

Statement of Preliminary Issues

Trade Me Limited / PropertyNZ Limited

10 March 2021

Introduction

1. On 18 February 2021, the Commerce Commission registered a clearance application from Trade Me Limited (Trade Me) seeking clearance to acquire 100% of the shares or assets of PropertyNZ Limited (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 **24 March 2021**.

The parties

5. Trade Me owns and operates trademe.co.nz which is an online marketplace offering auction and advertising services across a range of products and services. In particular, Trade Me operates an online platform for listing real estate for sale and for rent under the name Trade Me Property. Trade Me Property also provides property information and data through its 'Property Insights' microsite.
6. PropertyNZ Limited owns and operates the homes.co.nz website (Homes). Like Trade Me Property, Homes is also a platform for listing real estate for sale and for rent as well as providing property information and data.
7. Trade Me Property and Homes operate by displaying, for free, information and data about real estate and properties that is attractive to their audiences (consumers). This includes historical sales data, rateable value information and estimates of what a property is likely to sell for. Trade Me and Homes earn revenue by:

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.

- 7.1 selling property advertising (i.e. listings) to real estate professionals (i.e. agents and agencies) and (in the case of Trade Me only) to private individuals, to enable them to sell or rent properties; and
- 7.2 selling digital advertising services to agents and agencies and other advertisers.

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 (Guidelines).³ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
- 9. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁴ This allows us to assess the degree by which the proposed acquisition might lessen competition.
- 10. 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:
 - 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;⁵
 - 10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 10.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

Market definition

- 11. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.⁶

³ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. 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.

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

12. Trade Me Property and Homes are ‘multi-sided’ platforms that facilitate interactions between different groups on each side of the platform; in particular:
 - 12.1 between potential buyers/renters of property and sellers/lessors of that property; and
 - 12.2 between advertisers and consumers.
13. The Commission will consider whether to define a market for each side of the platform or a market for the platform itself. As the platform’s value to the customers on one side may vary depending on the number of customers on another side, a firm running the platform will typically take into account the effect of its pricing decisions on each side of the platform. In these cases, we may incorporate the interdependencies in demand between different groups of customers when defining the relevant market on each side of the platform.
14. Trade Me has submitted that there are national markets for the supply of:⁷
 - 14.1 advertising for real estate for sale to agents and agencies;
 - 14.2 advertising for real estate for rent to agents and agencies;
 - 14.3 digital advertising; and
 - 14.4 property data, information, and listings to consumers.
15. However, Trade Me submits that the outcome of its application does not turn on market definition and the Commission can be satisfied that the Proposed Acquisition would not substantially lessen competition, however the markets are defined, due to the presence of strong existing competitors.

The advertising side of the platform

Advertising for real estate for sale and for rent

16. On the advertising side of the platform, Trade Me considers the relevant product and/or customer group includes the supply to agents and agencies of advertising for real estate for sale, and separately, advertising for real estate for rent.⁸ Trade Me submits that in the case of advertising for real estate for sale, the market includes online and other forms of advertising (such as print), but in the case of advertising for real estate for rent, the market is likely to be online only. Trade Me considers this is because:
 - 16.1 agents and agencies’ requirements for advertising are discrete from other advertisers;

⁷ The Application at [48].

⁸ The Application at [55].

- 16.2 agents and agencies seeking advertising for real estate for sale switch between online advertising and print advertising, so the market should be wider than online advertising; and
- 16.3 in the case of advertising for real estate for rent, the market is predominantly online, and print advertising is less of a competitive constraint, indicating that the market can be limited to online advertising.
17. We will consider the degree to which agents and agencies switch or flex their advertising in response to changes in relative prices, whether it be for real estate for sale and/or for rent, between online advertisements and print advertisements. We will test whether there should be one broad market for advertising of real estate for sale (and/or rent) or whether there should be separate markets for print and for online real estate advertisements.

Other types of digital advertising

18. Other than real estate advertising, both Trade Me and Homes offer other types of general digital advertising including search and display advertising and partnership opportunities such as sponsored mortgage and energy calculators.
19. We will test the extent to which the merging parties overlap in the supply of general digital advertising. In the past, the Commission has identified a market for the supply of general digital advertising⁹ and Trade Me considers this market definition to remain appropriate. However, we will also test the existence of narrower digital advertising market(s).

The audience side of the platform

20. On the consumer (or audience) side of the platform, Trade Me and Homes provide listings as well as property information and data on their respective websites for free. The property information and data they provide includes historical sales data, rateable value information, estimates of what a property is likely to sell for as well as nearby listings. Trade Me and Homes provides this type of information and data, as well as listings, to attract as many consumers as they can to their websites.
21. Trade Me considers that, on the consumer side of the platform, there is a market for the supply of all the different property related information they provide, which would include property information and data as well as all the different listings. Nevertheless, Trade Me notes that this market could, in theory, be separated further into property data and information on the one hand, and property listings on the other.¹⁰
22. We will consider whether it is appropriate to consider the supply of property information and data separately from the supply of real estate listing information.

⁹ Commerce Commission Determination, *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8 at [285].

¹⁰ The Application at [72].

Without the acquisition

23. Trade Me considers the status quo is the appropriate counterfactual in this case. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo or whether the counterfactual may be something other than the status quo.

Preliminary issues

24. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market(s) by assessing whether horizontal unilateral and/or conglomerate effects might result from the Proposed Acquisition.

