

Statement of Preliminary Issues

THL/Apollo

28 January 2022

Introduction

1. On 13 December 2021, the Commerce Commission registered an application (the Application) from THL Group (Australia) Pty Ltd, a subsidiary of Tourism Holdings Limited (THL), seeking clearance to acquire 100% of the shares in Apollo Tourism & Leisure Ltd (Apollo) (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 **15 February 2022**.
5. 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.

The parties

6. THL and Apollo (the Parties) both supply motorhome and campervan (motorhome) rental services to domestic and international tourists in New Zealand.³
7. THL is a global tourism company, whose shares are listed on the New Zealand stock exchange. Relevant to the application, THL's business in New Zealand includes the manufacture and sale of motorhomes, the rental of motorhomes and the operation of online 'peer-to-peer' platforms that enable motorhome, campervan and other recreational vehicle owners (together, RV owners), including private individuals, to rent out their vehicles. THL's motorhome rental brands include Maui, Britz and Mighty, and its peer-to-peer RV rental platforms are Mighway and SHAREaCAMPER.

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 In this document, when we refer to motorhomes, this also includes campervans.

8. Apollo is a global tourism company, whose shares are listed on the Australian Securities Exchange. Apollo's business in New Zealand includes the sale of motorhomes and the rental of motorhomes. Apollo's motorhome rental brands include Star RV, Apollo, Cheapa Campa and Hippie Camper. Apollo is also a minority shareholder in Camplify Holdings Limited (Camplify) which operates an online peer-to-peer RV rental platform.
9. THL's Proposed Acquisition of Apollo is to be by way of a scheme of arrangement under the Corporations Act 2001 (Australia).
10. Separate to the Proposed Acquisition, THL has entered into a conditional agreement to sell its online peer-to-peer RV rental platforms businesses (Mighway and SHAREaCAMPER) to Camplify. We registered an application from Camplify for this transaction on 11 January 2022.
11. After completion of both these transactions, THL is likely to ultimately hold 22-23% of the shares in Camplify and have a seat on Camplify's Board of Directors.⁴ As part of the Proposed Acquisition, Camplify and THL would also enter an ongoing strategic and commercial relationship. This relationship will involve:⁵
 - 11.1 THL providing vehicle management services to Camplify RV owners in New Zealand and Australia; and
 - 11.2 Camplify and THL working together on opportunities to grow each other's businesses, including via cross-promotional marketing benefits such as THL marketing Camplify's peer-to-peer RV rental platform.

Our framework

12. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.⁶ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
13. 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).⁷ This allows us to assess the degree by which the Proposed Acquisition might lessen competition.

⁴ The Application at [6.5].

⁵ Camplify/Mighway and SHAREaCAMPER application at [3.3], Camplify ASX Announcement (25 October 2021) and THL NZX announcement (26 October 2021).

⁶ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz.

⁷ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

14. 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:
- 14.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
 - 14.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 14.3 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

15. We will 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.⁸
16. In the Application, THL submitted that the relevant market for purposes of assessing the Proposed Acquisition is the national market for motorhome rentals.⁹
17. In 1999, the Commission considered an application from THL for clearance to acquire the assets, liabilities and businesses operated by Britz New Zealand Rentals Limited and Backpacker Campervans Limited. In its decision, the Commission defined the relevant market as a national market for motorhome rentals.¹⁰
18. We will consider whether this is the appropriate market for considering the competition effects of the Proposed Acquisition in terms of motorhome rentals, or whether there might be separate or differentiated markets based on:
- 18.1 different types or sizes of motorhomes;
 - 18.2 the quality of motorhomes (eg, whether there is a separate market for budget and “premium” motorhomes);
 - 18.3 motorhomes rented from ‘traditional’ motorhome rental operators versus privately owned vehicles rented via online peer-to-peer RV rental platforms; and/or

⁸ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁹ The Application at [5.31].

¹⁰ Tourism Holdings Limited ad Britz New Zealand Rentals Limited and Backpacker Campervans Limited (Commerce Commission Decision 368, 13 August 1999) at [26].

- 18.4 different geographic areas, including motorhomes available for rent from depots located at or close to international airports (in major cities) versus other regional locations.
19. We will also consider whether it is appropriate for us to define any markets for sale of motorhomes as part of our assessment of the competition effects of the Proposed Acquisition.

Without the acquisition

20. 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.

