

COMMERCE COMMISSION

Decision No. 519

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

NIRO A/S

and

COLBY SYSTEMS LIMITED

The Commission: Paula Rebstock
David Caygill
Donal Curtin

Summary of Application: The acquisition by Niro A/S or a wholly owned subsidiary of Niro A/S (Niro or Avalon) of 100% of the shares of Colby Systems Limited (Colby) from Siemens Dematic AG.

Determination: Pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.

Date of Determination: 30 March 2004

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EXECUTIVE SUMMARY

The Proposal

1. A notice pursuant to s 66(1) of the Commerce Act was received on 18 February 2004. The notice sought clearance for the acquisition by Niro A/S or a wholly owned subsidiary of Niro A/S (Niro/Avalon) of 100% of the shares of Colby Systems Limited (Colby) from Siemens Dematic AG.

Market Definition

2. The Commission concludes that, for the purposes of the present application, the relevant markets are:
 - the national supply of systems for packing powder at a high output rate (above 12 to 14 tonnes an hour) into industrial-size bags (10-25kg) in New Zealand (the high output rate market); and
 - the national supply of systems for packing powder at a low output rate (below 12 to 14 tonnes an hour) into industrial-size bags (10-25kg) in New Zealand (the low output rate market).

Counterfactual

3. The Commission considers the appropriate counterfactual to be a sale of Colby to another party.

Competition Analysis

The High Output Rate Market

Existing Competition

4. The Commission considers that, due to the number of near competitors who have the potential to enter the market quickly and with minimal additional investment, the combined entity is likely to be constrained from attempting to exercise any degree of market power post-acquisition. Therefore, the Commission is of the view that competition is unlikely to be substantially lessened in the factual compared with the counterfactual.

Conclusion on Potential Competition

5. The Commission considers that the aggregated barriers to entry in this market are low to moderate, but that entry would be likely, timely and of an extent to constrain the combined entity should the combined entity attempt to exercise market power.

Countervailing Power

6. The Commission considers that, post-acquisition, due to the existence of several near competitors, Fonterra is able to and would switch its demand to an alternative supplier if the combined entity were to attempt to exercise market power. Accordingly the Commission considers that Fonterra has a sufficient degree of countervailing power, having a buyer market share in New Zealand of close to 100%, to prevent a substantial lessening of competition in this market post acquisition.

Conclusion

7. The Commission is satisfied that the proposed acquisition would not have nor would be likely to have the effect of a substantial lessening of competition in the high output rate market, in the factual compared to the counterfactual, due to the constraint on the combined entity that would be provided by existing competition, potential competition and Fonterra's strong countervailing power.

The Low Output Rate Market

Existing Competition

8. The Commission concludes that there would be sufficient existing competition to constrain the combined entity from attempting to exercise market power in the low output rate market.

Conclusion

9. The Commission is satisfied that the proposed acquisition would not have nor would be likely to have the effect of a substantial lessening of competition in the low output rate market due to the constraint on the combined entity that would be provided by the existing competition.

Overall Conclusion

10. On balance, the Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition, in the following markets:
 - the national supply of systems for packing powder at a high output rate (above 12 to 14 tonnes an hour) into industrial-size bags (10-25kg) and
 - the national supply of systems for packing powder at a low output rate (below 12 to 14 tonnes an hour) into industrial-size bags (10-25kg).
11. Accordingly, pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by Niro A/S or a wholly owned subsidiary of Niro A/S (Niro) of 100% of the shares of Colby Systems Limited (Colby) from Siemens Dematic AG.

THE PROPOSAL

12. A notice pursuant to s 66(1) of the Commerce Act was received on 18 February 2004. The notice sought clearance for the acquisition by Niro A/S or a wholly owned subsidiary of Niro A/S (Niro or Avalon) of 100% of the shares of Colby Systems Limited (Colby) from Siemens Dematic AG.

