

Determination

Volution Group plc and Proven Systems Limited [2023] NZCC 17

The Commission:	Sue Begg Bryan Chapple Nathan Strong
Summary of application:	An application from Volution Group plc seeking clearance to acquire 100% of the business and assets of Proven Systems Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition.
Date of determination:	11 July 2023

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The Application

1. On 19 May 2023, the Commerce Commission registered an application (the Application) from Volution Group plc (Volution) seeking clearance to acquire 100% of the business and assets of Proven Systems Limited (Proven) (the Proposed Acquisition).

Our decision

2. We give clearance to the Proposed Acquisition as we are satisfied that it will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. Volution and Proven (together, the Parties) supply home ventilation systems in New Zealand. Volution, through Simx Limited, supplies its home ventilation systems under the Smart Vent brand, principally through wholesalers and building supplies merchants.¹ Proven supplies its home ventilation systems under the DVS brand, which it supplies direct to consumers.²
4. Our investigation focused on the potential for the Proposed Acquisition to result in unilateral effects in the national market for the manufacture and distribution of home ventilation systems. We found that, while the Parties are two of the largest suppliers of positive pressure ventilation systems and also supply heat recovery ventilation systems, in a market encompassing all types of home ventilation systems, the merged entity would face sufficient competitive constraint from other suppliers of home ventilation systems such as HRV and Mitsubishi Electric.
5. Further, while the Parties are competitors in the supply of positive pressure ventilation systems, they are not each other's closest competitor. Proven/DVS's closest competitor is HRV. For customers who wish to or can only buy positive pressure systems:
 - 5.1 the merged entity would be constrained by other suppliers of positive pressure systems such as HRV (a current market leading supplier of positive pressure systems), SAYR, Fantech/Smooth-Air, Reliance Ventilation Systems and Condensation Control;
 - 5.2 existing suppliers are unlikely to face significant barriers in expanding the volume of positive pressure systems they currently supply; and
 - 5.3 the market appears to be moving away from positive pressure systems and towards alternative technologies, a trend which is driven by factors such as the increasing airtightness of new homes, increasing consumer understanding and awareness of the health impacts of indoor air quality, as well as industry views on best practice and the evolving regulatory environment.
6. We also considered the potential for the Proposed Acquisition to result in coordinated effects and in vertical effects but consider these effects are unlikely. This is because the merger is unlikely to make coordination more likely, complete or sustainable, nor

¹ The Application at [1] and [21].

² The Application at [6] and [21].

would it give the merged entity the ability and incentive to foreclose rival suppliers from accessing distribution channels and/or independent installers from accessing products.

Our framework

7. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisition Guidelines (our guidelines).³
8. To clear an application, we must be satisfied that a merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
9. We determine 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
10. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise prices above the price that would exist in a competitive market (the 'competitive price'),⁵ or reduce non-price factors such as quality or service below competitive levels.

The Parties and the Proposed Acquisition

11. Volution is a UK-based company and is the ultimate holding company of Volution Ventilation New Zealand Limited (Volution NZ), a New Zealand incorporated company. Volution NZ is the parent company of Simx Limited. Simx Limited supplies home ventilation systems under the Smart Vent brand. Volution principally supplies these systems through wholesalers and building supplies merchants.⁶ Volution NZ is also the parent company of Lupin Investments Limited (Lupin),⁷ the company incorporated to facilitate the Proposed Acquisition, as purchaser.
12. Proven is a New Zealand privately-owned company. It supplies and installs home ventilation systems under the DVS brand. Proven sells its DVS systems directly to consumers.⁸
13. The Parties' business activities overlap in the supply of home ventilation systems (specifically, home ventilation systems using positive pressure and heat recovery technology).

³ Commerce Commission, *Mergers and Acquisitions Guidelines* (May 2022).

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

⁵ Or below competitive levels in a merger between buyers.

⁶ The Application at [1] and [21].

⁷ We note that following our decision of 11 July 2023, but before publication of this determination, Lupin Investments Limited has been renamed to DVS New Zealand Limited.

⁸ The Application at [6] and [21].

