

Determination

Osmosis Buyer Ltd and Firewall Holdings S.A.R.L [2022] NZCC 14

The Commission:	Sue Begg (Chair) Dr John Small Dr Derek Johnston
Summary of application:	An application from Osmosis Buyer Limited seeking clearance to acquire all of the shares in Firewall Holdings S.A.R.L.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition (subject to the divestment undertaking dated 29 April 2022 provided by Osmosis Buyer Ltd under section 69A of the Commerce Act 1986).
Date of determination:	02 May 2022

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The Proposed Acquisition

1. On 1 March 2022, the Commerce Commission registered an application (the Application) from Osmosis Buyer Limited (Osmosis, or the Applicant) seeking clearance to acquire all of the shares in Firewall Holdings S.À R.L. (Firewall) (together, the Parties) as part of a global transaction (the Proposed Acquisition).
2. As part of the Application, Osmosis offered an undertaking (Divestment Undertaking) to divest the entire Merquip business (Proposed Divestment). The Divestment Undertaking is at **Attachment A** to this Determination.

Our decision

3. The Commission gives clearance to the Proposed Acquisition because it is satisfied that the Proposed Acquisition, taking into account the Proposed Divestment, will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand. The Proposed Divestment would remove all competitive overlap between the Parties in New Zealand.

Our framework

4. Our approach to analysing the competition effects of mergers is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).¹
5. We assess mergers using the substantial lessening of competition test. 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).²
6. In giving clearance to a transaction, we may accept undertakings from the applicant to dispose of assets or shares.³ If we accept a divestment undertaking, it is deemed to form part of the clearance.
7. We may only give clearance if we are satisfied that a proposed transaction, taking into account any divestment undertaking offered by the applicant, is unlikely to substantially lessen competition in any market in New Zealand.⁴

¹ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

² *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

³ Under section 69A(2) of the Act, we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

⁴ Sections 66(3) and 69A(3) of the Act.

The parties

The Applicant - Osmosis

8. Osmosis is part of the portfolio of companies owned by BDT Capital Partners, LLC. It controls entities that operate the Culligan group, an international provider of water treatment solutions. In relation to New Zealand, Culligan controls Zip Industries (Zip), which trades as Zenith Water (Zenith).
9. The core business of Zenith Water is the supply and servicing of multi-function taps (MFTs). A multi-function tap is a tap that dispenses instant filtered, boiled, chilled and sparkling water (or any combination of these) from a single outlet. MFTs are commonly found in office kitchens. Zenith's MFTs are manufactured in Zip's manufacturing facilities located in Condell Park, Sydney.
10. In New Zealand, Zenith had sales of [] in the year to 31 December 2020.

The Target - Firewall

11. Firewall is part of the portfolio of companies owned by Castik Capital Partners GmbH. It is the majority shareholder in Waterlogic Group Holdings Limited (Waterlogic), which owns Billi Australia Pty Limited, an Australian-based business that makes, sells, and supplies Billi-branded MFTs.
12. In October 2021, Firewall indirectly acquired the business and assets of Merquip Limited through a newly incorporated entity called Waterlogic New Zealand Limited (Merquip), which itself became part of the broader Waterlogic group of companies.
13. Merquip is a New Zealand distributor and service provider of water drinking products for use in homes, commercial settings, offices and hospitality outlets throughout New Zealand. The majority of its sales are generated from the sale of Billi MFTs. Merquip distributes drinking water products through third-party retailers,⁵ as well as to commercial customers and tradespeople that purchase on behalf of residential or commercial end-users.⁶
14. Billi Australia was established in Australia in 1989 and was acquired by Waterlogic in 2018. Billi Australia specialises in the supply and servicing of MFTs. Billi-branded products are manufactured at the Billi Australia facility in Melbourne, Australia. This facility is the only manufacturing facility owned or operated by the Billi group.
15. [] Billi Australia has no physical presence in New Zealand except through the distribution of its products via Merquip.

⁵ Such as Kitchen Things, Kitchen Studio, Reece, Chesters, Mico Plumbing, Plumbing World, Franklin, Southern Hospitality and Oakleys.



⁶ The Application at [3.9(b)].

16. In New Zealand, Merquip had sales of [] for the year ending 31 March 2021.



The merging parties' activities in New Zealand

17. Both Zenith and Merquip are active in the supply and servicing of drinking water products in New Zealand. Table 1 outlines the drinking water products supplied by the merging parties in New Zealand.

Table 1: Drinking water solutions supplied by the merging parties in New Zealand⁷

Product category	Description	Example
Multi-function taps (MFTs)	<p>MFTs filter or purify mains water, and add functionality (ie, heats/boils, chills, and/or carbonates it).</p> <p>MFTs can be used in commercial settings (eg, offices) and residential settings (eg, in a home kitchen).</p> <p>The Parties are both active in the supply of MFTs in New Zealand.</p>	
Bottle free coolers (BFC)	<p>BFCs (also known as “point of use/POU”, “mains-fed”, or “plumbed-in water coolers”) are connected to the customer’s plumbed water system, improving the quality of water via filtration or purification methods.</p> <p>Dispensed water can be ambient, cold, hot, or sparkling, depending on machine functionality.</p> <p>Merquip is, to a very limited extent, active in the supply of BFCs in New Zealand. Zenith is not active in this area.</p>	
Drinking fountains	<p>Drinking fountains are water dispensers connected to mains water, and are used in environments where a robust and impact resistant water machine is required (eg, in outdoor or public spaces).</p> <p>The Parties are both, to a limited extent, active in the supply of drinking fountains in New Zealand.</p>	

⁷ The Application at Table 1.