PROCEDURE

13. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. Accordingly, two extensions of time were sought and agreed to by the Applicant. A decision on the Application was required by 30 March 2004.
14. In its application, Niro/Avalon sought confidentiality for certain aspects of the Application involving commercially sensitive and valuable information. A confidentiality order was made in respect of the information for up to 20 working days following the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
15. The Commission's approach to analysing this proposed acquisition is based on principles set out in the Commission's Mergers and Acquisitions Guidelines.¹

STATUTORY FRAMEWORK

16. Under s 66 of the Commerce Act (the Act), the Commission may grant clearances for acquisitions where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.²
17. The Commission considers that it is necessary to identify a real lessening of competition that is not minimal.³ Competition must be lessened in a significant and sustained fashion. For the purposes of its analysis, the Commission is of the view that a lessening of competition and creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.
18. When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and able to be sustained for a period of at least two years.
19. Similarly, when the impact of market power is felt in terms of the non-price dimensions of competition such as reduced service, quality or innovation, for there to be a substantial lessening, or likely substantial lessening, of competition, these also have to be both material and sustainable for at least two years.

ANALYTICAL FRAMEWORK

20. The Commission applies a consistent analytical framework to all its clearance decisions. The first step is to determine the relevant market or markets. As acquisitions considered

¹ Commerce Commission, *Mergers and Acquisition Guidelines*, January 2004.

² *Foodstuffs (Wellington) Cooperative – Society Limited v Commerce Commission* (1992) 4 TCLR 713, p 721-722.

³ See *Fisher & Paykel Limited v Commerce Commission* [] 2 NZLR 731, 758, and also *Port Nelson Limited v Commerce Commission* [] 3 NZLR 554.

under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:

- with the acquisition in question (the factual); and
 - in the absence of the acquisition (the counterfactual).
21. The Commission analyses the extent of competition in each relevant market for both the factual and counterfactual scenarios, in terms of:
- existing competition;
 - potential competition; and
 - various other competition factors, including the countervailing market power of buyers or suppliers.
22. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios.

THE PARTIES

Niro/Avalon

23. Niro is part of the GEA group, a global technology group comprising more than 200 operating companies in some 50 countries around the world. GEA companies specialise in the manufacture of components, systems and complete process lines for process and thermal engineering activities, and for air treatment and dairy farm systems.
24. GEA is part of the mg technologies Group, one of Germany's large industrial enterprises focused on engineering and chemicals. The chemical division of mg technologies is soon to be divested.
25. Niro, with its worldwide subsidiaries, forms the Powder Technology Division of the GEA Group. Globally, the Niro group specialises in the design and supply of spray dryers, fluid bed dryers, membrane filtration, extraction, heating and cooling plants for processing liquid, particulate and solid materials.
26. Niro is also involved in environmental engineering, where Niro's core technology is used in air pollution control and waste management.
27. Niro's New Zealand operations comprise:
- Liquid Technologies NZ, a division of Niro (NZ), which supplies liquid processing and membrane technologies for the food, dairy and beverage industry within and outside of New Zealand; and
 - Avalon Engineering Limited (Avalon) which, operating under the brand name 'AVAPAC', designs, engineers and supplies systems for packing a wide range of food, dairy and pharmaceutical powders into industrial sized (10 – 25kg) bags.
28. It is in the latter area that the acquisition of Colby would result in the aggregation of business activity.

Colby

29. Colby Systems Limited is 100% owned by Siemens Dematic AG. Siemens Dematic AG was created by the merger of Siemens and Mannesmann Dematic. Siemens Dematic AG consists of four major divisions: Airport Logistics, Distribution and Industry, Electronic Assembly Systems and Postal Automation. The company has about 11,000 employees worldwide and a turnover of around 2.6 billion Euros.
30. Siemens Dematic AG is part of the Siemens group, a global electrical engineering and electronics group with more than 410,000 employees in over 190 countries. The parent company, Siemens AG, is listed on stock exchanges in Germany, Switzerland, London, Paris and New York.
31. Colby Powder Systems is part of the materials handling automation group of Siemens Dematic AG. Its major focus is the supply of equipment and integrated systems for handling and filling a broad range of powdered products, most notably foods.
32. 'Handling' and 'filling' (or 'packing') are two distinct functions. The New Zealand based operations of Colby do not include the design and engineering of powder 'handling' equipment. To the extent that Colby Powder Systems supplies powder 'handling' equipment into the New Zealand market, it is supplied from its operations in Australia.
33. Proprietary technologies include high speed rotary fillers, high accuracy intermittent fillers, powder gassing technology, reliable spoon/scoop dispensing machinery and technically advanced powder conveying systems.
34. In New Zealand, Colby designs, engineers and supplies systems for packing powders into industrial sized (10 – 25kg) bags for a wide range of food, dairy and pharmaceutical powders.

