

Statement of Preliminary Issues

Kingspan/Conqueror

13 November 2023

Introduction

1. On 20 October 2023, the Commerce Commission registered an application (the Application) from Kingspan Limited (Kingspan) seeking clearance to acquire the insulated panels and insulation boards business of Conqueror New Zealand Limited (Conqueror) (the proposed acquisition).¹
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 **27 November 2023**.

The parties

The applicant - Kingspan

5. Kingspan is a New Zealand company that is part of the Ireland-headquartered Kingspan Group. The Kingspan Group describes itself as a global leader in high-performance insulation and building envelope solutions.³ It has five operating divisions, of which two are active in New Zealand:⁴
 - 5.1 an insulated panels division, through which it imports insulated panels made with polyisocyanurate (PIR)⁵ and other cores into New Zealand; and

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 [2].

⁴ The Application at [2]. These two operating divisions are operated through two separate New Zealand companies – Kingspan Limited (insulated panels division) and Kingspan Insulation NZ Limited (insulation division).

⁵ We understand that polyisocyanurate is a type of plastic, typically produced as foam and used as rigid thermal insulation.

- 5.2 an insulation division, through which it imports rigid insulation boards made with PIR and other cores into New Zealand.

The target - Conqueror

6. Conqueror is a New Zealand-owned company that manufactures and supplies insulated panels and insulation boards in New Zealand. All the insulation products manufactured and supplied by Conqueror have a PIR foam core.⁶ Conqueror manufactures its products domestically and is New Zealand's only manufacturer of PIR foam core panel products.⁷
7. With the proposed acquisition, Kingspan would acquire the manufacturing and distribution of insulated panels and insulation boards and associated products business carried on by Conqueror. Conqueror would retain a smaller wholesale insulation supply business (remanufactured slab and profile cut insulation) using PIR foam core material supplied by Kingspan.⁸

Our framework

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

⁶ The Application at [3].

⁷ <https://conquerornz.co.nz/about-us/>.

⁸ The Application at [13].

⁹ Commerce Commission, *Mergers and Acquisitions Guidelines*, May 2022. Available on our website at www.comcom.govt.nz.

¹⁰ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

- 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.

Market definition

11. 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.¹¹
12. In the Application, Kingspan submitted that the relevant market is the national market for the supply of insulation solutions for industrial and commercial premises.¹² This adopted market definition includes both fire resistant panels, EPS core panels (which are not fire-resistant) and built-up solutions (being insulated roofing solutions made of materials such as netting, foil, batt insulation, or metal).¹³ In Kingspan’s view:
- 12.1 it is appropriate to adopt a market definition which includes both fire resistant panels and EPS core panels because across a range of building types, EPS core panels remain an option and will act as a competitive constraint on the merged entity,¹⁴ and
- 12.2 the market definition adopted must appropriately capture built-up solutions because built-up solutions are regarded by specifiers/building owners as substitutable for Kingspan’s products across a wide range of projects, and from a pricing/economic perspective, a hypothetical monopolist which sought to impose a small but significant non-transitory increase in price for insulated panels would lose a material number of customers to built-up solutions.¹⁵
13. We will consider whether the national market for the supply of insulation solutions for industrial and commercial premises is an appropriate market for assessing the competition effects of the proposed acquisition, or whether competitive effects are better assessed with reference to other markets. For example:
- 13.1 a narrower market for insulated panels only (ie, all types of insulated panels but not including built-up solutions);
- 13.2 a narrower market for certified fire-resistant insulated panels only (or alternatively, insulated panels made using a PIR foam core only); or

¹¹ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

¹² The Application at [43].

¹³ The Application at [30], [44] and [45].

¹⁴ The Application at [44].

¹⁵ The Application at [45].

- 13.3 separate geographic markets to account for any supply- or demand-side considerations that may differ between areas, such as the North and South Islands.
14. Given Kingspan and Conqueror also both supply insulation boards, we will consider the extent to which there is a separate relevant market for the supply of insulation boards.

Without the acquisition

15. Kingspan submits that if the proposed acquisition does not proceed, then the two most likely scenarios are either that the status quo will continue, or that Conqueror will cease operating the relevant business and assets as a going concern (with assets being dealt with/disposed of on a case-by-case basis). However, it submits that the simplest and most competitive market scenario for Commerce Act purposes is the status quo.¹⁶
16. We will consider what the parties would likely 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, for example, finding a different buyer for Conqueror’s insulated panels and insulation boards business.