Wall mounted boilers	<p>Wall mounted boilers are mains fed units that are affixed to a wall. They only deliver boiling water, which may be filtered or unfiltered.</p> <p>Zenith is active in the supply of wall mounted boilers in New Zealand. Merquip says it does not supply wall mounted boilers in New Zealand.⁸</p>	
Solutions for customers with higher volume needs	<p>Customers with relatively high-volume needs (such as hotels, restaurants, and cafes) use taps allowing them to offer filtered still and sparkling water to their customers. These taps replace the need for single use bottled water or tap water in hospitality venues, where water is offered to customers in reusable and refillable glass bottles.</p> <p>Merquip is, to a limited extent, active in the supply of such tap solutions in New Zealand (via its distribution of Cosmetal products). Zenith is not active in the supply of these tap solutions in New Zealand.</p>	

⁸ Merquip has advised that []. While Billi wall mounted boilers are listed for sale in New Zealand by Merquip, it says that []. We cannot exclude the real chance that Merquip is at least a potential competitor for the supply of wall mounted boilers, but it does not appear to be an active competitor.

18. Merquip stated that sales of MFTs account for [] of its sales in New Zealand.⁹ In the application, Osmosis submits that in relation to the other product types outlined in Table 1:
- 18.1 Merquip's share of the total installed base of BFC units in New Zealand is approximately [], with sales of less than [] in FY21;¹⁰
- 18.2 the combined market share of the merging parties in drinking fountains would amount to less than [] of the total installed base of drinking fountains in New Zealand;¹¹
- 18.3 Zenith's sales of wall mounted boilers account for less than [] of total installed base in New Zealand and totalled [] in FY21. Merquip sold [] wall mounted boilers in the same period;¹² and
- 18.4 Merquip's sales of Cosmetal tap solutions were approximately [] in FY21, representing approximately []% of Merquip's FY21 revenue.¹³
19. Our investigation found that while the merging parties are active in the supply and servicing of a range of drinking water products, they are primarily active (and compete most closely) in the supply and servicing of MFTs. For the other products they supply, there is either no competitive overlap (as is the case with bottle free coolers for example), or this overlap is negligible (in the case of drinking fountains).

With and without scenarios

With the acquisition

20. With the acquisition, Osmosis would acquire 100% of the shares in Firewall. As a result, Osmosis would obtain sole control of the Merquip business.

Without the acquisition

21. If the Proposed Acquisition does not proceed, both Osmosis and Firewall assert that they would continue to operate their respective businesses independently, with no material changes to their respective operating models and business plans.¹⁴
22. We consider that the appropriate without the merger scenario is the status quo, with Zenith and Merquip continuing to operate as independent competitors in the relevant markets in New Zealand.

⁹ Commerce Commission interview with [].

¹⁰ The Application at footnote 29.

¹¹ The Application at footnote 39.

¹² The Application at footnote 44.

¹³ The Application at footnote 45.

¹⁴ The Application at [6.1] – [6.4].

Market definition

23. Market definition is a tool that helps identify and assess the competitive constraints the merged firm would 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.
24. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services that fall outside the market, but which would still impose some degree of competitive constraint on the merged entity.
25. Osmosis has submitted that there is a single drinking water market, which includes not only MFTs, bottle-free coolers (BFCs), bottled water coolers (BWCs), drinking fountains, and wall-mounted boilers, but also in-fridge filtration, bottled water, vending machines, and SodaStream-type water carbonation solutions.¹⁵
26. Ultimately, however, Osmosis submits that it is not necessary for the Commission to reach a concluded view on market definition given that the Proposed Acquisition will not result in a substantial lessening of competition in any market in New Zealand, because:¹⁶
 - 26.1 Zenith and Merquip are not close competitors for the supply and servicing of any products other than MFTs, and their sales in New Zealand of other products are minimal; and
 - 26.2 the divestment of Merquip will remove the only substantive area of overlap between Osmosis and Firewall in New Zealand (namely, the supply and servicing of MFTs).
27. Given the Proposed Divestment encompasses the entirety of Waterlogic's business in New Zealand, it is not necessary to reach a conclusion on the relevant market. However, we consider that it is likely to be appropriate to consider MFTs to be in a separate market to other drinking water solutions. This is because MFTs appear to offer distinct solutions that other drinking water products cannot replicate, i.e., dispensing hot/cold/boiling/filtered and carbonated water from the same tap.
28. We also consider that taking this approach is likely to best isolate the competitive harm that may result from the Proposed Acquisition, given Zenith's and Merquip's significant presence in the supply of MFTs in New Zealand.

