

Statement of Preliminary Issues

Ampol Limited / Z Energy Limited

18 November 2021

Introduction

1. On 2 November 2021, the Commerce Commission registered an application (the Application) from Ampol Limited (Ampol) seeking clearance to acquire 100% of the shares in Z Energy Limited (Z) (the Proposed Acquisition).¹
2. Ampol is the owner of Gull New Zealand Limited, Terminals New Zealand Limited and ALD Group Holdings NZ Limited (together, Gull).
3. As part of the Application, Ampol has submitted a divestment undertaking (the Proposed Divestment Undertaking) to divest Gull as a going concern (the Proposed Divestment), by a trade sale or an initial public offering (IPO).
4. 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. In doing so, we will consider whether the Proposed Divestment Undertaking will be effective in addressing any competition concerns.
5. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.²
6. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition and the effectiveness of the Proposed Divestment Undertaking in addressing those likely effects. We request that parties who wish to make a submission do so by 2 December 2021.
7. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

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.

The parties

8. Ampol is an Australian-based fuel company. In New Zealand, Ampol operates through Gull. Gull sources most of its refined fuel requirements from Ampol in Australia and imports it into New Zealand via its storage facility at Mount Maunganui. It supplies commercial and retail customers in New Zealand, primarily through its network of Gull-branded service stations.
9. Z is a New Zealand-based fuel company. It has operations across the fuel supply chain in New Zealand, including refining, importing, storage, distribution, wholesale supply and retail supply to commercial and retail customers. At the retail level, Z supplies fuel through a network of Z and Caltex-branded service stations.

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.³ 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).⁴ 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
 - 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

³ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz.

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

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.⁵

14. Ampol submitted that because it is seeking clearance to acquire Z subject to the Proposed Divestment, it is not necessary to conclusively define the relevant markets.⁶ Drawing on the market defined by the Commission in Z/Chevron,⁷ Ampol submitted that the markets relevant to the overlap arising from the Proposed Acquisition are:⁸
 - 14.1 retail fuel markets – separate, service station specific, local markets for the supply of fuel products (ie, diesel, regular petrol and premium petrol, collectively) to retail customers, using a 2km radius as a starting point to identify problem areas (among other considerations);
 - 14.2 terminal storage markets – separate regional markets for the storage of each refined fuel product (petrol, diesel, aviation fuel, marine fuel and bitumen), by terminal location;
 - 14.3 a market for commercial supply to distributors – the supply of fuel products to distributors at Mt Maunganui; and
 - 14.4 commercial petroleum product markets – separate markets for the large bulk commercial customers that purchase diesel directly from the major fuel firms and the smaller bulk customers that purchase diesel through resellers.
15. We will consider whether these are the appropriate markets for considering the competition effects of the Proposed Acquisition.

Without the acquisition

16. 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 whether the parties would seek alternative options.
17. As part of this assessment, we will consider whether Gull would continue to provide the level of competitive constraint in the relevant markets as it does currently.

Preliminary issues

18. We will assess whether the Proposed Acquisition, taking into account the Proposed Divestment, is likely to substantially lessen competition in the relevant markets by looking at:

⁵ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁶ The Application at [17.1(a)].

⁷ Z Energy Limited and Chevron New Zealand Limited [2016] NZCC 10.

⁸ The Application at [17.2].

- 18.1 the unilateral effects that may result from the Proposed Acquisition;
 - 18.2 whether the Proposed Acquisition is likely to result in coordinated effects;
 - 18.3 whether the merged entity would be able and have the incentive to foreclose rivals due to vertical effects; and
 - 18.4 the effectiveness of the Proposed Divestment in addressing the above effects (to the extent that we consider they arise).
19. The main focus of our consideration will be on the form and substance of the Proposed Divestment Undertaking, including whether appropriate measures are in place to minimise the asset, composition and purchaser risks associated with the Proposed Divestment.

Unilateral effects: would the merged entity be able to raise prices on its own?