Other Relevant Parties

Technopak

35. Technopak, a New Zealand company that was formed in 2002, is owned by two ex-employees of Sapak (Colby). It has already installed a low output rate powder filling system in the US, and is in the process of developing a high output rate system for another dairy company in the US. [

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Amtec

36. Amtec is an Australian-based company that designs and builds filling equipment and systems. Amtec produces systems predominantly for the dairy industry in Australia and the US, but has recently entered other areas such as gelatine and salt.
37. Amtec's filling machines are low output rate machines, [

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Innopak

38. Innopak is a New Zealand company that provides filling and handling solutions as an integrator. Innopak's main customer is Murray Goldberg in Australia, but it also deals with various New Zealand companies including Fonterra.

Nucon

39. Nucon is a New Zealand company that specialises in the field of bulk solids material handling. It designs, manufactures and installs systems internationally. Nucon integrates various pieces of equipment from various suppliers to make up their systems.

Downer MBL

40. Downer Engineering, through its specialist process engineering business unit, Downer MBL, provides a complete service in the design, supply, construction, installation and commissioning of processing equipment for the food, dairy, beverage and related sectors throughout the Pacific Rim, Asia and South America. Downer MBL offers both fundamental process engineering and development or application of clients' processes, from the design of single items of equipment through to entire systems, where Downer often acts as an integrator.

Chronos-Richardson

41. Chronos-Richardson is a business unit of Canadian-based Premier Tech Chronos. Chronos-Richardson has been supplying systems for 125 years for weighing, bagging and palletising. It has a well established global presence and supplies machinery and systems to many countries.

Slidell Inc

42. Slidell is a US-based company, formed in 1975, that produces a complete line of packaging equipment and a range of packaging systems. It produces for a range of industries including chemical, food, pharmaceutical and agricultural. Most of Slidell's systems are high spec and can fill up to 22 tonnes per hour.

Design Engineering Pty Ltd (Dendy)

43. Dendy, an Australian company, was formed in 1975 and has supplied machines to 15 countries worldwide. Dendy sells a range of packaging equipment and also has the facilities to manufacture equipment to individual specifications.

Behn & Bates

44. Behn & Bates is a subsidiary of German engineering company Harver Boecker. It specialises in the development, manufacture and sale of filling equipment, particularly in relation to the food industry, and has had a presence in the industry for nearly 70 years.

Fonterra

45. Fonterra's annual turnover is about \$14 billion. It generates over 20% of New Zealand's export revenue, and more than 7% of its GDP.
46. About 20,000 people are employed by Fonterra in approximately 120 countries. The company operates two major divisions - New Zealand Milk and New Zealand Milk Products (NZMP). New Zealand Milk accounts for about 41% of the company's annual turnover, and produces fast-moving consumer goods.