¹⁵ The Application at [9.1].

¹⁶ The Application at [9.10].

Competition Assessment

29. Osmosis submitted that the only competitive overlap of substance in New Zealand arising from the Proposed Acquisition is in relation to the supply and servicing of MFTs. Table 2 below provides the Applicant's estimates of market share for the supply and servicing of MFTs in New Zealand.

Table 2: MFTs by installed volume in NZ, FY20¹⁷

Competitor	Number of units	Market Share (%)
Zenith	[]	[]
Merquip	[]	[]
Merged entity	[]	[]
Insinkerator	[]	[]
Brita	[]	[]
Rheem	[]	[]
Others	[]	[]
Total	[]	100

30. Zenith submitted that, with the Acquisition, there will be several alternative suppliers of MFTs in New Zealand.
31. Our investigation has indicated that Merquip and Zenith are the largest competitors for the supply and servicing of MFTs, and that they are likely to be each other's closest competitor.
- 31.1 [], a large nationwide plumbing merchant stated that Merquip and Zenith MFTs make up around [] of total MFT sales and that other competitors such as [] have different products and areas of strategic focus.¹⁸
- 31.2 [], also a large nationwide plumbing merchant considered that Merquip and Zenith MFTs account for approximately [] of its total MFT sales, despite it having [] to distribute [] branded MFTs in New Zealand. [] noted that the merging parties are dominant in these products and that while they do have some differences in design, the products supplied by the merging parties have the same functionality and are designed for the same end use (and user).¹⁹
- 31.3 [], a competing manufacturer of MFTs estimated that the merging parties account for around [] of the market and that other competitors, such as

¹⁷ The Applicant's estimates, set out in the Application at [10.5].

¹⁸ Commerce Commission interview with [].

¹⁹ Commerce Commission interview with [].

[] tend to focus either on just the [], parts of the market.²⁰

31.4 [], which supplies the [] brand of MFTs considered that it accounts for around [] of the market. [] has a focus on the [] and this is reflected in their sales being predominantly through [], as opposed to plumbing merchants or direct to commercial customers. [] estimated that the merging parties account for around [] of the market.

32. Based on the above, we consider that Zenith and Merquip are likely to be each other's closest competitors and, absent the Proposed Divestment, existing MFT competitors may be unlikely to provide sufficient constraint on the merged entity.

Assessment of the Proposed Divestment

33. Osmosis has also offered to the Australian Competition and Consumer Commission (ACCC) an undertaking to divest the entire Billi Australia business which is currently the primary supplier of MFTs to Merquip. The ACCC's consideration of the Proposed Acquisition and the undertaking that Osmosis has offered to it, is separate to the Commission's own assessment.

34. We consider that the Proposed Divestment is likely to remedy any potential competition concerns that are likely to result from the Proposed Acquisition. Our investigation found that the only overlap between the parties arises from the products supplied by Merquip. As a result, we are satisfied that the Proposed Divestment would remove all competitive overlap between the parties. For the reasons we set out below, we are further satisfied that post-divestment, Merquip will remain independent of Zenith and will continue to compete with it.

Our framework for assessing divestment undertakings

35. We must only clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.²¹ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.²²

²⁰ Commerce Commission interview with [].

²¹ Commerce Act 1986, s 66(1) of the Commerce Act 1986.

²² In *Commerce Commission v Woolworths Limited (CA)*, above n 4 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”. However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

36. We may accept undertakings to dispose of assets or shares.²³ If divestment undertakings are accepted by us, they are deemed to form part of the clearance.
37. For a divestment undertaking to remedy competition concerns, we must be satisfied that the divestment will result in sufficient additional competitive constraint on the merged firm so that a substantial lessening of competition is no longer likely.
38. In making this assessment, we consider all the relevant risks associated with divestment proposals. These risks arise because a divestment undertaking's impact will be felt in the future.
39. We assess three kinds of risks associated with divestment undertakings.
- 39.1 Composition risk – the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured.
- 39.2 Asset risk – the risk that the competitive effectiveness of a divestment package will deteriorate prior to completion of the divestment.
- 39.3 Purchaser risk – the risk that there may not be a purchaser found within the timeframe of a divestment undertaking that is acceptable to the Commission.
40. We have assessed the composition, asset and purchaser risks associated with Osmosis's divestment proposal in accordance with our guidelines.²⁴

The Proposed Divestment

41. Under the Proposed Divestment, Osmosis offered to divest all components necessary for the ongoing competitive operation of the Merquip business in New Zealand, []:²⁵
- 41.1 []
- 41.2 []
- 41.3 []

²³ Under s 69A(2) of the Commerce Act 1986 we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

²⁴ Commerce Commission, *Mergers and Acquisitions Guidelines*, Attachment F, July 2013.

²⁵ The Application at [11.10].

41.4

41.5

41.6

41.7

41.8

]

(collectively, the Divestment Business).

