

Statement of Preliminary Issues

USG Corporation / Boral Limited

20 December 2013

Introduction

1. On 4 December 2013, the Commerce Commission received a joint application from USG Corporation (USG) and Boral Limited (Boral) seeking clearance to enter into a joint venture. The proposed joint venture relates to the two parties' operations in Asia, the Middle East and Australasia for the supply of plasterboard, ceiling tiles and ancillary building products such as metal studs and tracks, metal ceiling grids and metal ceiling battens.
2. The public version of the application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/detail/805>
3. This Statement of Preliminary Issues outlines the key competition issues we currently consider will be important in deciding whether or not to grant clearance. The issues highlighted in this statement are based on the information available at the time of publication, and may change as our assessment of the application for clearance progresses. Therefore, the issues highlighted in this statement are not binding on us.
4. We invite interested parties to make comment on the likely competitive effects of the proposed joint venture and request that parties who wish to make a submission do so by **Friday 17 January 2014**.

The transaction

5. The proposed joint venture relates to the two parties' operations in Asia, the Middle East and Australasia for the supply of plasterboard, ceiling tiles and ancillary building products (such as metal studs and tracks, metal ceiling grids and metal ceiling battens). For all other products supplied by USG and Boral, the two parties will continue to operate separately.
6. We will only be considering the impact of the proposed joint venture on markets in New Zealand.

Relevant parties

USG Corporation

7. USG is a supplier of a range of building products and is based in the United States. In New Zealand, USG primarily supplies ceiling tiles and metal building products.

Boral Limited

8. Boral supplies a range of building products and is based in Australia.

9. At present, Boral has a limited presence in New Zealand. However, Boral has a 50% shareholding in Rondo Building Services Pty Limited (Rondo) which, like USG, supplies a range of metal building products in New Zealand.¹
10. Given this shareholding, Boral and Rondo are likely to be associated entities. For the purposes of our competition assessment, in the first instance, we will not treat Boral and Rondo as independent competitors in the market. Rather, we will treat them as one competitor.²

Our framework

11. As required by the Commerce Act 1986, we assess whether a merger (or joint venture) is likely to result in a substantial lessening of competition. How we assess this is set out in our Mergers and Acquisitions Guidelines.³
12. We ask whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).⁴
13. A tool used to assess competitive effects is market definition. Market definition provides a framework to help identify and assess the close competitive constraints the merged firm would likely face.⁵ A market is defined in the Commerce Act as a market in New Zealand for goods or services as well as other goods or services that are substitutable for them as a matter of “fact and commercial common sense”.⁶
14. We define markets in the way that we consider best isolates the key competitive constraints on the merging parties. In many cases this may not require us to precisely define the boundaries of a market.
15. We analyse the extent of competition in each relevant market both with and without the merger to determine whether the merger would be likely to substantially lessen competition.
16. We assess the following three factors when considering whether this is likely to be the case.

¹ The other 50% shareholding in Rondo is owned by the Australian-based company, CSR Limited.

² See Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013 at [2.4]-[2.9] for further information on how the Commission assesses associated and interconnected entities. Available on our website at www.comcom.govt.nz

³ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

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

⁵ *Commerce Commission v New Zealand Bus Limited* (2006) 11 TCLR 679 (HC), at [123]. *Brambles New Zealand Ltd v Commerce Commission* (2003) TCLR 868 (HC) at [137].

⁶ Similarly, the courts have said that “[t]he boundaries of the market are defined by substitution between one product and another and between one source of supply and another, in response to changing prices”. See *Commerce Commission v New Zealand Bus Limited* (HC), above n 5 at [123] citing *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,247.

- 16.1 Existing competition – the degree to which existing competitors compete.
 - 16.2 Potential competition – the extent to which existing competitors would expand their sales or new competitors would enter and compete effectively if prices were increased.
 - 16.3 The countervailing market power of buyers – the potential for a business to be sufficiently constrained by purchaser’s ability to exert substantial influence on negotiations.
17. A comparison of the extent of competition both with and without the merger enables us to assess the degree by which the proposed merger might lessen competition. If the lessening is likely to be substantial, we may not give clearance to the proposed merger.

Preliminary issues

Areas of overlap

Product dimension

18. USG and Boral have advised that, in New Zealand, the proposed joint venture would result in overlap in the supply of three products:
- 18.1 metal building products;
 - 18.2 ceiling tiles; and
 - 18.3 plasterboard.
19. USG and Boral consider that there are three main types of metal building products, namely:
- 19.1 metal studs and tracks that are used for interior wall partitions;
 - 19.2 metal ceiling grids that are used to support ceiling tiles; and
 - 19.3 metal ceiling battens that ceiling lining and ceiling panels are fixed to.
20. For these types of metal building products, we will consider which products customers regard as close substitutes. In particular, we will consider whether timber products, such as timber studs and timber battens, are feasible substitutes for metal products.
21. Ceiling tiles (or ceiling panels) are used in buildings to cover a ceiling area. While USG supplies these products in New Zealand, Boral advised that neither it, nor any of its related companies, supplies ceiling tiles to any great extent in New Zealand.
22. We will consider whether there is overlap in respect of ceiling tiles and the extent to which there are alternative suppliers of ceiling tiles in New Zealand.

23. Plasterboard is used in buildings for the lining of interior walls. While both USG and Boral supply plasterboard in many overseas countries, both parties have advised that they have a limited plasterboard presence in New Zealand.
24. We will consider whether there are any other products that may overlap between USG and Boral such as joint treatments, cornices and industrial gypsum.

Existing competition

25. For all the areas where there is overlap, we will consider the closeness of competition between USG and Boral and, where relevant, the closeness of competition between USG and Rondo.
26. We will then consider the degree of competitive constraint that would be provided by existing domestic manufacturers as well as importers. To this extent, we will consider how easily existing suppliers could expand their supply to New Zealand customers, taking into account their existing capacity, experience and transportation costs.

Potential competition

27. We will consider the constraint from potential entry on the proposed joint venture. In particular, we will consider the ability of a new competitor to establish a production plant to produce the necessary range of metal building products to compete with the proposed joint venture.

Conglomerate effects

28. Both USG and Boral supply a range of different products in the building industry. In particular, many of the individual products are key inputs into other downstream products such as internal walls and ceiling systems.
29. We will consider whether the proposed joint venture would create or increase the ability and incentive of the joint venture parties to foreclose competitors at different levels in the supply chain by offering bundled discounts or by tying purchases of certain products.

Next steps

30. We are currently aiming to make our decision by **Friday 31 January 2014**. However, this date may change as the investigation progresses.
31. To keep up to date with any changes to our deadline and to find relevant documents, visit our clearance register on our website at <http://www.comcom.govt.nz/clearances-register/>
32. As part of our investigation, we will identify the parties we believe will provide the best information to help us assess the preliminary issues identified above.
33. We also invite submissions from any other parties who consider they have information relevant to our consideration of this matter. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference

USG/Boral in the subject line of your email, or The Registrar, PO Box 2351, Wellington 6140 by close of business **Friday 17 January 2014**. Please clearly identify any confidential information contained in the submission and provide contact details.