

Statement of Preliminary Issues

Are Media / Ovato Retail Distribution NZ

6 August 2021

Introduction

1. On 19 July 2021, the Commerce Commission registered an application (the Application) from Are Media Limited seeking clearance to acquire 100% of the shares in Ovato Retail Distribution NZ Limited (ORD NZ), which is ultimately owned by Ovato Limited (the Proposed Acquisition).¹ The Proposed Acquisition is part of a wider transaction that includes Are Media acquiring Ovato's retail distribution business in Australia.
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 August 2021**.

The parties

The Applicant

5. Are Media Limited is the New Zealand subsidiary of the Australian company Are Media Pty Limited (together, 'Are Media'). Are Media publishes a range of well-known magazines for New Zealand audiences, such as *The New Zealand Listener*, *Your Home and Garden*, *Woman's Day*, and *New Zealand Woman's Weekly*.³ Are Media is not currently involved in the supply of magazine distribution services in New Zealand.⁴

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/>.

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 The Application at [41].

⁴ The Application at [3].

The Target

6. ORD NZ provides retail distribution services to magazine publishers, including Are Media, and is currently the only distributor of magazines to retailers such as supermarkets, services stations and book stores in New Zealand.⁵
7. ORD NZ is owned by Ovato NZ Limited, which is in turn owned by Ovato Limited (together, Ovato). In addition to retail distribution services, Ovato provides other services to the print media industry, including printing and residential distribution services to magazine publishers and other customers.
8. In New Zealand, the Proposed Acquisition relates only to the sale and purchase of ORD NZ, and Ovato would retain its printing and residential distribution services post-acquisition.⁶
9. The Application refers to Ovato's challenging financial position, as a result of substantial and progressive print industry decline and its high fixed costs.⁷

Our framework

10. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.⁸ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
11. 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).⁹ This allows us to assess the degree by which the proposed acquisition might lessen competition.
12. 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:
 - 12.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
 - 12.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and

⁵ The Application at [27.2] and [47].

⁶ The Application at [2].

⁷ The Application at [80].

⁸ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz.

⁹ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

- 12.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

Market definition

13. 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.¹⁰
14. The Proposed Acquisition would result in the vertical integration of ORD NZ’s distribution of magazines to retailers with Are Media’s magazine publishing business.
15. In the Application, Are Media submitted that it is unnecessary to identify or rely on any particular market definition(s) for the purposes of assessing the Proposed Acquisition, but identifies three potential markets based on the activities of the Parties:¹¹
- 15.1 the national market for distribution of print magazines (in which ORD NZ is active but Are Media is not);
- 15.2 the national market for supply of media content to consumers (in which Are Media is active but ORD NZ is not); and
- 15.3 the national market for supply of advertising services (in which both Parties compete, but would incorporate a range of channels, including print magazine and online advertising).
16. We will consider whether the most appropriate markets for assessing the Proposed Acquisition are those suggested by the Applicant, or whether the impact of the transaction is better assessed with reference to other markets.
17. For example, we will consider whether the Proposed Acquisition is best assessed with reference to a broad market for the provision of media content to consumers (as suggested by the Applicant), or whether any competition issues are better analysed using narrower markets, eg, separate markets for different magazine categories.

Without the acquisition

18. We will consider what the Parties would do if the Proposed Acquisition does not go ahead, as well as the likely competitive position of each. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo or an alternative without-the-acquisition scenario. As part of our

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

¹¹ The Application at [98]-[99].

assessment, we will take into account Ovato's financial position and how that may impact its competitiveness.

Preliminary issue: would the merged entity be able to foreclose rivals?

19. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market(s) by assessing whether vertical effects might result from the Proposed Acquisition.
20. 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 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').
21. The Proposed Acquisition would combine ORD NZ's magazine retail distribution network with Are Media's magazine publishing business. However, Are Media has submitted that there is no prospect of a substantial lessening of competition due to vertical effects. It submits that the merged entity would have no ability and no incentive to foreclose other publishers because:¹²
 - 21.1 barriers to entry into retail distribution of magazines are low, and there are other sources of distribution available to other publishers;
 - 21.2 retailers are well placed to exert pressure on Are Media if it attempted to foreclose rival publishers; and
 - 21.3 it is unlikely that any gains from increased sales of Are Media's magazines would be enough to offset the reduced profits at the distribution level, including because there is limited substitutability between magazine titles both within and between different magazine categories.
22. We will assess whether the Proposed Acquisition would be likely to give Are Media the ability and incentive to foreclose rival magazine publishers by restricting their access to ORD's retail distribution (either by raising prices or withholding services). Such a strategy could result in a substantial lessening of competition if it raised rivals' costs or made entry or expansion harder, weakening the constraint of rivals on the merged entity. In that case, the merged entity may be able to raise prices or reduce the quality of its magazines.
23. As part of our assessment of these issues, we will consider:
 - 23.1 whether the merged entity would have the ability to foreclose, through having control over an important input (ie, ORD NZ's retail distribution network);

¹² The Application at [9]-[10].

- 23.2 whether the merged entity would have the incentive to foreclose, ie, whether it could earn additional profits from the strategy; and
- 23.3 whether the competition lost due to any foreclosure of competitors would amount to a substantial lessening of competition.
24. ORD NZ may also have access to data about publishers' sales, which would be visible to Are Media post-acquisition. We will consider whether the merged entity could use this to benefit its publications at the expense of rivals in a way that substantially lessens competition. For example, we will consider if the merged entity could profitably restrict the distribution services offered to certain publishing rivals that compete closely with the merged entity's major titles.
25. We invite submissions on these issues, including evidence in relation to the extent that customers switch between different magazine titles that have similar content.
26. At this stage we do not consider the Proposed Acquisition is likely give rise to horizontal or coordinated effects, but we also invite submissions on these issues.¹³

Next steps in our investigation

27. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **13 September 2021**. However, this date may change as our investigation progresses.¹⁴ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
28. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

Making a submission

29. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Are Media / ORD NZ" 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 August 2021**.
30. 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.
31. 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

¹³ Please see our *Mergers and Acquisitions Guidelines* for more information on how we assess horizontal and coordinated effects.

¹⁴ 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.

OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.