Assessment of composition risk

42. Composition risk is the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured.

43. Overall, we consider that the Divestment Undertaking is sufficient to mitigate composition risk.

43.1 First, we consider that the Divestment Business (being the Merquip Business described above) comprises everything that the purchaser of Merquip would need in order to viably and effectively operate Merquip in competition with Zenith and the other competitors in the market.

43.2 Second, Merquip’s recent history of operating independently from its parent company provides both the vendors and purchasers of the Merquip business with a clear indication of the assets the Merquip business would require in order to compete (and also demonstrates that the Merquip business is able to operate as an independent going concern).

43.3 Third, we are satisfied that the Divestment Business can be effectively separated from the remainder of Firewall’s business. As at the date of this Determination Merquip has been a part of Firewall’s Waterlogic business for 6 months. Prior to that date, it operated as an entirely stand-alone business,²⁶ which contracted with third party suppliers (most notably Billi Australia) on an arm’s length basis. We do not consider that separation of Merquip from

²⁶ Merquip says that
[
].

the Waterlogic group would be a logistically difficult or time-consuming process.

Should Osmosis be required to divest Billi and Merquip to the same purchaser?

44. Notwithstanding that the Proposed Divestment before the Commission does not involve divestment of the Billi Australia business, we considered whether our assessment of the competitive impact of the Proposed Divestment would differ depending on whether the Merquip and Billi Australia businesses were sold to the same purchaser or to separate purchasers.
45. This issue relates to both composition and purchaser risk, and so for convenience we discuss it here.
46. From the New Zealand perspective, we consider this [] materially reduces purchaser risk. A significant proportion of Merquip’s sales are contributed by Billi products. We therefore consider ongoing supply of those products from Billi Australia to be critical to Merquip’s ongoing competitiveness and viability.
47. Under the proposed Divestment Undertaking the []
[]
[] in such a way that undermines Merquip’s competitiveness in the New Zealand market.
48. On that basis, we would consider that a scenario in [] would carry a higher purchaser risk (from the New Zealand perspective), because a potential purchaser of Merquip would need to factor in the risk []. This could increase the risk that a purchaser acceptable to the Commission is not forthcoming.
49. []
[]
50. If the businesses were acquired separately, Merquip’s established track-record of performance, strong network of relationships within New Zealand, and long history of association with the Billi brand indicates to us that a purchaser of Billi Australia would likely find the option of continuing to supply into New Zealand through Merquip an attractive one. When considering the appropriateness of the proposed purchaser that Osmosis ultimately notifies to us, we will take into account the

confidence that purchaser has that it will be able to achieve ongoing supply of Billi products to Merquip.

Assessment of asset risk

51. Asset risk is the risk that the competitive effectiveness of divestment business or assets will deteriorate prior to completion of the divestment.
52. Overall, we consider that the Divestment Undertaking is sufficient to mitigate asset risk.
53. Under the Divestment Undertaking:
 - 53.1 Osmosis has undertaken to preserve the economic viability of the Divestment Business and to hold it separate from the business that Osmosis is retaining, including ensuring that [];
 - 53.2 Until the completion of the Divestment, a divestment manager will manage the Divestment Business independently from the rest of Osmosis to ensure Merquip's continued marketability and competitiveness;
 - 53.3 Osmosis has undertaken to divest the Divestment Business within [] months of acquiring Waterlogic New Zealand Limited. If Merquip has not been sold within this period, []; and
 - 53.4 an independent monitor will be appointed. The independent monitor will report to the Commission on Osmosis' compliance with its' obligations under the Divestment Undertaking, the performance of the Divestment Business, and the progress of the sale of the Divestment Business.
54. The proposed independent manager of the Divestment Business, [], is an experienced manager and []. We consider he possesses the requisite knowledge and experience to operate Merquip effectively and competitively, and to ensure that the value of the assets is maintained, during the divestment period.
55. We also consider that the preservation obligations, [],²⁷ and hold-separate obligations provided for in the proposed Divestment Undertaking are

²⁷

[].

robust and that that the anticipated timeframe for the Proposed Divestment is no longer than needed to effectively carry out the Proposed Divestment.

Assessment of purchaser risk

- 56. Purchaser risk is the risk that there may not be a purchaser found within the timeframe of a divestment undertaking that is acceptable to the Commission.
- 57. Overall, we consider that that the Divestment Undertaking is sufficient to mitigate purchaser risk.
- 58. The Merquip business has competed in the New Zealand market for over two decades. It is a profitable business with a strong reputation and competitive position in New Zealand. We expect that it would be attractive to potential purchasers.
- 59. The proposed sale of []]. As at the date of our decision, []].

Overall conclusion

- 60. Subject to the Proposed Divestment, we are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition.

Determination on notice of clearance

61. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Osmosis Buyer Limited to acquire Firewall Holdings S.À R.L subject to the divestment undertaking dated 29 April 2022 provided by Osmosis Buyer Limited under section 69A of the Commerce Act 1986.

