

Statement of Preliminary Issues

Juice Technologies (Infocare) / APT Childcare

8 January 2020

Introduction

1. On 16 December 2019, the Commerce Commission registered an application (the Application) from Juice Technologies Pty Limited (Juice Technologies) to acquire 100% of the shares of APT Business Solutions Limited (APT) (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 close of business on **Wednesday 29 January 2020**.

The parties

5. Juice Technologies is active in New Zealand through its wholly owned subsidiary, Infocare Systems Limited (Infocare). We refer to the Applicant as Infocare from this point on. Infocare and APT both provide student management system software (SMS) to the New Zealand childcare industry. SMS is designed to assist with the administrative aspects of providing childcare services.
6. The core functionality of the merging parties' SMS products is similar and includes:
 - 6.1 recording child enrolment details, attendance details and demographics;
 - 6.2 storing staff/teacher information, staff rosters and worked hours;
 - 6.3 billing and invoicing; and
 - 6.4 documenting fundraising projects and recording donations.

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.

7. In addition, Infocare and APT both offer modules that allow childcare providers to communicate with parents and staff.
8. Childcare providers can also use the software to report up-to-date statistical information to the Ministry of Education for funding purposes. Infocare submitted that SMS providers must be certified by the Ministry of Education to supply SMS to childcare services, excluding out of school care and recreation services, which can use SMS that is not Ministry-approved.

Our framework

9. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.³ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
10. 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).⁴ This allows us to assess the degree by which the proposed acquisition might lessen competition.
11. If the lessening of competition resulting from the proposed acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
 - 11.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;⁵
 - 11.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 11.3 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

12. 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

³ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at www.comcom.govt.nz

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

⁵ References to price increases in this document should be taken to include a reduction in quality, service or innovation.

determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.⁶

13. In its application, Infocare submitted that the relevant market for our consideration of the Proposed Acquisition is the national market for the provision of SMS to childcare providers.⁷ However, the Application also identifies four different categories of childcare providers that use SMS, being:
 - 13.1 education and care centres, which are all-day centres catering for ages 0 - 5;
 - 13.2 kindergartens, which cater for ages 2 ½ - 6 and employ qualified and registered teachers;
 - 13.3 home-based care services, which provide young children with early childhood education either in the child's own home or in the home of an educator; and
 - 13.4 out of school care and recreation (OSCAR) providers, which include holiday programmes and before/after school care.
14. Infocare submitted that SMS providers typically supply SMS to multiple customer types and that customer requirements for SMS do not vary, meaning the software provided to customers is largely the same.
15. We will consider whether the market definition outlined in the Application is appropriate for our assessment of the Proposed Acquisition. For example, we will test:
 - 15.1 the extent to which different types of childcare providers have different SMS requirements, such that it may be appropriate to adopt separate markets for different types of customers; and
 - 15.2 alternatively, whether it may be appropriate to adopt a broader customer market including, for example, primary, secondary, and/or tertiary education providers.

Without the acquisition

16. The Application states that both Infocare and APT require significant technology upgrades, and that it would be challenging for either party to undertake this investment individually.⁸ Infocare submitted that, absent the Proposed Acquisition, it and APT would continue to do business as separate entities but would both have limited ability to compete effectively with new entrants offering superior technology.⁹ It argues that, as a result:
 - 16.1 both would continue to lose market share to new software providers;

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

⁷ The Application at [30].

⁸ The Application at [14].

⁹ The Application at [52].

- 16.2 one of the new SMS platforms would likely acquire APT;
 - 16.3 Infocare may need to raise its fees in order to upgrade its software; and
 - 16.4 ultimately one or both firms could fail.
17. We will consider what would likely happen should the Proposed Acquisition not proceed, including the extent to which Infocare and APT are likely to remain viable competitors absent the Proposed Acquisition. We will also test whether there is a real chance of an alternative purchaser acquiring APT and whether this scenario would likely be substantially more competitive than the scenario with the Proposed Acquisition.

Preliminary issues

18. 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 and/or coordinated effects might result from the Proposed Acquisition. The questions that we will be focusing on are:
- 18.1 *Horizontal unilateral effects*: would the loss of competition between the parties enable the any market participant to profitably raise prices by itself?
 - 18.2 *Horizontal 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?

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

19. 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 entity can profitably increase price above the level that would prevail without the merger, or decrease the quality of the products and/or services supplied.
20. Infocare submitted that the Proposed Acquisition would not substantially lessen competition for the following reasons:¹⁰
- 20.1 The merged entity would face constraint from existing and potential competitors. These include recent entrants to the SMS market that have superior technology,¹¹ as well as potential new entrants both from overseas and from adjacent markets.
 - 20.2 Customers could constrain any attempts to raise prices through their ability to switch SMS suppliers. There are no barriers to doing so and loss of even one large customer would substantially reduce the merged entity's revenue.

¹⁰ The Application at [70]-[92].

¹¹ Infocare submitted that entrants to the SMS market since 2017 have included Discover (Superior Admin Limited), Aimy Plus (Aimy Limited), Junior Logs (Mace IT Services Limited), and Porse (Porse In-Home Childcare NZ Limited) – the Application [61].

20.3 The Proposed Acquisition would be pro-competitive as it would allow the merged entity to improve its product offering and remain a viable competitor.

21. We will assess whether the evidence supports Infocare's claims.

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

22. 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 prices increase across the market.

23. Infocare submitted that the Proposed Acquisition would not enhance the ability for the merged entity to coordinate its behaviour with competitors because:¹²

23.1 the SMS market is rapidly developing and has been characterised in recent years by entry, innovation, and advancing technology;

23.2 competitors vary in size and do not regularly interact; and

23.3 the products of different SMS providers are not all the same and there is limited transparency of the commercial terms offered by different providers.

24. We will assess whether any relevant market is vulnerable to coordination and whether the Proposed Acquisition would likely change the conditions in any market so that coordination is more likely, more complete or more sustainable.

Next steps in our investigation

25. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **Wednesday 4 March 2020**. However, this date may change as our investigation progresses.¹³ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.

26. 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

27. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Infocare/APT" 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 **29 January 2020**.

¹² The Application at [93].

¹³ 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.

28. 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.
29. 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.