Industry background

14. Home ventilation systems reduce excess damp, moisture-filled air and improve the overall air quality inside a house.⁹ There are a range of different technologies used to provide home ventilation to address these issues, including positive pressure, heat and energy recovery and mechanical extract ventilation. In summary:
- 14.1 positive pressure systems draw fresh air from the roof cavity of a home (or directly from outside) and circulate this air around the home, forcing out moist, stale air via gaps in the structure of the home;
 - 14.2 heat and energy recovery systems are balanced pressure systems which draw fresh air into a home from outside and, at the same time, extract moist, stale air from inside the home. These two streams of air then pass through an exchange core which transfers heat energy and/or moisture from the outgoing air to the incoming air; and
 - 14.3 mechanical extract ventilation systems are continuous extract fans that draw air from a room such as a bathroom or kitchen through a ducted system which, at the same time, sucks in fresh air.
15. Volution submitted that any of these technologies can be used to provide ventilation systems for any type of home, but that the effectiveness of a home ventilation system may vary depending on the characteristics of the building. In particular, it submitted that a positive pressure system is generally effective for older homes, while heat and energy recovery systems are more effective for (newer) more airtight homes.¹⁰ Evidence gathered from industry participants indicates that this is typically the case – while each type of technology can generally be used in any type of home,¹¹ positive pressure systems are generally more effective for older, less airtight homes, while heat and energy recovery systems are generally more effective for newer, more airtight homes (including passive houses).^{12 13} Evidence gathered from industry participants also suggests that cost is often a key driver of consumer choice when deciding between alternative technologies.¹⁴

⁹ The Application at [12].

¹⁰ The Application at [13].

¹¹ Commerce Commission interview with [], Commerce Commission interview with [], Commerce Commission interview with [], Commerce Commission interview with [], and Commerce Commission interview with [].

¹² Commerce Commission interview with [], Commerce Commission interview with [], Commerce Commission interview with [], and Commerce Commission interview with [].

¹³ Passive houses are designed to optimise the health and wellbeing of those inside them while consuming very little energy. Passive houses have high quality insulation, heat control and robust windows, airtight construction, heat recovery ventilation and thermal bridge free design. See <https://genless.govt.nz/stories/the-principles-of-passive-housing-and-why-it-matters/>

¹⁴ Commerce Commission interview with [], Commerce Commission interview with [] and Commerce Commission interview with [].

The relevant markets

16. Market definition is a tool that helps identify and assess the competitive constraints a merged firm is likely to face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.¹⁵

Volution's submissions

17. Volution submits that the market relevant to our assessment of the Proposed Acquisition is the national market for the manufacture and distribution of home ventilation systems.¹⁶
- 17.1 Volution submits that the relevant market includes all types of home ventilation systems because all technologies can be, and are, used to provide ventilation systems for any type of home.¹⁷ While it acknowledges that heat and energy recovery systems are more costly than positive pressure systems,¹⁸ and that the effectiveness of a home ventilation system may vary depending on the characteristics of the building,¹⁹ it considers that the different technologies solve the same consumer problem and consumers therefore see them as substitutable.²⁰
- 17.2 Volution submits that the geographic scope of the relevant market is national, given it supplies customers across all of New Zealand and many of its competitors do (or could do with minimal investment) likewise.²¹
- 17.3 Volution supplies its Smart Vent home ventilation systems via intermediaries such as wholesalers and building supplies merchants. Proven supplies its DVS home ventilation systems direct to consumers. However, Volution considers that it competes with suppliers that supply direct to consumers (such as DVS and HRV).²²

Our view

18. For the purposes of this determination, we have analysed the competitive effects of the Proposed Acquisition in relation to a national market for the manufacture and distribution of home ventilation systems. Evidence from industry participants indicates that:
- 18.1 as noted above, heat and energy recovery systems are generally more effective in modern, more airtight homes (including passive houses), and positive pressure systems are generally more effective in older, less airtight homes. However, in most cases, a homeowner can typically elect to install

¹⁵ *Mergers and Acquisitions Guidelines* above n3 at [3.7]-[3.8].

¹⁶ The Application at [11]-[23].

¹⁷ The Application at [13].

¹⁸ The Application at [14].

¹⁹ The Application at [13].

²⁰ The Application at 2.

²¹ The Application at [20].

²² The Application at [21].

any type of home ventilation technology into their home depending on their specific requirements and/or budget.²³ All of the large suppliers of positive pressure systems also offer heat and/or energy recovery systems;

- 18.2 most major suppliers of home ventilation systems supply on a national basis (although, there is at least one supplier who does not supply on a nationwide basis and some suppliers appear to be more successful in certain regions);²⁴ ²⁵ and
- 18.3 suppliers who operate using different channels (ie, via intermediaries or direct to consumers) are competing for sales. That said, suppliers may be competing more closely with those operating via the same sales channel as them.
19. We have not needed to reach any definitive views on the precise boundaries of the relevant markets, including functional levels of the market, in order to make this determination. While evidence suggests that the relevant market is likely a national market for the manufacture and distribution of home ventilation systems, we have also considered:
- 19.1 due to the Parties being two of the largest suppliers of positive pressure ventilation systems, the effect of the Proposed Acquisition on customers who cannot substitute between the alternative technologies sold by the Parties – that is, customers who can or wish to only buy either a positive pressure or a heat recovery system; and
- 19.2 whether the Proposed Acquisition would give the merged entity the ability and incentive to foreclose rival suppliers from accessing distribution channels and/or independent installers from accessing products.