Preliminary issues

17. We will investigate whether the proposed acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral, coordinated or vertical effects might result from the proposed acquisition. The questions that we will be focusing on are:
- 17.1 unilateral effects: would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?¹⁷
- 17.2 coordinated effects: would the proposed acquisition change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable?
- 17.3 vertical effects: would the proposed acquisition increase the merged entity’s ability and/or incentive to foreclose rivals?

Unilateral effects: would the merged entity be able to profitably raise prices by itself?

18. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining

¹⁶ The Application at [21] – [22].

¹⁷ For ease of reference, we only refer to the ability of the merged entity to “raise prices” from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, ie, it could increase quality-adjusted prices.

competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses.¹⁸ A merger could also reduce competition if one of the merging firms was a potential or emerging competitor. In such a case, the merger may preserve the market power of the incumbent firm.

19. The parties overlap in the supply of insulated panels and insulation boards.
20. In the Application, Kingspan submitted that the proposed acquisition would not be likely to substantially lessen competition in the national market for the supply of insulation solutions for industrial and commercial premises due to unilateral effects because, in summary:¹⁹
 - 20.1 the degree of competition between Kingspan and Conqueror is not as close compared to some of Kingspan's other competitors due to the significant upgrades needed to Conqueror's processes, products and services, and capital constraints;
 - 20.2 the removal of that competition as a result of the proposed acquisition will not be likely to result in substantially higher prices or lower quality/service by the merged entity. The market is extremely fragmented, and there remains well-resourced competitors that have excess capacity and the potential to expand; and
 - 20.3 the threat of entry will also constrain any exercise of market power by the merged entity.
21. Kingspan also submitted that the proposed acquisition is unlikely to give rise to competition issues in the supply of insulation boards because there is a vast array of products (such as Pink Batts and Bradford Gold) which are substitutable for insulation boards.²⁰
22. We will consider:
 - 22.1 closeness of competition: the degree of constraint that Kingspan and Conqueror impose upon one another. To the extent that any constraint is material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors;
 - 22.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;
 - 22.3 entry and expansion: how easily rivals could enter and/or expand; and

¹⁸ *Mergers and Acquisitions Guidelines* above n9 at [3.62].

¹⁹ The Application at [83].

²⁰ The Application at [58].

- 22.4 countervailing power: whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

Coordinated effects: would the proposed acquisition make coordination more likely?

23. 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 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.²¹
24. In the Application, Kingspan submitted that the proposed acquisition would not be likely to substantially lessen competition in the national market for the supply of insulation solutions for industrial and commercial premises due to coordinated effects. In summary, it submits that the market is not particularly conducive to coordinated conduct and the loss of competition from Conqueror will not materially facilitate coordinated conduct.²² It further submits that coordinated effects are not likely because:²³
- 24.1 a large proportion of sales are made by tender where the price is not transparent which would make it hard for the remaining suppliers to monitor the price;
- 24.2 the market is fragmented with smaller players that could disrupt coordination. Competitors in the market have differing levels of capacity and are in different locations which may create alternative pricing incentives; and
- 24.3 effective allocation of customers is unlikely given the range of customers and the various routes to market.
25. We will assess whether any of the relevant market/s are vulnerable to coordination, and whether the proposed acquisition would change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable.

Vertical effects: would the merged entity foreclose rivals?

26. 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').²⁴
27. With the proposed acquisition, Kingspan would supply the wholesale supply business that is being retained by Conqueror with PIR input material. We will consider the

²¹ *Mergers and Acquisitions Guidelines* above n9 at [3.84].

²² The Application at [83.4].

²³ The Application at [81].

²⁴ *Mergers and Acquisitions Guidelines* above n9 at [5.1]-[5.5].

impact of this relationship on competition, including whether there is any competitive overlap between Kingspan and the retained Conqueror business and consequently, whether the proposed acquisition would give the merged entity the ability and incentive to foreclose rival suppliers, and the likely effect of any foreclosure on competition in any relevant market.

Next steps in our investigation

28. The Commission is currently scheduled to make a decision on whether or not to give clearance to the proposed acquisition by **18 December 2023**. However, this date may change as our investigation progresses.²⁵ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
29. 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

30. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference “Kingspan/Conqueror” 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 **27 November 2023**.
31. 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. If you make a submission and we do not acknowledge receipt of that submission within two working days, you should resubmit your submission.
32. 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.

²⁵ 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.