Dated this 2nd day of May 2022

Sue Begg
Deputy Chair

Attachment A: Divestment Undertaking



Russell
McLeagh

Divestment undertaking

PARTIES

Osmosis Buyer Limited

Applicant

The Commerce Commission

Commission



DEED dated 29 April 2022

PARTIES

Osmosis Buyer Limited

("Applicant")

The Commerce Commission

("Commission")

INTRODUCTION

- A. The Applicant has applied to the Commission for clearance of the Proposed Transaction pursuant to section 66 of the Commerce Act 1986 ("**Commerce Act**"), ("**Clearance**").
- B. Pursuant to section 69A of the Commerce Act, the Applicant gives the Commission this Undertaking as part of the application for clearance of the Proposed Transaction.

COVENANTS

1. The Applicant undertakes to the Commission that, if the Proposed Transaction completes pursuant to the Clearance, the Applicant will:
 - (a) divest, or cause the divestiture of, the Divestiture Business within the Divestiture Period; and
 - (b) use best endeavours to procure, obtain or assist any Approved Purchaser(s) to obtain any consents required as per **Annexure A**.
2. The Applicant acknowledges that this Undertaking:
 - (a) forms part of any clearance given by the Commission for the Proposed Transaction under section 66(3)(a) of the Commerce Act; and
 - (b) imposes legal obligations on the Applicant under the Commerce Act.

Commencement and term

3. This Undertaking comes into effect when it is signed by the Applicant and accepted by the Commission under section 69A of the Commerce Act.



4. The obligations contained in this Undertaking are discharged upon Divestiture Completion.

Definitions

In this Undertaking:

"**Affiliate**" means, in relation to a party, any person who is an interconnected body corporate or an associated person of that party as those terms are defined in the Commerce Act;

"**Applicant Group**" means the Applicant and its Affiliates, and including the Retained Business following the Control Date (where the context requires);

"**Approved Divestiture Agent**" means one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Applicant in accordance with clause 17 and clause 21;

"**Approved Divestiture Agent Sale Period**" means the period of [] from the end of the Initial Sale Period;

"**Approved Purchaser**" means a party (or parties) that is (or are) approved by the Commission pursuant to clauses 11 to 15 as a purchaser of the Divestiture Business;

"**AU Divestiture Business**" means the Divestiture Business as defined in an undertaking provided by the Applicant to the Australian Competition and Consumer Commission under s87B of the Australian Competition and Consumer Act 2010 (Cth) in respect of the Applicant's proposed acquisition of Firewall Holding S.À R.L, such undertaking relevantly comprising Billi Australia Pty Ltd ACN 624 854 829, Billi R&D Pty Ltd ACN 136 662 014, Billi Financial Services Pty Ltd ACN 613 926 328, accompanied by the assets, licences, agreements and other tangible and intangible property required to facilitate the operation of those businesses in Australia.

"**Competitively Sensitive Information**" means specific, non-aggregated, non-public competitively sensitive information, including the following information relating to how the Divestiture Business' or the Applicant Group's businesses (as the case may be) compete in New Zealand, including the following:

- (a) current or future pricing or commercial terms;
- (b) customers and any related customer information;
- (c) suppliers and any related supplier information such as prices or terms;
- (d) material and specific input costs;



- (e) profit margins on specific services or to specific customers or types of customers;
- (f) expansion plans, including capital investment plans, marketing plans, volumes, capacity plans and/or business strategy plans; and/or
- (g) any other current or future competitive strategies of the Divestiture Business or Applicant Group, as the case may be.

"Commencement Date" means the date on which the Commission grants Clearance, subject to Divestment in compliance with this Undertaking.

"Conflict of Interest" means any conflict of interest that impairs the Approved Divestiture Agent's or Independent Monitor's (as the case may be) objectivity and independence in discharging its duties under this Undertaking (but for the avoidance of doubt, a conflict of interest does not arise solely because a third party (such as an accounting firm or investment bank) has worked, or is currently working, with the Applicant on a third party arm's length basis);

"Confidential Information Protocol" means the confidential information protocol set out in **Annexure B**.

"Confidentiality Undertaking" means the form of Personal Confidentiality Undertaking set out at **Schedule B of Annexure B**.

"Control Date" means the date of completion of the Proposed Transaction, notified to the Commission in accordance with clause 23;

"Divestiture Business" means the entire issued share capital of Waterlogic New Zealand Limited (trading as Merquip), which supplies drinking water solutions in New Zealand, or all of the core assets held (or used) by Waterlogic New Zealand Limited in supplying water drinking solutions in New Zealand as detailed in **Annexure A**;

"Divestiture Completion" means completion of the Divestment;

"Divestiture Sale Agreement" means all transaction documentation effecting the Divestment (including any sale and purchase, transitional and other ancillary agreements);

"Divestiture Period" means [] from the Control Date;

"Divestment" means the divestment(s) as a going concern of the Divestiture Business to an Approved Purchaser, whether pursuant to a divestment of the Divestiture Business only or



pursuant to a broader divestment that includes divestment of the Divestiture Business within the perimeter of that broader divestment;

"Independent Manager" means the present manager of Merquip, [], or if that person resigns, or their role with Merquip otherwise ends prior to Divestiture Completion, any other person appointed as the manager of Merquip who is approved by the Commission and is (a) not an officer, employee, contractor or agent of the Applicant and (b) appointed to that role subject to appropriate incentive schemes and / or remuneration levels consistent with industry practice, to preserve the economic viability and marketability of the Divestiture Business, in accordance with clause 5(d);

"Independent Monitor" means a natural or legal person who

(a) is approved by the Commission and appointed pursuant to clauses 28 and 29 of this Undertaking;

(b) is independent of the Applicant Group; and

(c) possesses the necessary qualifications to carry out its obligations.]

