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Determination

NEP Broadcast Services New Zealand Limited and Sky Network Television Limited [2021] NZCC 1

The Commission:	Anna Rawlings Dr John Small Tristan Gilbertson Vhari McWha
Summary of application:	An application from NEP Broadcast Services New Zealand Limited seeking clearance to acquire from Sky Network Television Limited the assets of its outside broadcasting business, Outside Broadcasting Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition.
Date of determination:	3 February 2021

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

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The proposed acquisition

1. On 25 September 2020 the Commerce Commission (the Commission) registered an application (the Application) under section 66(1) of the Commerce Act 1986 (the Act) from NEP Broadcast Services New Zealand Limited (NEP) to acquire from Sky Network Television Limited (Sky) the assets of its outside broadcasting (OB) business, Outside Broadcasting Limited (OSB) (the Proposed Acquisition).

2. Sky, through OSB, is the largest provider of OB services in New Zealand. Sky owns the rights to broadcast, over the next five years, a number of significant sports events in New Zealand. Accordingly, it has significant obligations to a number of sporting bodies in relation to OB services.

3. Historically, OSB provided Sky with OB services. However, Sky submitted that a significant proportion of OSB's OB assets are reaching the end of their working life and require significant investment in upgrades and maintenance. Given the number of broadcast rights that Sky is contracted to broadcast, this situation gives rise to significant delivery supply risk. Sky submitted that, rather than make this investment, it is more economic for it to obtain OB services from a third party. It has therefore decided to sell the OSB business and assets to NEP and enter into a long-term contract for NEP to supply it with OB services (Supply Agreement).

4. Sky submitted that it would enter into the Supply Agreement with NEP whether or not NEP acquired OSB's assets and would withdraw OSB's assets from service in New Zealand in the event that NEP did not acquire them.

5. The Proposed Acquisition and the Supply Agreement have been structured in a way that means that the Supply Agreement will inevitably follow from the Proposed Acquisition. Any clearance given is for the acquisition of the subject assets only.[1]

Our decision

6. The Commission gives clearance to the Proposed Acquisition as we are 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. For the avoidance of doubt, the Commission's clearance decision does not cover the Supply Agreement.

7. The Commission has reached this view because, for the reasons set out in detail below, we are satisfied that there would be no material difference in competition between the situation with the Proposed Acquisition and the situation without the Proposed Acquisition. In both situations, we consider that OSB will cease supplying OB services in New Zealand and that Sky will enter into a contract for the supply of OB services with NEP. As a result, it has not been necessary for the Commission to

[1] Under s 66(1) of the Commerce Act 1986, a person who proposes to acquire assets or shares may give the Commission a notice seeking clearance for the acquisition. Any clearance given by the Commission under s 66(3)(a) of the Commerce Act 1986 is only in relation to the proposed acquisition of assets or shares described in the notice seeking clearance.

define the relevant markets, or to undertake a substantive analysis of competitive effects.

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 (our guidelines).[2]

The substantial lessening of competition test

9. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.

10. 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).[3]

11. A lessening of competition is generally the same as an increase in market power. Market power confers the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),[4] or reduce non-price factors such as quality or service below competitive levels.

The clearance test

12. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[5] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The parties and the industry

13. NEP is a large global technical production company, facilitating the outside broadcast of live events in over 80 countries. NEP has been providing OB services in New Zealand on an ongoing basis since 2018, when it acquired the assets of NZ Live.

14. Before 2018, NEP provided technical production facilities for the broadcast of the 2015 Cricket World Cup, using equipment brought into New Zealand from overseas. NEP currently provides studio and OB services to TAB New Zealand, TVNZ, MediaWorks and other parties for sporting and entertainment events.

15. Sky is a New Zealand entertainment company that broadcasts live sport and also makes a range of other entertainment content available to consumers through television broadcasts and digital streaming channels and apps. Its OB business, OSB, films and produces a substantial portion of local sports content including New

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2 Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).
3 *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].
4 Or below competitive levels in a merger between buyers.
5 Section 66(3)(a).

Zealand rugby and netball. Sky also provides OB services to third parties, including MediaWorks and TVNZ.