Other Purchasers of Filling Systems

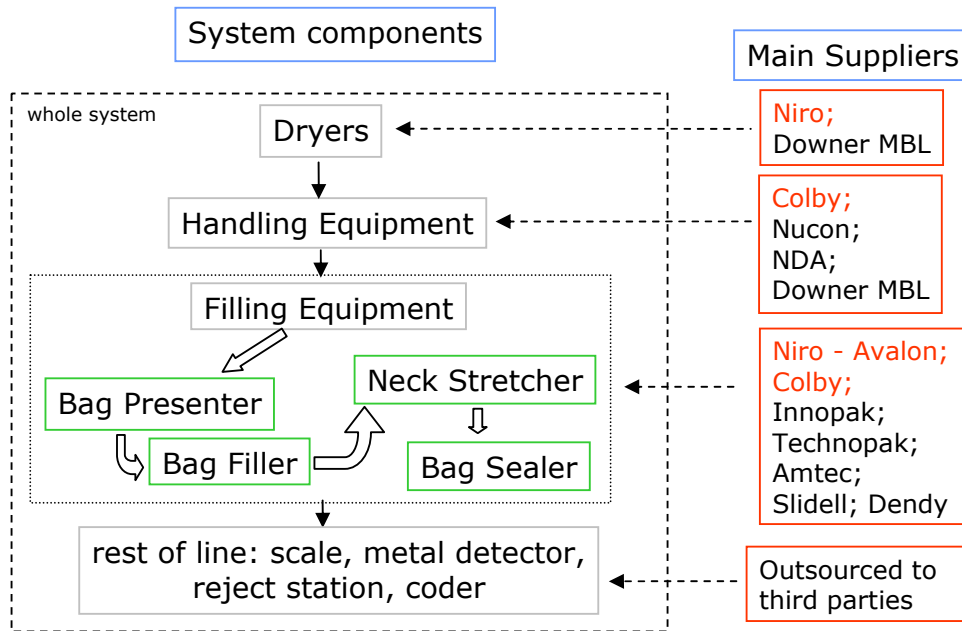
47. Dominion Salt, established in 1956, specialises in the manufacture and wholesale supply of salt. It has produced and exported pharmaceutical grade salt for the last 22 years to over 20 countries, primarily in Asia, the South Pacific and South America.

48. New Zealand Pharmaceuticals Limited (NZP) is a Good Manufacturing Practices (GMP) certified manufacturer of natural biochemicals that have been extracted from a range of plant and animal raw materials. NZP's products have pharmaceutical, dietary supplement, cosmetic, biotechnology/diagnostic and aquaculture uses.
49. The New Zealand Sugar Company, established in 1885, trades under the name of Chelsea Sugar, and produces various sugar-based products.
50. Weston Milling is involved in the supply of wheat flour, and has a number of mills located around New Zealand. In addition it is involved in the supply of fondants, flavourings, meat and smallgoods, fruits, yeasts, fats and oils.
51. Canpac International is a subsidiary of Fonterra that is involved in the packaging of milk powder. Canpac is involved in packing over 700 product lines and 50 brands into cans and sachets for export.
52. Cedenco Foods is a food ingredient processing and marketing company with factory operations in Gisborne, New Zealand and Echuca, Northern Victoria, Australia. Cedenco supplies bulk food ingredients such as corn, squash and tomato powder, tomato paste, sweet corn and pumpkin frozen puree, and soup mixes. It is 100% owned by US company SK Foods.

INDUSTRY BACKGROUND

53. Systems for packing powders into industrial-size bags comprise a series of components designed to carry out different steps in the process of bag filling from the point where the powder enters the inlet flange of the filling machine (prior to which the powders are handled by powder 'handling' equipment) through to the point at which the filled bags are in a state ready for despatch from the processing facility.
54. These systems differ in their design from the systems and technologies used to pack products such as liquids and other non-powder solids, or systems for packing powders into smaller-size bags or other types of containers, such as drums.
55. The various steps of the bag filling system, and the related steps involved in the production of a filled bag ready for sale, are represented in Diagram 1.

Diagram 1
Components of a Powder Filling System



56. The range of products packed using industrial powder packing systems include:

- food, e.g. whey protein concentrate, bakery mixes, cocoa powders, soya bean bases, tomato powders, soup bases, fat filled whey, caseinates, lactate, hydrolysed yeast calcium, permeates, baby food, hydrolysed whey proteins, functional food compounds, coffee whitener and hydrolysed corn starch;
- dairy (whole milk, skim milk and butter milk);
- pharmaceutical;
- fertilisers; and
- chemicals (stearic acids and acrylic resins).

57. The requirements for packing may vary with the type of powder. For example:

- although there are weight and measurement requirements for all packaging, a higher degree of accuracy may be required for some types of powders, particularly high value powders where inaccurate filling could result in significant financial loss to the supplier or to the customer; or
- with foods, food ingredients and pharmaceuticals the bag filling systems need to use higher specification materials in order to meet hygiene requirements.