With and without scenarios

20. Assessing whether a substantial lessening of competition is likely requires us to:
- 20.1 compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the merger, often referred to as the factual) with the likely

²³ Commerce Commission interview with [], Commerce Commission interview with [], Commerce Commission interview with [], and Commerce Commission interview with [].

²⁴ Commerce Commission interview with [], Commerce Commission interview with [], Commerce Commission interview with [], Commerce Commission interview with [], Commerce Commission interview with [], and Commerce Commission interview with [].

²⁵ We considered whether it may be appropriate to define regional markets given customers would need to work with a supplier who can install their product in their region (either directly or through independent installers). However, given the majority of suppliers appear to service nationwide and there appears to be an extent of supply-side substitutability, we consider that the relevant market is likely a national market for the manufacture and distribution of home ventilation systems.

state of competition if it does not (the scenario without the merger, often referred to as the counterfactual); and

- 20.2 determine whether competition is likely to be substantially lessened by comparing those scenarios.

The factual

21. With the Proposed Acquisition, Volution would acquire Proven (via Lupin), and would own and operate both the Smart Vent and DVS brands.

The counterfactual

22. Volution submits that the relevant counterfactual against which to assess the competition effects from the Proposed Acquisition is the status quo under which Volution and Proven would remain in competition.²⁶
23. Proven told us that, absent the Proposed Acquisition, []²⁷
24. For the purposes of assessing the Proposed Acquisition, we have defined the counterfactual as the status quo.

Horizontal unilateral effects

25. Horizontal unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors, if any) such that the merged entity can exercise market power and profitably increase prices above (and/or reduce quantity, quality or innovation below) the level that would prevail without a merger.²⁸
26. For the reasons set out below, we are satisfied that the Proposed Acquisition is not likely to give rise to unilateral effects in any relevant market.

Volution's submissions

27. Volution submits that the Proposed Acquisition would not be likely to substantially lessen competition due to unilateral effects. It submits that:²⁹
- 27.1 a relatively small aggregation in market share would arise from the Proposed Acquisition – in a national market for the manufacture and distribution of home ventilation systems, Volution has an approximate market share of []% and Proven []%, meaning that the merged entity would have an approximate []% share;
- 27.2 Volution and Proven are not each other's closest competitors because they operate using different channels to market, and the focus of their current

²⁶ The Application at [25].

²⁷ Commerce Commission interview with [].

²⁸ *Mergers and Acquisitions Guidelines* above n3 at [3.62].

²⁹ The Application at 2-3, [19], [21], [26]-[27], [34]-[35], [37] and [40].

29. Table 1 sets out estimated market shares in the national market for the manufacture and distribution of home ventilation systems.

Table 1: Estimated market shares (%)

Supplier	Positive pressure	Other systems	All systems
Volution	[]	[]	[]
Proven	[]	[]	[]
Merged entity	[]	[]	[]
Condensation Control	[]	[]	[]
Fantech/Smooth-Air	[]	[]	[]
HRV	[]	[]	[]
Mitsubishi Electric	0	[]	[]
Reliance Ventilation Systems	[]	[]	[]
SAYR	[]	[]	[]
Stiebel Eltron	0	[]	[]
All other parties	[]	[]	[]
Total	100	100	100

Source: Commerce Commission estimates based on data in the Application and information gathered from third parties.

30. In the supply of positive pressure systems specifically, the merged entity would be constrained by other suppliers of positive pressure systems such as HRV (a current market leading supplier of positive pressure systems), Fantech/Smooth-Air, SAYR, Reliance Ventilation Systems and Condensation Control. HRV is a large-scale supplier, would [] to the merged entity and would continue to provide substantial competitive constraint on the merged entity, particularly in sales made direct to consumers. Fantech/Smooth-Air is also a significant supplier of positive pressure systems, []. SAYR and Reliance Ventilation Systems, [], would provide further additional constraint on the merged entity, along with other smaller suppliers (eg, []).
31. In the supply of heat recovery systems specifically, at its current volumes the merged entity would not be a major supplier of heat recovery systems and would be

Commission interview with [], Commerce Commission interview with [],
 Commerce Commission interview with [] and Commerce Commission interview with [].

constrained by firms such as Mitsubishi Electric, Reliance Ventilation Systems,³¹ Fantech/Smooth-Air, HRV,³² Stiebel Eltron and Condensation Control.