"Initial Sale Period" means [] from the Control Date;

"Personnel" means employees and independent contractors of the Divestiture Business as at the Commencement Date, including [];

"Proposed Transaction" means the Applicant's proposed acquisition of all the shares in the Target Business from the Vendor, as described in the Applicant's notice seeking clearance pursuant to section 66 of the Commerce Act 1986 dated 25 February 2022;

"Provision of Services" means the sale and supply of drinking water dispensers, including multi-functional taps, and related parts and aftersales services in New Zealand;

"Retained Business" means Waterlogic Group Holdings Limited, excluding the Divestiture Business and the AU Divestiture Business;

"Sale and Purchase Agreement" means the share sale and purchase agreement dated 21 December 2021 in respect of the acquisition by the Applicant of the Target Business;

"Target Business" means Waterlogic Group Holdings Limited, including assets, agreements and employees listed in **Annexure A**;

"Undertaking" means this deed;



"Vendor" means Firewall Holding S.À R.L, the entity that will sell the Target Business, including Waterlogic New Zealand Limited, to the Applicant pursuant to the Proposed Transaction;

"Working Day" has the same meaning as in section 2 of the Commerce Act 1986;

"Zip" means Zip Industries (Aust) Pty Limited (including its subsidiaries), which is an Affiliate of the Applicant which supplies (among other things) drinking water solutions.

Conduct until Divestiture Completion

Preservation obligations

5. The Applicant will from the Control Date until Divestiture Completion, use best endeavours to:
 - (a) preserve the reputation and goodwill of the Divestiture Business;
 - (b) preserve the economic viability, marketability and competitiveness of the Divestiture Business;
 - (c) maintain the Divestiture Business' Provision of Services in a manner consistent with the Provision of Services as at the date of this Undertaking (including, to the extent necessary, providing any services to the Divestiture Business that, immediately prior to completion of the Proposed Transaction, are provided to the Divestiture Business by the Vendor's group); and
 - (d) maintain a level of staffing at the Divestiture Business that is materially the same as at the date of this Undertaking, including maintaining appropriate incentive schemes and / or remuneration levels consistent with industry practice, to encourage:
 - (i) the Independent Manager to preserve the economic viability and marketability of the Divestiture Business; and
 - (ii) Personnel to remain with the Divestiture Business.

Negative obligations

6. The Applicant will not from the Commencement Date until Divestiture Completion:
 - (a) carry out any act upon its own authority that might have a significant adverse impact on the value, management, competitiveness or viability of



the Divestiture Business or that might alter the nature and scope of activity, or the commercial strategy, of the Divestiture Business; or

- (b) sell or transfer the Divestiture Business to any person other than to an Approved Purchaser.

Hold-separate obligations

7. The Applicant will designate the Independent Manager who will, from the Control Date until Divestiture Completion, operate the Divestiture Business as if it were an entirely separate going concern from the Retained Business and Zip, including ensuring that:

- (a) the day-to-day operations of the Divestiture Business are the responsibility of the Independent Manager;
- (b) all employees employed in the Divestiture Business ultimately report to the Independent Manager;
- (c) the Independent Manager reports directly to the CEO of the AU Divestiture Business (as required in the normal course of business);;
- (d) no persons involved in the day-to-day management of, or who have board or governance roles with, the Retained Business or Zip shall:
 - (i) be on the board of, or have governance roles with, the Divestiture Business;
 - (ii) be involved in the day-to-day management of the Divestiture Business; or
 - (iii) receive any Commercially Sensitive Information about the Divestiture Business through the reporting process;
- (e) the Independent Manager continues to use all reasonable endeavours to maximise the value and viability of the Divestiture Business and operate the Divestiture Business on the basis that the Retained Business and Zip are arm's length businesses separate from the Divestment Business; and
- (f) the Applicant or its Affiliates (as the case may be) continue to operate the Retained Business and Zip on the basis that Retained Business and Zip are arm's length businesses separate from the Divestment Business.