- 20. Where two suppliers compete in the same market, a merger could remove a competitor that would otherwise provide a competitive constraint, allowing the merged entity to raise prices.⁹
- 21. Ampol and Z overlap in New Zealand in relation to retail service stations, terminal storage, commercial supply to distributors and the commercial supply of fuel.
- 22. In the Application, Ampol acknowledges that, given the Commission's previous assessments of the competitive position of Gull in the New Zealand market and the overlap between Gull and Z in certain local markets, absent the Proposed Divestment the Commission would wish to work through the competition effects in relation the relevant markets.¹⁰ This includes the potential for both unilateral and coordinated effects in retail markets. Ampol submitted that as a result of the Proposed Divestment, the Proposed Acquisition does not have any potential to result in a substantial lessening of competition in any market in New Zealand.¹¹ Ampol further submitted that the Proposed Divestment remedies all potential competition issues in local retail markets, as it means that there would not be any aggregation with the Proposed Acquisition.¹²
- 23. We will consider whether, taking into account the effect of the Proposed Divestment Undertaking, we can be satisfied that the Proposed Acquisition is not likely to give rise to unilateral effects concerns.

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

- 24. 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

⁹ *Mergers and Acquisitions Guidelines* above n3 at [3.62].

¹⁰ The Application at [19.1].

¹¹ The Application at [1.4]

¹² The Application at [19.6].

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.¹³

25. Ampol submitted that the Proposed Divestment remedies any coordinated effects issues in retail markets that the Commission may otherwise have wished to examine.¹⁴
26. We will assess whether any of the relevant markets are vulnerable to coordination, and whether we can be satisfied that the Proposed Acquisition, taking into account the effect of the Proposed Divestment Undertaking, would not be likely to change the conditions in the relevant market so that coordination is more likely, more complete, or more sustainable.

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

27. 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.¹⁵
28. We will consider whether we can be satisfied that the Proposed Acquisition, taking into account the effect of the Proposed Divestment Undertaking, is not likely to give rise to vertical effects through the restricted supply of key inputs.

Proposed Divestment Undertaking

29. Where a merger raises competition concerns, an applicant can provide an undertaking to sell assets or shares as a condition of clearance.¹⁶ For a divestment undertaking to remedy competition concerns, we must be satisfied that the divestment will result in sufficient additional competitive constraint on the merged firm so that a substantial lessening of competition is no longer likely.¹⁷
30. To assess whether a divestment undertaking remedies competition concerns, we consider all the relevant risks associated with any proposed divestment. We assess three kinds of risk associated with any divestment:
 - 30.1 composition risk – the risk that the scope of any divestment undertaking may be too limited, or not appropriately configured, to attract a suitable purchaser or to allow a successful business to be operated in competition with the merged entity;
 - 30.2 asset risk – the risk that the competitiveness of a divested business will deteriorate prior to the completion of any divestment; and

¹³ *Mergers and Acquisitions Guidelines* above n3 at [3.84].

¹⁴ The Application at [19.6].

¹⁵ *Mergers and Acquisitions Guidelines* above n3 at [5.1]-[5.2].

¹⁶ *Mergers and Acquisitions Guidelines* above n3 at [F.2].

¹⁷ *Mergers and Acquisitions Guidelines* above n3 at [F.12].

- 30.3 purchaser risk – the risk that there may not be a purchaser that is acceptable to us and/or the risk that the applicant has an incentive to sell to a party who would not be a strong competitor.