32. As well as considering the constraint that existing competitors provide currently, we have also assessed the likelihood of competitors entering or expanding to constrain the merged entity in response to a price increase. In doing so, we have considered:
- 32.1 the conditions of entry and expansion in the market for the manufacture and distribution of home ventilation systems; and
- 32.2 whether entry or expansion is likely to be sufficient in extent in a timely manner to constrain the merged entity.
33. We consider that the conditions of entry and expansion are not substantial. Some industry participants indicated that there are unlikely to be any significant barriers to entry/expansion by new or existing suppliers, regardless of the type of home ventilation system.³³ Other industry participants suggested that there might be some barriers to entry or expansion.
- 33.1 First, some industry participants suggested that brand awareness is an important feature of competition in the home ventilation industry, and that some suppliers might find it difficult to compete on price with large-scale suppliers, or compete against the breadth of their offering.³⁴
- 33.2 Second, in terms of entry/expansion for the supply of positive pressure systems, one industry participant considered that the trend away from such systems would make sustaining a business based around positive pressure systems difficult.³⁵
- 33.3 Third, in terms of entry/expansion for the supply of heat recovery systems, some industry participants commented that the complexities of heat recovery systems may make entry and expansion for these products more challenging, with additional knowledge/expertise required by suppliers.³⁶ Some market participants told us this was a barrier to entry/expansion. We understand that in order to sell heat recovery systems effectively, the sales team and supporting staff need to have sufficient knowledge about the systems. We expect therefore that overcoming this barrier would involve technical training for those staff members. While we recognise this would

³¹ [redacted]. See Commerce

Commission interview with [redacted].

³² [redacted].

³³ Commerce Commission interview with [redacted], Commerce Commission interview with [redacted] and Commerce Commission interview with [redacted].

³⁴ Commerce Commission interview with [redacted], Commerce Commission interview with [redacted], Commerce Commission interview with [redacted], and Commerce Commission interview with [redacted].

³⁵ Commerce Commission interview with [redacted].

³⁶ Commerce Commission interview with [redacted], Commerce Commission interview with [redacted], and Commerce Commission interview with [redacted].

involve some cost, we do not see this as a particularly high barrier. Moreover, we note the major market participants already supply heat recovery systems (to varying degrees), and so most are likely to have already invested in this training.

34. While we received some evidence from industry participants on potential barriers to entry or expansion, we consider that the conditions of entry and expansion are not substantial.
35. There is evidence of likely expansion by existing competitors. For example, [],³⁷ [],³⁸ and [].³⁹ None of these parties indicated that their expansion plans would be affected by the Proposed Acquisition. We consider that the Proposed Acquisition is unlikely to change the likelihood of this expansion and these and other competitors would be further incentivised to expand in response to an exercise of market power by the merged entity. We also cannot rule out the possibility of new entry in the future.⁴⁰
36. In addition to being satisfied that the Proposed Acquisition would not substantially lessen competition due to unilateral effects in a national market encompassing all types of home ventilation technologies, we are also satisfied that the Proposed Acquisition would not substantially lessen competition if markets were defined narrowly on the basis of individual system type.

Coordinated effects

37. A merger can substantially lessen competition if it increases the potential for the merged entity and all, or some, of its remaining rivals to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase across a market or in a significant portion of a market.⁴¹
38. Successful coordination requires market participants to reach at least an implicit agreement to act in a coordinated way (eg, by coordinating their pricing behaviour, or by allocating customers or geographic areas), and then to maintain that agreement by detecting and punishing any party that deviates from the agreement.⁴²
39. We assess both whether the market is vulnerable to coordination, and whether the transaction results in coordination being more likely, more complete or more sustainable.⁴³

³⁷ Commerce Commission interview with [].

³⁸ Commerce Commission interview with [].

³⁹ Commerce Commission interview with [].

⁴⁰ [].

⁴¹ *Mergers and Acquisitions Guidelines* above n3 at [3.84].

⁴² *Mergers and Acquisitions Guidelines* above n3 at [3.85] and [3.88].

⁴³ *Mergers and Acquisitions Guidelines* above n3 at [3.86].

40. For the reasons set out below, we are satisfied that the Proposed Acquisition is unlikely to give rise to coordinated effects.