Ring-fencing obligations

8. The Applicant will from the Control Date until Divestiture Completion implement all necessary measures including a Confidential Information Protocol in the form set out at **Annexure B** to ensure that, to the extent possible:

(a) the Divestiture Business' officers, employees, contractors or agents, do not receive any Competitively Sensitive Information relating to the Retained Business, Zip, the Applicant or the Applicants' other Affiliates (excluding, for the avoidance of doubt, the AU Divestiture Business); and

(b) the Retained Business', Zip's, the Applicant's or the Applicants' other Affiliates' (excluding, for the avoidance of doubt, the AU Divestiture Business) officers, employees, contractors or agents do not receive any Competitively Sensitive Information relating to the Divestiture Business,

other than in accordance with clause 7 or where such disclosure is strictly necessary for the purpose of one of the following:

(c) progressing the Divestment (including relating to maintaining the viability of the Divestiture Business and the Provision of Services in relation to the Divestiture Business on a transitional basis);

(d) reporting to the Commission or to the Independent Monitor, pursuant to this Undertaking; and

(e) complying with legal, reporting and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements) or to progress any legal dispute or regulatory matter,

and provided such information is disclosed only to those officers, employees, contractors, agents or advisers, who have signed a Confidentiality Undertaking in the form set out at **Schedule B** of **Annexure B**, and need to know the information in order to carry out the purposes listed at clause 8(c)-(e) above, and is used solely for those purposes. For the purposes of this clause:

(i) advisers (including any support staff) do not need to sign individual undertakings if their organisation has given an undertaking on their behalf, or they are subject to professional or other pre-existing confidentiality obligations which would



preclude them sharing Competitively Sensitive Information other than in accordance with this clause;

- (ii) the Applicant will notify the Commission of any additions to or removal of individuals from the list of officers, employees, contractors, agents or advisers set out at **Schedule A** of **Annexure B** who have signed a Confidentiality Undertaking under this clause.

Non-solicitation obligations

- 9. The Applicant undertakes from the Commencement Date until Divestiture Completion that:
 - (a) it will not solicit Personnel of the Divestiture Business; and
 - (b) it will procure that its Affiliates will not solicit Personnel of the Divestiture Business.
- 10. For the avoidance of doubt, such non-solicitation obligations in clause 9 will not apply in the case of any person being employed or contracted by the Applicant or its Affiliates, as a result of recruitment, contracting, marketing, or solicitation in the ordinary course of its business without reference to, or use of, any confidential information of the Divestiture Business, including where such person has responded to a publicly placed advertisement or was employed or contracted as a result of normal recruiting, contracting, marketing, or solicitation procedures that were not targeted at any particular person.

Approved Purchaser

- 11. The Applicant will provide the Commission at least [] before the end of the Initial Sale Period:
 - (a) in writing, the identity of the proposed purchaser (or where negotiations are ongoing with more than one potential purchaser, the potential purchasers) of the Divestiture Business;
 - (b) the draft Divestiture Sale Agreement (including the identity of the proposed purchaser, if not already provided under clause 11(a)) to the Commission;
 - (c) if the proposed purchaser is not also the proposed purchaser of the AU Divestiture Business, a copy of the draft proposed arrangements for the



supply of drinking water dispensers, including multi-functional taps, and related parts and services by the AU Divestiture Business to the Divestiture Business in New Zealand; and

- (d) in writing, the reasons why any such proposed purchaser is a suitable purchaser of the Divestiture Business, with reference to the requirements in clause 12.

12. The Applicant must satisfy the Commission that the Divestment will be carried out in a manner consistent with this Undertaking and that the proposed purchaser(s) of the Divestiture Business:

- (a) will not be an Affiliate of the Applicant, and will be demonstrably independent of the Applicant Group;
- (b) has the financial resources, expertise and incentive to viably operate and develop the Divestiture Business as a viable competitor in New Zealand;
- (c) is not likely to create competition concerns that would result in a contravention of section 47(1) of the Commerce Act 1986; and
- (d) is not likely to [].

13. The Applicant shall provide the Commission the information and documentation in clause 11 before the Commission is able to approve the proposed purchaser(s).

14. The Commission's approval of any purchaser proposed by the Applicant or the Approved Divestiture Agent (as the case may be) shall be contingent on the Commission approving the final binding Divestiture Sale Agreement.

15. The Applicant will ensure that [].

16. Neither the Applicant nor the Approved Divestiture Agent can proceed with the Divestment until such time as the information required under clause 11 has been provided to the Commission and, the Applicant or the Approved Divestiture Agent and/or the proposed purchaser, has provided the information contemplated by this Undertaking or as requested by the Commission and:

- (a) the Commission advises in writing that it has, at its discretion, approved the proposed purchaser and the Divestiture Sale Agreement; or



- (b) [] has elapsed or such longer period as the Commission advises in writing that it requires in connection with its assessment under this Undertaking has elapsed.

[]

17. []

18. []

(a) []; and

(b) []; and

(c) [].

19. [].

20. []:

(a) []; and

(b) [].

21. []:

(a) [].

(b) []:

(i) [];

(ii) [].

Fulfilment of Undertaking

22. The Applicant shall notify the Commission of the Divestiture Completion as soon as reasonably practicable, and in any event, no later than [] after such completion has occurred, subject to the Commission keeping that information confidential.

Monitoring compliance with this Undertaking

23. The Applicant shall notify the Commission in writing of the proposed Control Date at least [] in advance of the Control Date.



24. At the Commission's request, the Applicant will give the Commission any information and documents relating to the Divestment reasonably required, or the opportunity to have a meeting with the Applicant about the Divestment and the Applicant's progress towards carrying out the Divestment.