58. Systems for packing powders into industrial-sized bags range in packing speeds from 3 tonnes per hour to over 15 tonnes per hour. Contracts for high output rate systems are not

frequent, with no more than one system being sold each year, on average, in New Zealand. Sales of low output rate systems are more frequent. Filling systems vary in price from approximately \$250,000 for a small filling system to several million dollars for a high output, high spec system.

Suppliers

59. In New Zealand, both Niro/Avalon and Colby operate on a similar basis in that both design the filling systems, outsource the manufacture of the additional component parts, then assemble the components into a system. They source metal detectors and check weighers as discrete products from third party manufacturers. Niro/Avalon and Colby occasionally sell an individual component, but for the most part they supply the complete packing system.
60. Niro/Avalon and Colby both supply directly to users of such systems (e.g., Fonterra) and to intermediaries, such as Downer MBL (also known as integrators), which buy from various suppliers and put systems together. Other suppliers focus on supplying particular components of the filling systems. The main suppliers of each part of a filling system and its related steps are set out in Diagram 1.
61. Niro/Avalon and Colby have focused on New Zealand and overseas customers that use systems that require high accuracy and hygiene specifications. In recent years they have been the only suppliers of high output rate filling systems for milk powder in New Zealand. As explained above, [] Overseas companies such as Slidell and Chronos Richardson also supply high output rate systems for milk powder packing.

Customers

62. There are many different types of customers using whole systems to pack products ranging from pharmaceutical salt to milk powder. The largest customer of Niro/Avalon and Colby is Fonterra, which uses systems for drying milk and handling and packing milk powder.
63. Components are also purchased by integrators, such as Innopak and Downer MBL, who on sell these components packaged as entire systems based on the individual customer requirements.
64. Contracts for high output rate systems are not frequent. In the last five years, less than five contracts have been signed. The agreements are typically very complex, especially in the case of Fonterra where the technical specification requirements of the system fill hundreds of pages.

MARKET DEFINITION

65. The Act defines a market as:

. . . a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

66. For competition purposes, a market is defined to include all those suppliers, and all those buyers, between whom there is close competition, and to exclude all other suppliers and buyers. The focus is upon those goods or services that are close substitutes in the eyes of buyers, and upon those suppliers who produce, or could easily switch to produce, those goods or services. Within that broad approach, the Commission defines relevant markets

in a way that best assists the analysis of the competitive impact of the acquisition under consideration, bearing in mind the need for a commonsense, pragmatic approach.

67. For the purpose of competition analysis, the Commission's approach is to assume the relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test). The smallest space in which such market power may be exercised is defined in terms of the five dimensions of a market discussed below. The Commission generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for a period of one year.

Product Dimension

68. Initially, markets are defined for each product supplied by two or more of the parties to an acquisition. For each initial market so defined, the Commission considers whether the imposition of a SSNIP would be likely to be profitable for the hypothetical monopolist. If it were, then all of the relevant substitutes must be incorporated in the market.
69. The Applicant submitted that the relevant product market is "the market for the design and supply (including installation and commissioning) of systems for packing powders into industrial sized (10-25kg) bags".
70. The Applicant noted that from the point of view of the system supplier, powder packing systems are similar in their functionality and in the fundamentals of technical design and engineering, regardless of the powder being packed. However, some systems referred to in the industry as 'high spec systems' differ from other industrial powder packing systems with regard to finer points of precision and finish.
71. The greater the extent to which one good or service is substitutable for another, on either the demand-side or supply-side, the greater the likelihood that they are bought and supplied in the same market. The degree of demand-side substitutability is influenced by the extent of product differentiation.
72. Close substitute products on the demand-side are those between which at least a significant proportion of buyers would switch when given an incentive to do so by a small change in their relative prices.
73. Buyers buy systems that are specific to the type of powder they pack as the technical requirements differ according to the type of product that is being packed. This means that a buyer who wishes to buy a milk powder packing machine for industrial-sized bags would not buy a machine that is designed to pack pharmaceutical salt or flour.
74. In some limited cases, it is possible to reconfigure a machine that was made for a certain product to handle another. However, this is likely to be costly, and would involve a loss of efficiency as the new machine would not be optimised in its design for the new product.
75. The Commission considers that there is limited demand-side substitutability among different packing machines built for different products, but there is some demand-side substitutability amongst product-specific machines having different characteristics. For example, a buyer could buy a 20 tonne/hour packing machine or could buy two 10 tonne/hour modular ones side by side. The surface and volume occupied by the machines would be different in each case, but the end result would be the same in terms of output rate. The Commission notes that there may be cost efficiencies in operating one large machine as opposed to two smaller machines although this may be offset by other

advantages such as the ability to continue production if one machine requires repair as opposed to production stopping as is the case with a single machine.