16. NEP and OSB both supply OB services to customers and are currently the two largest providers in New Zealand supplying to third parties. The provision of OB services entails the filming of sports, entertainment and other events (both indoors and outdoors) on behalf of broadcasters, rights holders and other third parties. Providers of OB services provide engineering and technical expertise, as well as equipment and personnel to physically film events. Filmed content is then transmitted back to a central location (on-site with the event, or off-site), where additional creative production elements can be added before the content is broadcast.

17. OB services have traditionally been provided from OB units, which are trucks or vans specifically designed to house the cameras and control room computers needed to film and produce an event on-site at a location. Depending on the event and the expectations and budget of the customer, OB services can also be provided using 'flyaway kits' (which are portable packs of cameras and equipment that can be transported to an event), or using IP/streaming cameras, which send live feeds via the internet directly to screens or to a remote production centre.

18. OB services are required for a range of different events, ranging from one-off events, such as a live concert or memorial service; to multi-day or seasonal events such as entertainment series like Dancing with the Stars, or sporting events like a season of rugby or netball. Contracts for entertainment events are typically awarded on an event-by-event basis. At a minimum, contracts for sporting events are awarded for an entire season of that sport and may extend beyond a single season, in some cases for number of years.

19. OB suppliers typically set prices to customers based on a daily rate for the use of the required OB equipment and the staff required to operate it. This means that events vary in value to the OB supplier according to their complexity (ie, the number of cameras and other equipment needed to film the event to the required standard), and the number of filming days that the event will require.

The likely state of competition with and without the Proposed Acquisition

20. To assess whether a merger is likely to substantially lessen competition in a market, we compare 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).[6]

With the Proposed Acquisition

21. In the factual scenario, NEP would acquire OSB's assets. Sky would exit OSB from the supply of OB services and Sky would purchase OB services from NEP under the Supply Agreement.

6 *Mergers and Acquisitions Guidelines* above n2 at [2.29].

Without the Proposed Acquisition

22. Sky submitted that, if the Proposed Acquisition did not proceed:

    22.1 Sky would exit OSB from the market(s) in which it operated; and

    22.2 Sky would enter into a long-term supply agreement for OB services with NEP.

23. On that basis, Sky says there is no material difference between the situation with the Proposed Acquisition and the situation without the Proposed Acquisition.

24. As set out below, the Commission has tested these submissions, and is satisfied that in the counterfactual OSB's assets would likely exit and Sky would likely contract with NEP for OB services.

Framework for the Commission's analysis of the counterfactual

25. As noted, Sky submitted that if the transaction did not proceed, Sky would exit OSB from the market and enter into a supply agreement with NEP[7] [ ].[8]

26. We have interrogated Sky's stated counterfactual in two limbs:

    26.1 first, we considered whether the evidence supports Sky's claim that OSB would cease competing in the counterfactual or, alternatively, whether Sky would continue to operate OSB (and compete to provide OB services) beyond the short term; and

    26.2 second, we considered what Sky would be likely to do with OSB's assets where OSB did not continue competing independently in the counterfactual. In particular, whether OSB's assets would exit New Zealand or, alternatively, be sold (in their entirety or partially) to other parties that would use those assets to supply OB services in New Zealand in competition with NEP.

Would OSB continue competing in the absence of the Proposed Acquisition?

27. We are satisfied that OSB would cease competing in the counterfactual. The evidence before us suggests that Sky would need to invest significant capital to upgrade OSB's aging assets in order to remain a viable supplier of OB services. Sky considers such investment would be uneconomic when compared with outsourcing these services to a third party on a long-term basis, and this is supported by Sky's internal documents.[9]

28. Against this background, we are satisfied that in the counterfactual, Sky would seek to outsource its OB requirements, most likely to NEP, as quickly as possible and

7 NEP and Sky joint response to Statement of Issues (14 December 2020) at [27].

8 Sky response to Statement of Preliminary Issues (12 November 2020) at [14] and [21].

9 [ ].

would not operate OSB beyond the short-term in the face of increasing delivery supply risks and costs.

