

Statement of Preliminary Issues

Goodman Fielder / Lion

28 June 2018

Introduction

1. On 22 June 2018, the Commerce Commission registered an application (the Application) from Goodman Fielder New Zealand Limited (Goodman Fielder) to acquire assets related to the manufacture and distribution of “Yoplait” branded yoghurt from Lion – Dairy and Drinks (NZ) Limited (Lion) (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 **Friday 13 July 2018**.

The parties

5. Goodman Fielder is a food company operating across New Zealand, Australia, and the Asia-Pacific region. In New Zealand, Goodman Fielder produces a range of dairy, bread, and grocery items, including yoghurt under the brands Meadow Fresh, Activate probiotic, Naturalea, Kalo, and Puhoi Valley.
6. Lion is a food and beverage company in Australia and New Zealand ultimately owned by Kirin Holdings Company Limited. Lion’s New Zealand business includes alcoholic and non-alcoholic beverages, dairy drinks, and the manufacture and distribution of yoghurt under the Yoplait brand.
7. Lion currently has a licence from Sodima (a French company) to use the Yoplait brand in New Zealand. As well as acquiring the manufacturing and distribution assets that are the subject of the Application, Goodman Fielder also intends to obtain a

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.

licence from Sodima such that it would be the exclusive supplier of Yoplait yoghurt in New Zealand.

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.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 as a result of the proposed acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
 - 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;
 - 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.⁵
12. In the Application, Goodman Fielder submitted that the relevant market for assessing the proposed acquisition is the national market for the manufacture and

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

wholesale supply of yoghurt and dairy food.⁶ Goodman Fielder noted that the Commission defined such a market in *Decision 459* in 2002 and *Decision 542* in 2004.

13. We will test whether the market definition used in *Decisions 459* and *542* is still appropriate for our analysis. In particular, we will test whether the market should be narrower than that submitted by Goodman Fielder. For example, we will test whether there is now sufficient distinction between “mainstream” and “gourmet” yoghurt products such that they should form separate product markets.

Without the acquisition

14. We will consider what the parties would do if the proposed acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or whether the parties would seek alternative options, for example, finding a different buyer for Lion’s assets.

Preliminary issues

15. We will investigate whether the proposed acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral or coordinated effects might result from the proposed acquisition. The questions that we will be focusing on are:
 - 15.1 unilateral effects: would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?
 - 15.2 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 or reduce quality or innovation by itself?⁷

16. Where two suppliers compete in the same market, a merger of the two would remove a competitor that would otherwise act as a competitive constraint, potentially allowing the merged entity to raise prices.
17. In the Application, Goodman Fielder submitted that the proposed acquisition would not result in a substantial lessening of competition in the national market for the manufacture and wholesale supply of yoghurt and dairy food because:⁸

⁶ The Application at [13.3].

⁷ For ease of reference, we only refer to the ability of the merged entity to “raise prices” from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

⁸ The Application at [14.1].

- 17.1 the merged entity will continue to face competition from Fonterra as well as a broad range of other competitors including Epicurean Dairy. Epicurean Dairy supplies yoghurt under “The Collective” brand in New Zealand;
 - 17.2 barriers to entry and expansion are low, as evidenced by recent examples of successful entry, the existence of potential entrants, and the ability of incumbents to expand their product range and volume of production;
 - 17.3 the merged entity would also be constrained from increasing prices above competitive levels by the countervailing power that could be exercised by the two major supermarkets.
18. We will consider:
- 18.1 the degree of constraint that Goodman Fielder and Lion currently impose upon one another. To the extent that any constraint is material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors;
 - 18.2 the constraint posed by other existing competitors, including Fonterra and Epicurean Dairy;
 - 18.3 how easily rival yoghurt manufacturers and distributors could enter and/or expand;
 - 18.4 the ability and willingness of customers to switch between different yoghurt products and different yoghurt brands;
 - 18.5 whether supermarkets would have sufficient countervailing power to punish the merged entity in the event that it raised prices or decreased quality, through mechanisms such as sponsoring entry or expansion, entering the market themselves by producing home-brand yoghurt products, or taking other actions such as reducing the merged entity’s shelf facings and/or promotional slots.

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

- 19. 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 output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.⁹
- 20. In the Application, Goodman Fielder submitted that the proposed acquisition would not increase any risk of coordinated effects in the relevant market because:¹⁰

⁹ *Mergers and Acquisitions Guidelines* above n3 at [3.84].

¹⁰ The Application at [14.1] and [16.41].

- 20.1 wholesale yoghurt prices in New Zealand are not transparent;
 - 20.2 the yoghurt category is characterised by growth, innovation, and differentiated products;
 - 20.3 the ability of the two major supermarkets to detect and punish coordinated behaviour;
 - 20.4 the presence of a vigorous, vertically integrated and large-scale competitor in Fonterra; and
 - 20.5 significant recent examples of entry and expansion in the market as well as vigorous competition from Epicurean Dairy and other smaller competitors.
21. We will assess whether any of the relevant markets are vulnerable to coordination, and whether the proposed acquisition would change the conditions in the relevant market so that coordination is more likely, more complete or more sustainable. Some of the factors we will consider are:
- 21.1 whether the characteristics of the relevant markets makes coordination more likely. This may be the case when, for example, the products are homogeneous, firms can easily observe each other's prices, there is little innovation and stable demand, and/or there is repeated interaction between firms;
 - 21.2 whether the proposed acquisition will leave any markets with only a few rivals or eliminate a vigorous competitor;
 - 21.3 whether the firms in the market are similar (for example, in size and cost structure) such that they will have similar incentives to coordinate; and
 - 21.4 whether the threat of entry or the countervailing power of customers or suppliers would disrupt any attempts to coordinate.

Next steps in our investigation

- 22. The Commission is currently scheduled to make a decision on whether or not to give clearance to the proposed acquisition by **17 August 2018**. However, this date may change as our investigation progresses.¹¹ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
- 23. 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.

¹¹ 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.

Making a submission

24. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference “Goodman Fielder/Lion” 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 **Friday 13 July 2018**.
25. 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.
26. 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.