

## Statement of Preliminary Issues

### Rhone Capital LLC and Fluidra, S.A.

16 February 2018

#### Introduction

1. On 5 February 2018, the Commerce Commission registered an application (the Application) seeking clearance for Rhone Capital LLC (Rhone or the Applicant) to acquire up to 100% of the shares in or the assets of Fluidra S.A. (Fluidra).<sup>1</sup>
2. The Commission will give clearance if it is satisfied that the proposed merger 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.<sup>2</sup>
4. We invite interested parties to provide comments on the likely competitive effects of the proposed merger. We request that parties who wish to make a submission do so by **2 March 2018**.

#### The parties<sup>3</sup>

5. Rhone is a New York-based private equity firm that owns a number of entities, including the Zodiac group of companies (Zodiac). Zodiac supplies a range of swimming pool equipment globally. In New Zealand, Zodiac imports and distributes a range of equipment used in residential pools, including pumps, filters, cleaners, heating, and automation systems. It also manufactures a range of residential pool covers in Auckland.
6. Fluidra is a global manufacturer of residential and commercial swimming pool equipment, based in Spain. Fluidra does not have a manufacturing presence in New Zealand but supplies a range of pool equipment, primarily under the brand name AstralPool, through a New Zealand-based distributor, Aqua Clear Products Limited.

#### Our framework

7. Our approach to analysing the competition effects of the proposed merger are based on the principles set out in our Merger and Acquisition Guidelines.<sup>4</sup> As required by

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<sup>1</sup> 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/>.

<sup>2</sup> 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.

<sup>3</sup> The Application at [2]-[3].

the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.

8. We determine whether a merger 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).<sup>5</sup>
9. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. 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 sense.<sup>6</sup>
10. We compare the extent of competition in each relevant market both with and without the merger. This allows us to assess the degree by which the proposed merger might lessen competition. If the lessening of competition is likely to be substantial, we will not give clearance to the proposed merger. 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 they would expand their sales if prices increase;
  - 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.

### **Preliminary issues**

11. We will investigate whether the proposed merger would be likely to substantially lessen competition in the relevant markets by assessing whether unilateral and/or conglomerate effects might result from the merger. The questions that we will be focusing on are:
  - 11.1 unilateral effects: would the merger lessen competition by eliminating the constraint that the two entities impose upon one another?
  - 11.2 conglomerate effects: are there any “must have” products in the ranges of either of the merging parties that would result in the merged entity having greater ability and/or incentive to prevent or hinder rivals from competing effectively by bundling and/or tying products?

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<sup>4</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>5</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>6</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

### Market definition

12. The Applicant submits that the markets affected by the proposed merger are the national markets for the supply of each of the following products used in residential swimming pools:<sup>7</sup>
  - 12.1 pool pumps;
  - 12.2 water treatment products;
  - 12.3 pool filters;
  - 12.4 pool cleaners;
  - 12.5 pool heating equipment;
  - 12.6 pool automation systems; and
  - 12.7 pool water features.
13. We will test whether each of these markets is appropriate for our analysis, including whether the markets should be defined more narrowly or more widely. For example, we will consider whether it is appropriate to divide water treatment products into separate markets such as chemicals, dosing equipment and salt water chlorinators.
14. In addition, we will test the degree to which:
  - 14.1 competition is between systems of complementary products as opposed to between individual products. For example, we will test whether products from different manufacturers are compatible with each other. If products from different manufacturers are incompatible, this may support a wider market for the supply of swimming pool systems; and
  - 14.2 different products used in residential swimming pools can also be used in spas and/or large commercial pools and vice versa. This may affect whether the relevant markets are restricted to residential pools.

### Without the merger

15. The Applicant submits that the relevant without-the-merger scenario is the status quo, in which Zodiac and Fluidra continue to compete independently in the supply of swimming pool products in New Zealand.<sup>8</sup> We will test what is likely to occur absent the merger.

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

16. Where two suppliers compete in the same market, a merger between the two would remove a competitor that would otherwise act as a competitive constraint, potentially allowing the merged entity to raise prices or lessen quality.

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<sup>7</sup> The Application at [13.1].

<sup>8</sup> The Application at [25].

17. The Applicant submits that there are several factors common to all of the relevant markets which demonstrate that the proposed merger will not substantially lessen competition, namely:<sup>9</sup>
- 17.1 the merging parties face strong existing competition from a broad range of competitors;
  - 17.2 Zodiac and Fluidra are not close competitors as they each focus on different price points in the relevant markets;
  - 17.3 there are low barriers to entry and expansion; and
  - 17.4 the merging parties' customers, such as wholesalers, retailers and pool builders, have strong countervailing buyer power.
18. In determining whether the proposed merger is likely to give rise to unilateral effects, we will assess whether the product offerings of competing suppliers are likely to exercise a genuine constraint on the merged entity. More specifically, we will test:
- 18.1 the closeness of competition between the merging parties, in order to understand the extent of any competition that would be lost as a result of the merger;
  - 18.2 whether other suppliers offer products that are good alternatives to those supplied by the merging parties;
  - 18.3 the ability and willingness of wholesalers, retailers and pool builders to switch between suppliers;
  - 18.4 how easily rival suppliers could enter and/or expand in the relevant markets and whether this would be likely post-merger;<sup>10</sup> and
  - 18.5 whether wholesalers, retailers and pool builders would have sufficient countervailing power to punish the merged entity in the event that it raised prices or decreased quality, through mechanisms such as sponsoring entry or expansion, or refusing to stock the merged entity's product in a market where it faces greater competition from rivals.

**Conglomerate effects: would the merged entity be able to foreclose rivals?**

19. A conglomerate merger is a merger between firms that supply products that may relate to each other (eg, complementary products). A conglomerate merger could enable the merged entity to hinder rivals' ability to compete by:
- 19.1 providing bundled discounts to customers that buy the merging parties' products together rather than separately; or

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<sup>9</sup> The Application at [19]-[24].

<sup>10</sup> See the Commission's *Mergers and Acquisitions Guidelines* at [3.95].

- 19.2 tying, where the merged entity refuses to sell one of the merging parties' products (usually a "must have" product) unless customers also buy the other parties' product/s.
20. Such bundling or tying could foreclose rivals through their inability to offer products comparable to the tied or bundled products.
21. The Applicant submits that Zodiac and Fluidra offer complementary ranges of products.<sup>11</sup> We will consider whether either of the parties has "must have" products and whether the proposed merger would likely give the merged entity the ability and incentive to engage in behaviour, such as bundling or tying, which might foreclose rivals in the relevant markets. In doing so we will consider products both within and outside the relevant markets.

### Next steps in our investigation

22. The Commission is currently scheduled to make a decision on whether or not to give clearance to the merger by **5 April 2018**. However, this date may change as our investigation progresses.<sup>12</sup> In particular, if we need to test and consider the issues identified further, the decision date is likely to extend.
23. As part of our investigation, we will be identifying and contacting parties we consider will be able to help us to assess the preliminary issues identified above.

### Making a submission

24. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference "Rhone/Fluidra" 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 March 2018**.
25. 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.
26. 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, if disclosure would unreasonably prejudice the supplier or subject of the information. In assessing the confidentiality of information contained in submissions for the purposes of publication on our website, we intend to apply an approach that is consistent with the OIA.

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<sup>11</sup> Application at [5.1].

<sup>12</sup> 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.