The Proposed Divestment Undertaking and Ampol's submissions

31. The Proposed Divestment Undertaking would see Ampol divesting Gull. Ampol submits in the Application that:
- 31.1 Ampol will divest Gull post-Acquisition within a timeframe agreed with the Commission (the Divestment Period);
- 31.2 Ampol proposes to carry out the Proposed Divestment by way of either a trade sale to a purchaser approved by the Commission or by the sale of shares in Gull to the market through an IPO;¹⁸
- 31.3 at the option of the purchaser of Gull, or the directors of Gull if the Divestment is via an IPO, arm's length agreements can be put in place for Ampol to continue to supply refined fuel and transitional support services to Gull if needed (Divestment Related Agreements);¹⁹
- 31.4 Ampol would commit to hold-separate business preservation and information ring-fencing obligations that will apply during the Divestment Period;²⁰ and
- 31.5 if the Proposed Divestment takes place through an IPO, Ampol would retain a meaningful shareholding in Gull (Retained Shareholding), which Ampol says is necessary in order to support a successful IPO. If Ampol considers it necessary for the success of the IPO, it may also retain a larger number of shares than the Retained Shareholding (the Additional Shares). However, Ampol proposes giving an undertaking to Gull and its shareholders not to exercise any voting rights that may attach to the Additional Shares.²¹ Ampol further proposes that it would enter into a binding agreement with Gull not to sell the Retained Shareholding and any Additional Shares until at least after the announcement of Gull's 2023 annual financial results (Lock Up Period).²² It states in the Application that its intention is to dispose of the Additional Shares over a period following the expiry of the Lock Up Period.²³ This intention would be communicated to Gull by letter, and would be recorded in the product disclosure statement for Gull's listing, but would not be an obligation enforceable by the Commission.²⁴

¹⁸ The Application at [20.3].

¹⁹ The Application at [20.6].

²⁰ The Application at [20.9].

²¹ The Application at [25.17]-[25-19] and [25.22].

²² The Application at [25.18] and [25.21].

²³ The Application at [25.18] and [25.20].

²⁴ The Application at [25.21].

32. Ampol submitted that the composition, asset and purchaser risks arising from the Proposed Divestment Undertaking are minimal and would not reduce the effectiveness of the Proposed Divestment.²⁵
- 32.1 On composition risk, Ampol submitted that Gull has a long-standing history of market competitiveness and a proven and long-established low-cost market strategy, and that this would likely continue to be the case post-divestment. Ampol proposes to divest Gull in its entirety and submitted that the separation of Gull from Ampol is easily achievable as it already operates largely independently of Ampol. Ampol also submitted that the Divestment Related Agreements would enable continued supply of refined fuel and transitional support services to Gull if needed.²⁶
- 32.2 On asset risk, Ampol submitted that Gull as a business would not deteriorate over the Divestment Period. In particular, Ampol proposes that Gull would be separately managed by a hold-separate manager and with information ring-fencing in place. In addition, Ampol submitted that Gull's goodwill and competitiveness would be protected by preservation obligations included in the Proposed Divestment Undertaking, and that Gull would continue to receive support services and refined fuel from Ampol during the Divestment Period.²⁷
- 32.3 Ampol submitted that purchaser risk is low and that Gull would remain an effective independent competitor as it has always done, regardless of whether Gull is divested via a trade sale to a purchaser approved by the Commission or an IPO.²⁸

Our proposed approach to the assessment of the Proposed Divestment Undertaking

33. We have not previously considered a proposal to divest a company or business unit through an IPO. Our initial assessment is that the sale of the shares in a business via an IPO has several differences from a trade sale, which is the usual divestment process proposed to us by clearance applicants.
34. We will consider:
- 34.1 whether a divestment via an IPO process is capable of ensuring that composition, asset and purchaser risks are sufficiently mitigated; and
- 34.2 the extent to which the IPO process generally creates new or different issues for our assessment of whether we can be satisfied that the Proposed Acquisition, taking into account the effect of the Proposed Divestment Undertaking, will not have or would not be likely to have the effect of substantially lessening competition in the relevant markets. This could include any new or different issues that may arise for our substantive

²⁵ The Application at [22.3].

²⁶ The Application at [23].

²⁷ The Application at [24].

²⁸ The Application at [25].

competition analysis or our assessments of the Proposed Divestment and the Proposed Divestment Undertaking.