29. We investigated the likelihood of Sky continuing to run OSB long-term in the counterfactual. We do not consider this scenario to be likely because:

29.1 we are persuaded by Sky's submission that it would not make commercial sense to reject the long-term stability of a supply agreement with NEP in favour of operating OSB with an aging asset base that represents increasing delivery supply risk;[10] and

29.2 [ ].[11]

30. On this basis, we consider that:

30.1 without the Proposed Acquisition, Sky would cause OSB to exit the market; and

30.2 there is no likely counterfactual in which OSB would continue to compete to supply OB services beyond the short term.

Would OSB's assets exit the market(s) in the counterfactual?

31. Given our conclusion that without the Proposed Acquisition OSB would exit the market, it is necessary to consider what Sky would be likely to do with OSB's assets. Interviewees advised us that there is a liquid international market for second-hand OB equipment ranging in scale and value from individual cables/wires, to near-fully-equipped OB trucks.[12] Second-hand equipment is sold at a significant discount to new equipment, although it may not always come with warranties or associated service level agreements, which may not be acceptable to some purchasers.[13]

32. We have considered whether some or all of OSB's assets would be acquired via the second-hand equipment market by another party wishing to supply – or increase or expand its supply of – OB services in New Zealand.

33. Having considered the available evidence and, in particular, having interviewed a number of third-party OB suppliers (both domestic and international), we do not

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10 [ ].

11 [ ].

12 [ ].

13 [ ].

consider that there is a real chance of this outcome, in particular because the third-party competitors that we have interviewed have all stated that:[14]

33.1 in order for them to be willing to invest in additional assets in New Zealand, they would need to win contracts of the necessary duration or magnitude to justify that investment; and

33.2 they do not believe that there are currently, or are likely to be in the near future, sufficient contracts of the necessary duration or magnitude in New Zealand.

34. We do not consider that the number of third-party contractual opportunities is likely to increase in the short term.

34.1 A significant number of existing sports rights in New Zealand are currently held by Sky which, for reasons we have set out above, is not likely to contract with an OB supplier that is not NEP in the counterfactual. These sporting rights are contracted over periods longer than one year, and consequently OB supply opportunities for those events arise more infrequently.[15]

34.2 Contractual opportunities for entertainment events tend to be on an event-by-event basis, and we have not seen any evidence to indicate that the annual number or magnitude of such contractual opportunities is likely to materially increase in the short term. Given the relatively small value of individual entertainment event opportunities, an OB provider would need to be guaranteed a number of those events to justify investment in equipment, which is unlikely given that each opportunity is contractually and often temporally independent.[16]

Would Sky enter into a long-term agreement with another OB supplier in the counterfactual?

35. We also considered whether Sky would be willing to enter into a long-term supply agreement with an alternative OB supplier instead of NEP in the counterfactual. We do not consider this scenario likely. Sky has expressed a clear and consistent preference to transact with NEP for several reasons, including as a result of the strong working relationship between the two businesses, and the reputation and reliability of NEP, [ ] rather than any other third party. Additionally, given Sky's delivery supply risk and consequent need to negotiate alternative supply arrangements expeditiously, as well as the transaction costs involved, we do not consider it likely that Sky would abandon its

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14 [ ].

15 [ ].

16 [ ].

proposed supply agreement with NEP – which is well-advanced – to start commercial negotiations afresh with a new OB supplier.

36. Furthermore, we do not we consider it likely that Sky would split its purchase of OB services across different OB suppliers. To do so would represent a significant logistical challenge given the number of sports events that Sky is contractually obligated to broadcast annually, and would increase the risk for Sky that for any given event, it is unable to arrange an appropriate OB services provider (including due to scheduling conflicts). Further, such an approach may increase Sky's costs due to the loss of scale economies achievable by purchasing OB services from a single supplier.

Overall conclusion

37. In both the factual and counterfactual, we consider that OSB will cease supplying OB services in New Zealand, and that Sky will enter into a contract for the supply of OB services with NEP. In both scenarios, we do not consider that a third-party competitor is likely to acquire the assets and use them to compete against NEP. As such, we do not consider there to be a substantial lessening of competition when comparing the scenario with the Proposed Acquisition to the scenario without it.

38. We are therefore 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.

Determination on notice of clearance

39. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance to NEP Broadcast Services New Zealand Limited to acquire from Sky Network Television Limited the assets of its outside broadcasting business, Outside Broadcasting Limited.

Dated this 3rd day of February 2021

Anna Rawlings
Chair