change the conditions in the relevant market(s) so that coordination is more likely, more complete or more sustainable?
- 16.3 Vertical/conglomerate effects: would the Proposed Acquisition increase the merged entity's ability and/or incentive to engage in conduct that prevents or inhibits rivals from competing?

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

- 17. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase in price being thwarted by rival firms' competitive responses.
- 18. Pact and Flight both supply rigid plastic packaging. We will assess whether the Proposed Acquisition may cause unilateral effects through the loss of competition between the firms.
- 19. In the Application, Pact submitted that the Proposed Acquisition would not be likely to substantially lessen competition due to unilateral effects because:¹³
 - 19.1 there are other suppliers of packaging, including local manufacturers and importers;
 - 19.2 the parties compete against other types of packaging and materials; and
 - 19.3 the options that customers have give them significant bargaining power.
- 20. We will consider:
 - 20.1 the degree of competitive constraint that Pact and Flight impose upon one another. We will consider whether Pact and Flight are close competitors because of (for example) the location of their plants, the range of products they can manufacture or the customers they compete for;
 - 20.2 whether competition lost between Pact and Flight could be replaced through existing rivals expanding their operations or through new rivals entering the market; and

¹² For ease of reference, we only refer to the ability of the merged entity to "raise prices" from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, ie, it could increase quality-adjusted prices.

¹³ The Application at [1.3].

- 20.3 whether customers have special characteristics that would enable them to resist a price increase (such as by being able to sponsor new entry).
21. Pact submits that an important industry trend is a movement towards sustainable packaging.¹⁴ We will consider how this and any other changes in relation to sustainable packaging might be relevant to our analysis, including how amendments to the Basel Convention (and any Government response) could affect the volume of PET suitable for recycling in New Zealand.¹⁵

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

22. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.¹⁶
23. In the Application, Pact submitted that the Proposed Acquisition would not be likely to substantially lessen competition due to coordinated effects, arguing that:¹⁷
- 23.1 a large number of competitors will remain in the market(s) post-merger;
 - 23.2 the parties are not close competitors;
 - 23.3 the market is highly dynamic;
 - 23.4 key competitors have different business models;
 - 23.5 there are constraints from products made from different materials (even if these are treated as falling outside of the market);
 - 23.6 there is a lack of price transparency; and
 - 23.7 there is no multi-market contact (ie, Pact and Flight do not have commercial interactions with other competitors in other markets).
24. We will assess whether the Proposed Acquisition would change the conditions in the relevant market(s) so that coordination is more likely, more complete or more sustainable, and in particular whether:
- 24.1 there are factors that make the relevant market(s) vulnerable to coordination; and

¹⁴ The Application at [5.15].

¹⁵ "Basel Convention Plastic Waste Amendments" The Basel Convention (2019) <www.basel.int>

¹⁶ *Mergers and Acquisitions Guidelines* above n5 at [3.84].

¹⁷ The Application at [7.24].

- 24.2 the merger is likely to change conditions so that coordination is more likely, including whether one or both of the parties are currently acting as a destabilising competitor.

Vertical and conglomerate effects: would the merged entity be able to foreclose rivals?

25. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively (which we refer to as “foreclosing rivals”).
26. Pact submitted that there is no risk of vertical effects, including because:¹⁸
- 26.1 Pact does not have any material business selling inputs to competitors; and
- 26.2 competitors operate by importing inputs (such as plastic flakes) and so are not reliant on Pact or Flight.
27. We will assess whether the Proposed Acquisition would be likely to give the merged entity the ability and incentive to foreclose rivals. In particular, we will consider whether:
- 27.1 the merged entity would have control over an important input;
- 27.2 the merged entity would have the incentive to impede its rivals by refusing to supply the input or only supplying at a higher price; and
- 27.3 such behaviour would substantially lessen competition.
28. We will also assess whether the merged entity is likely to bundle (ie, provide together at a discount) or tie (ie, only provide one service with another) complementary products, so that competitors are unable to provide a competitive constraint on the merged entity.

Next steps in our investigation

29. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **20 October 2020**. However, this date may change as our investigation progresses.¹⁹ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
30. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

¹⁸ The Application at [7.27]-[7.28]

¹⁹ The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

Making a submission

31. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Pact/Flight" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **18 September 2020**.
32. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
33. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.