35. As part of this assessment, we will consider:
- 35.1 whether an IPO process provides us with sufficient certainty as to the level of purchaser risk involved in the Proposed Divestment (given we are unlikely to be able to identify and interview all purchasers in an IPO process, as we would in a trade sale process);
 - 35.2 whether the potentially longer timeframes involved in executing a successful IPO undermine the certainty that we can have that the Proposed Divestment Undertaking will sufficiently address asset risk and, more generally, remedy any competition concerns associated with the Proposed Acquisition; and
 - 35.3 any other implications of the IPO process for the Proposed Divestment and Proposed Divestment Undertaking.
36. With respect to the specific terms of the Proposed Divestment Undertaking, we intend to consider:²⁹
- 36.1 in relation to composition risk:
 - 36.1.1 whether any acquirer of Gull would require additional assets, or ongoing supply or support services, in order to operate Gull in a way that replicates the competitive constraint that Gull would impose on the relevant market(s) without the Proposed Acquisition; and
 - 36.1.2 the extent to which our assessment of composition risk can take into account the Divestment Related Agreements. We understand that Ampol intends to provide templates of the Divestment Related Agreements to the Commission before the Commission decides whether to grant clearance, and that they would only be entered into with Gull prior to the Proposed Divestment if required by the purchaser or (in the case of a divestment through an IPO) the directors of Gull;³⁰
 - 36.2 in relation to asset risk, whether there are sufficient protections in the Proposed Divestment Undertaking to mitigate any degradation of the competitiveness of Gull during the Divestment Period; and
 - 36.3 in relation to purchaser risk:
 - 36.3.1 whether there are likely to be potential purchasers of Gull or, in the case of a divestment through an IPO, managers and directors of Gull, that have the experience, expertise and incentive to operate Gull in a

²⁹ *Mergers and Acquisitions Guidelines* above n3 at [F.15].

³⁰ The Application, at [20.7].

way that maintains its level of competitive constraint in the relevant market(s) compared with the scenario without the Proposed Acquisition;

36.3.2 how likely it is that Gull would continue to provide its current level of competitive constraint if it were divested by IPO, including whether Gull's current market strategy would continue under public ownership; and

36.3.3 whether the purchaser approval process contemplated by the Applicant in the case of an IPO provides the Commission with sufficient certainty that purchaser risks will be mitigated. In the IPO process, Ampol would notify the Commission in writing of the identity of any person who proposes to acquire shares in the Gull business over a certain threshold as soon as reasonably practicable. This means that, in effect, any purchaser that proposes to acquire shares in Gull below that threshold would not need to be notified to the Commission under the Proposed Divestment. We will test whether this proposed approach sufficiently addresses purchaser risk, or whether competition law concerns may arise from the acquisition by a competitor (or several competitors) of shares in Gull below the specified threshold, taking into account the potential for Ampol to own the Retained Shareholding and Additional Shares in Gull.

37. We also intend to test, in relation to the potential for Gull to be divested through an IPO:

37.1 whether the Retained Shareholding and/or Additional Shares may give rise to any competition law concerns or composition risks, including:

37.1.1 what degree of influence Ampol/Z would continue to have over Gull during and beyond the Divestment Period, including through any Retained Shareholding and/or Additional Shares;

37.1.2 the likelihood of Ampol disposing of the Retained Shareholding and/or any Additional Shares following the expiry of the Lock Up Period in the absence of any obligations enforceable by the Commission, and whether any investors would have the incentives to enforce the sell down of the Additional Shares; and

37.1.3 whether the Retained Shareholding and/or Additional Shares mean that the Proposed Divestment Undertaking would not sufficiently address the potential horizontal or coordinated effects concerns arising from the Proposed Acquisition (including if other fuel competitors also take minority stakes in Gull);

37.2 whether the provision of products/services under the Divestment Related Agreements could give rise to competition issues, including through:

- 37.2.1 diminishing Ampol's incentives to compete vigorously and independently with Gull; and/or
 - 37.2.2 increasing the risk of coordinated conduct between Ampol and Gull, during the period that the Divestment Related Agreements are on foot (taking into account the proposed hold-separate obligations); and
 - 37.3 the combined effect of the Retained Shareholding, any Additional Shares and/or any Divestment Related Agreements, in light of the above.
38. In addition to the above, we may also identify further issues as we progress further in our investigation and undertake interviews with third parties. We invite submissions on whether there are any additional issues relating to the proposal to divest Gull through an IPO that the Commission should consider.

Next steps in our investigation

39. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by 18 January 2022. However, this date may change as our investigation progresses.³¹ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
40. 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

41. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Ampol/Z" 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 2 December 2021.
42. 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.
43. 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.

³¹ 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.