25. The Applicant undertakes to submit a written report to the Commission, or, if applicable, the Independent Monitor, on a monthly basis (commencing from the Control Date until Divestiture Completion), or more frequently if requested by the Commission, containing the following information relating to the Divestiture Business (and any other information about the Divestiture Business or the Applicant's compliance with this Undertaking reasonably requested by the Commission) for the purpose of the Commission monitoring:
 - (a) The preservation of the economic viability, marketability and competitiveness of the Divestiture Business (including by providing the Commission with a performance summary of the Divestiture Business (similar to management accounts);
 - (b) The Applicant's compliance with:
 - (i) the hold-separate obligations in clause 7;
 - (ii) the ring-fencing obligations in clause 8; and
 - (iii) the non-solicitation obligations in clause 9;
 - (c) Confirmation by a director of the Applicant that the Applicant has complied with its obligations under the Undertaking; and
 - (d) Progress on the sale process for the Divestment Business.

26. Nothing in the Undertaking requires the Applicant to provide legally privileged information or documents to the Commission.

27. The Applicant shall report any known breaches of this Undertaking to the Commission in writing as soon as reasonably practicable and in any event, within [] of being made aware of the breach.

Independent Monitor

28. The Applicant shall appoint an Independent Monitor who will be responsible for submitting a written report to the Commission on a monthly basis (commencing from the Control Date until Divestment Completion) containing the following information



relating to the Divestiture Business (and any other information about the Divestiture Business or the Applicant's compliance with the Undertaking reasonably requested by the Commission) for the purpose of preserving the economic viability, marketability and competitiveness of the Divestiture Business:

- (a) The Applicant's compliance with:
 - (i) the hold-separate obligations in clause 7;
 - (ii) the ring-fencing obligations in clause 8; and
 - (iii) the non-solicitation obligations in clause 9;
- (b) Confirmation that the Applicant has complied with its obligations under the Undertaking;
- (c) The Applicant's progress on the sale process for the Divestiture Business; and
- (d) Performance summary of the Divestiture Business (similar to management accounts).

29. The Independent Monitor shall be approved, and its terms of appointment shall be approved, by the Commission, acting reasonably.

- (a) The Applicant shall use its best endeavours to provide the identity of the proposed Independent Monitor and its terms of appointment at least [] before the Control Date, to be approved by the Commission (approval in both cases not to be unreasonably withheld) as soon as reasonably practicable.
- (b) In the event the Independent Monitor's mandate ends before the obligations in this Undertaking are discharged in accordance with clause 28, the replacement Independent Monitor and the replacement Independent Monitor's terms of appointment shall also be approved by the Commission pursuant to this clause.
- (c) If the Commission does not approve any proposed Independent Monitor (and has reasonable grounds for doing so) by the Control Date, the Commission may (acting reasonably) identify and approve any person as the Independent Monitor, including approving the terms of appointment of the Independent Monitor, and direct the Applicant to appoint that person on the terms reasonably required.



30. The Applicant will (and will procure that, where appropriate, the Independent Manager will) report on matters identified in the undertaking to the Independent Monitor and otherwise comply with any reasonable request for information or assistance to enable the performance of the Independent Monitor's obligations as set out in clause 28.

Miscellaneous

31. Any notice requirements under this Undertaking shall be given in writing and to the following designated recipients:

For the Commission: Gavin McNeill (Gavin.mcneill@comcom.govt.nz)

Sam Holmes (sam.holmes@comcom.govt.nz)

For the Applicant: Sarah Keene (sarah@keene.com)

Petra Carey (petra.carey@russellmcveagh.com)

32. The Applicant undertakes to provide the Commission with a copy of any information memorandum (or similar documentation) provided to potential purchasers relating to the Divestiture Business within [] of any such information memorandum (or similar documentation) being provided to potential purchasers (or if such documentation has been provided to potential purchasers prior to signing of this Undertaking, within [] of signing of this Undertaking).
33. Nothing in this Undertaking requires the Applicant to provide legally privileged information or documents to the Commission.
34. The Applicant confirms that by entering into the obligations recorded in this Deed it intends to create binding and enforceable legal obligations for the benefit of the Commission. The Applicant may, with the written consent of the Commission, vary this Undertaking at any time. For the avoidance of doubt, the Applicant may submit to the Commission an application to vary this Undertaking pursuant to section 69AC under the Commerce Act 1986. The Commission will consider the application in accordance with its statutory obligations under section 69AC.
35. This Undertaking is governed by New Zealand law and the parties accept the exclusive jurisdiction of the New Zealand courts.
36. This Undertaking may be executed by an exchange of electronic copies (whether by email or otherwise) and execution of this Deed by that means is valid and sufficient execution.





SIGNED AS A DEED

By:

Signature of Director

Name of Director

In the presence of:

Signature of witness

Name of witness

Occupation

City/town of residence



ANNEXURE A

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1. []

(i) []

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(ii) []

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CONFIDENTIAL ANNEXURE B

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(b) []

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(ii) []

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(b) []

(c) []

(d) []

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22. []

CONFIDENTIAL SCHEDULE A

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CONFIDENTIAL SCHEDULE B

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