Preliminary issues

21. 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 or coordinated effects might result from the Proposed Acquisition. The questions that we will be focusing on are:
- 21.1 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?¹¹
- 21.2 vertical effects: would the merged entity have the ability and incentive to foreclose its rivals?
- 21.3 coordinated effects: would the Proposed Acquisition change the conditions in the relevant markets so that coordination is more likely, more complete or more sustainable?
22. This assessment is forward-looking. It will recognise that the state and conditions of competition now may not be reflective of conditions in the future, post-COVID and once international tourists return to New Zealand. This may be particularly relevant to our assessment of the likelihood and timeframe within which competitors may expand or enter to constrain the merged entity.

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

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

¹¹ 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, i.e. it could increase quality-adjusted prices.

24. The Parties overlap in the supply of motorhome rental services and in the sale of motorhomes.

Motorhome rental services

25. In the Application, THL submitted that the Proposed Acquisition would not be likely to substantially lessen competition due to unilateral effects in motorhome rental services because:¹²

- 25.1 there is vigorous competition in the motorhome rental market which will continue to constrain the merged entity, including from traditional motorhome rental operators and privately-owned RVs available to rent through peer-to-peer RV rental platforms;
- 25.2 due to COVID-19, there are unprecedented levels of excess capacity which will act as a significant constraint on the merged entity. This is likely to continue in the medium-term;
- 25.3 the merged entity will be constrained by other RV, accommodation and transport options which provide significant constraint on motorhome rental pricing and will continue to do so post-acquisition;
- 25.4 barriers to entry and/or expansion are very low as evidenced by the recent significant growth in New Zealand of peer-to-peer RV rental platforms; and
- 25.5 wholesalers possess significant countervailing power in relation to international tourists.¹³

26. We will consider:

- 26.1 closeness of competition: the degree of constraint that THL and Apollo 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;
- 26.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity. In relation to the potential constraint from Camplify's peer-to-peer RV rental platform, we will consider whether THL/Apollo's ongoing relationship with Camplify will impact the incentive of Camplify to compete with a merged THL/Apollo;
- 26.3 entry and expansion: how easily rivals could enter and/or expand; and
- 26.4 countervailing power: whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

¹² The Application at [1.3].

¹³ Including international wholesalers and online agents, which often act as agents for multiple motorhome rental suppliers.: The Application at [6.41].

Motorhome sales

27. In the Application, THL submitted that, while the Parties overlap in the sale of new and used motorhomes, the Parties combined market share in motorhome sales is insignificant and there are many parties involved in the sale of motorhomes at the wholesale and retail level.¹⁴
28. We will consider and are interested in interested parties' views on the impact of the Proposed Acquisition on the sale of new and used motorhomes.

Vertical effects: ability and incentive to foreclose rivals

29. A merger 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 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').
30. We will consider whether the proposed strategic and relationship between THL and Camplify (as summarised earlier at [11]) could give rise to foreclosure concerns. Such concerns could arise where:
- 30.1 the Parties may have an ability and incentive to prevent THL's rivals in traditional motorhome rentals from accessing at all Camplify's peer-to-peer RV rental platform, or to disadvantage THL's competitors by manipulating search rankings on Camplify's platform to favour THL listings; and/or
- 30.2 the Parties may have an ability and incentive to prevent Camplify's rivals in peer-to-peer RV rental platforms from accessing THL's RV management services or gaining the business of THL's motorhome rental listings.
31. We will test this with the Parties and other industry participants.

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

32. A merger 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.
33. In the Application, THL submitted that the Proposed Acquisition would not be likely to substantially lessen competition due to coordinated effects because:¹⁵
- 33.1 there is a high degree of differentiation in the products and services offered by motorhome rental operators, no transparency of volumes of sales, and significant excess fleet capacity; and

¹⁴ The Application at [4.36].

¹⁵ The Application at [1.4].

- 33.2 the Proposed Acquisition will not result in the removal of a particularly aggressive or destabilising competitor.
34. We will assess whether any relevant markets are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in any relevant markets so that coordination is more likely, more complete or more sustainable.

Next steps in our investigation

35. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **1 March 2022**. However, this date may change as our investigation progresses.¹⁶ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
36. 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

37. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "THL/Apollo" 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 **15 February 2022**.
38. 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.
39. 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.

¹⁶ 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.