Volution's submissions

41. Volution submits that the Proposed Acquisition would not be likely to substantially lessen competition due to coordinated effects. It submits that the relevant market does not have features that make it prone to coordinated conduct and that the Proposed Acquisition would not change the features of the market in a way that would make coordinated conduct more likely. Volution submits:⁴⁴
- 41.1 the market is fragmented with a long tail of numerous competitors who can expand sales easily, making coordination much more difficult in practice;
 - 41.2 pricing of rivals is not easily observable meaning that it is difficult for competitors to act in ways that promote coordination;
 - 41.3 the products are differentiated with different technologies and solutions being used by different players; and
 - 41.4 the different sales channels utilised by different parties make coordination difficult.

Our view

42. We are satisfied that the Proposed Acquisition would not be likely to substantially lessen competition in the national market for the manufacture and distribution of home ventilation systems due to coordinated effects.
43. The Proposed Acquisition will decrease the number of suppliers in the market and []. These factors may make coordination relatively more likely and more sustainable between the merged entity and HRV. However, we consider that coordination remains unlikely in this market due to the large number of other suppliers in the market, differences in cost structures and scale, the differentiated nature of the products, the presence of innovation, the lack of transparency and low barriers to entry in the market.
44. We consider that a number of features in the market for the manufacture and distribution of home ventilation systems make it less vulnerable to coordination:
- 44.1 the large number of suppliers in the home ventilation market (and scope for them to expand) makes both reaching agreement, and sustaining that agreement, unlikely;
 - 44.2 the products in the home ventilation market are differentiated with regard to price and quality (within each of positive pressure and heat recovery systems, as well as taken as a whole). There are large differences in market share across firms. These factors tend to make identification of a 'focal point' for coordination (in terms of prices or market shares) less likely, and make

⁴⁴ The Application at 3 and [52]-[53].

coordination more difficult to sustain, because each firm faces a different potential payoff from undercutting the coordinated agreement;

- 44.3 in addition, prices and volumes are generally not readily observable, except for prices available through merchants such as Bunnings (which is only relevant to the extent that suppliers of ventilation systems supply through wholesalers rather than directly), but the presence of rebates or other trade terms may mean that these prices might not be a good focal point in any case. This is likely to make coordination difficult to sustain,⁴⁵ because it makes it more difficult for market participants to identify any deviation (undercutting of the coordinated outcome). Although the lack of transparency on prices and sales does not necessarily prevent coordination, it makes it both more difficult to sustain and more limited in scope;
- 44.4 as noted above, the barriers to entry and expansion are not substantial, which also tends to make coordination more difficult to sustain. Any attempt to maintain supra-competitive prices is likely to trigger entry and/or expansion, which would erode the profitability of coordination. The prospect of future entry also tends to reduce the scope for retaliation, which in turn limits the sustainability of coordination; and
- 44.5 finally, each of the suppliers in the market has invested in innovative technology and many are continuing to do so in response to industry trends.⁴⁶ Innovation makes collusion on prices less easy to sustain.⁴⁷

Vertical effects

45. A merger or acquisition between parties who operate in related markets can result in a substantial lessening of competition due to vertical effects. This can occur where a merger or acquisition gives the merged entity (or a related 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').⁴⁸
46. The Parties operate using different channels to market. Volution principally supplies its Smart Vent home ventilation systems through wholesalers and building supplies merchants, with its systems installed by independent installers. In contrast, Proven supplies and installs its DVS systems direct to consumers.
47. For vertical effects to arise, there needs to be the existence of substantial market power in one or more of the relevant levels of a supply chain. Currently, neither of the Parties have substantial market power.
48. We have not received any evidence to suggest that Proposed Acquisition would give the merged entity a substantial degree of market power or a greater ability or incentive to foreclose rival suppliers from accessing distribution channels and/or

⁴⁵ *Mergers and Acquisitions Guidelines* above n3 at [3.89.6].

⁴⁶ Commerce Commission interview with [], Commerce Commission interview with [] and Commerce Commission interview with [].

⁴⁷ *Mergers and Acquisitions Guidelines* above n3 at [3.89.5].

⁴⁸ *Mergers and Acquisitions Guidelines* above n3 at [5.1]-[5.2].

independent installers from accessing products. As such, we are satisfied that the Proposed Acquisition is unlikely to give rise to vertical effects.

Determination on notice of clearance

50. We are 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.
51. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Volution Group plc to acquire 100% of the business and assets of Proven Systems Limited.

Dated this 11 July 2023

Sue Begg
Associate Commissioner