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

25. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint such that the merged entity can profitably increase prices above the level that would prevail without the merger, or decrease the quality of the products and/or services supplied.
26. The Applicant considers that the Proposed Acquisition would not be likely to substantially lessen competition in any relevant advertising market.
- 26.1 In the supply of advertising for real estate for sale to agents and agencies, Trade Me considers that:
- 26.1.1 the merged entity would be constrained by the numerous competitors who compete in the real estate advertising industry.¹¹ These competitors range from print media providers, like NZ Herald and Property Press, to other online providers like realestate.co.nz and OneRoof; and
- 26.1.2 Homes' removal as an independent participant is unlikely to change the underlying strong competitive dynamic that exists, because Homes is a relatively small participant in this market and is not an unusually disruptive competitive force.
- 26.2 In the supply of advertising for real estate for rent to agents and agencies, Trade Me considers that Homes is a relatively small participant, the Proposed Acquisition would result in limited overlap, and there would be several other suppliers.
- 26.3 In the supply of general digital advertising, Trade Me considers there is no material overlap between the two merging parties and, given the presence of other suppliers, there would be no potential for any competitive harm in this market.

¹¹ The Application at [78].

27. In any advertising markets, we will consider:
- 27.1 the degree of competitive constraint that Trade Me and Homes impose upon one another now, and could potentially impose on one another in the future. To the extent that any constraint is material, we will assess whether the competition lost between the merging parties could be replaced by rival competitors;
 - 27.2 how easily rivals could enter and/or expand in response to a price increase by the merged entity and whether that is likely to occur in a timely manner; and
 - 27.3 the extent to which customers, and in particular agents and agencies, have special characteristics that would enable them to resist a price increase by the merged entity, such as sponsoring new entry or expansion.¹²

Unilateral effects in any audience market: would the merged entity be able to increase the price or decrease the quality of property related information by itself?

28. A platform's value to advertisers on one side of the platform may vary depending on the quality of the product offered to consumers, in this case viewers or the audience, on the other side of the platform. Consumers do not pay to access the listings and the property-related information and data offered on the parties' platforms, but by engaging with a platform and allocating their attention to it, they provide those platforms with the opportunity to monetise that attention by selling it to advertisers.
29. In the case of Homes, website users are also able to proactively share their own data with the platform – by confirming that they own a particular property, and then contributing further information on that property to Homes' existing dataset – which increases the overall attractiveness of the Homes platform to consumers and, by extension, to advertisers wishing to pay for a share of that audience's attention.
30. Unilateral effects in any audience market could arise if the Proposed Acquisition removed a competitor that would otherwise provide a significant competitive constraint such that the merged entity can increase the price or decrease the quality of real estate information or data (or the level of innovation in the provision of this information or data) that would prevail without the merger. We will consider what such a price increase or quality decrease could look like in this scenario, but it could include outcomes such as an increase in the volume of advertising on the platform, or a reduction in the amount of property information presented on the platform or the frequency with which such information is updated.
31. Trade Me considers there is no plausible scenario in which consumers seeking property listings, information and data will be worse off as a result of the Proposed Acquisition. This is because all providers are incentivised to compete and innovate to

¹² We note that one competitor, Realestate.co.nz, is 50% owned by a group of five major real estate agencies.

attract a larger audience (to maximise advertising revenue) and this would not change as a result of the Proposed Acquisition.¹³

32. Regardless, Trade Me notes that any potential competition effects in an audience market are likely to be less significant than any effects in an advertising market. As Trade Me considers there are no likely competition issues in any advertising market, Trade Me considers there is therefore even less chance of any competition issue arising in an audience market.¹⁴
33. In any audience market, we will consider:
 - 33.1 the degree of competitive constraint that Trade Me and Homes impose upon one another now, and could potentially impose on one another in the future. To the extent that any constraint is material, we will assess whether the competition lost between the merging parties could be replaced by rival competitors;
 - 33.2 the extent to which Homes currently provides a particularly unique or innovative experience to consumers, which would be lost as a result of the Proposed Acquisition; and
 - 33.3 how easily rivals could enter and/or expand in response to an increase in price or a decrease in the quality of information provided by the merged entity and whether that is likely to occur in a timely manner.

Conglomerate effects – would the merged entity be able to foreclose rivals?

34. A conglomerate merger is a merger between firms supplying products that may be complementary. Such mergers may, in certain situations, increase a merged firm's ability and/or incentive to foreclose competitors by, for example, bundling together complementary products, or by refusing to sell those services to customers unless they also buy a second service from it (also known as tying).
35. While Homes only supplies property and real estate related services, Trade Me supplies a range of different products and services in addition to those provided via Trade Me Property.
36. Trade Me submits that the Proposed Acquisition is unlikely to lead to a substantial lessening of competition via conglomerate effects. This is because the Proposed Acquisition does not change the scope of Trade Me's existing business model as it already supplies similar products to Homes.¹⁵
37. We will assess whether the Proposed Acquisition creates the ability and incentive for Trade Me to foreclose rivals through conglomerate effects. We will consider whether, as a result of the Proposed Acquisition:

¹³ The Application at [137].

¹⁴ The Application at [130] and [131].

¹⁵ The Application at [139].

- 37.1 whether the merged entity would have any products that other providers must have to compete in any relevant market; and
- 37.2 whether the merged entity would have the ability and the incentive to foreclose existing or potential competitors' access to these products.

Next steps in our investigation

38. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **19 April 2021**. 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.
39. 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

40. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference 'Trade Me/Homes' 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 **24 March 2021**.
41. 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.
42. 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.