76. Close substitute products on the supply-side are those between which suppliers can easily shift production, within one year, using largely unchanged production facilities and little or no additional investment in sunk costs, when they are given a profit incentive to do so by a small change in their relative prices.
77. It appears that suppliers specialising in high output rate packing machinery can easily shift to building low output rate packing machinery, and some suppliers such as the Applicant do in fact produce both types of equipment. However, it is more difficult for a manufacturer of low output rate machinery to shift to producing high output rate machinery. More expertise and capital are needed to build high output rate equipment than low output rate equipment.
78. With regard to the different types of powders, it appears that most suppliers do offer packing machines for different products, as the systems used to pack them are similar in their functionality and in the fundamentals of technical design and engineering. Thus, companies that predominantly manufacture milk powder packing machines can, for example, also offer pharmaceutical salts packing machines. In short, it is possible for companies to shift production to other powders having similar, but not identical, characteristics. A recent example is provided by Amtec who have moved from packing machines for dairy to machines for gelatine or salt.
79. The Commission considers that there is some degree of supply-side substitutability in the supply of powder packing machinery with respect to the production of different powders, but there is limited supply-side substitutability between high and low output rate machinery.
80. There is no clear boundary between low and high output rate packing machines. However, based on what manufacturers and clients generally consider to be low and high output rates, the Commission takes the view that the appropriate limit is between 12 and 14 tonnes per hour. This distinction is made based on the views of industry participants with respect to the technical requirements of, and demand for, such machines.

Conclusion on the Product Market

81. Because of the limited demand-side and supply-side substitutability, the Commission considers that the relevant product markets for the purposes of the present Application are:
 - systems for packing powder at a high output rate (above 12 to 14 tonnes an hour) into industrial sized bags (10-25kg); and
 - systems for packing powder at a low output rate (below 12 to 14 tonnes an hour) into industrial sized bags (10-25kg)

Geographic Dimension

82. The Commission defines the geographic dimension of a market to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local sources of supply be raised.
83. The Applicant submitted that the relevant geographical dimension is the whole of New Zealand.
84. The Commission notes that Niro/Avalon, Colby and other suppliers supply equipment nationally and internationally. Although the equipment is supplied internationally as well

as nationally, under the Act the Commission has jurisdiction only to consider markets in New Zealand for goods or services. Accordingly the Commission considers the appropriate geographic dimension to be national.

Functional Dimension

85. The production, distribution and sale of a product typically occur through a series of functional levels, conventionally arranged vertically in descending order. Generally, the Commission identifies separate relevant markets at each functional level affected by an acquisition, and assesses the impact of the acquisition on each.
86. Diagram 1 above illustrates the functional levels involved in the design, manufacture and distribution of powder packing lines. Niro/Avalon and Colby sell packing machinery both directly to companies that process the products and to intermediaries, such as Downer MBL and Nucon which integrate the different components into complete systems.
87. In the design and supply of systems for packing powder at a fast output rate, Niro/Avalon's and Colby's activities include manufacturing and distribution and therefore cannot be limited to one specific functional level. Accordingly, the Commission considers the appropriate functional dimension is the supply of systems for packing powder into industrial sized bags.

Conclusion on Market Definition

88. The Commission concludes that for the purposes of this application, the relevant markets are:
 - The national supply of systems for packing powder at a high output rate (above 12 to 14 tonnes an hour) into industrial sized bags (10-25kg) (the high output rate market) in New Zealand; and
 - The national supply of systems for packing powder at a low output rate (below 12 to 14 tonnes an hour) into industrial sized bags (10-25kg) (the low output rate market) in New Zealand.

COUNTERFACTUAL AND FACTUAL

89. In reaching a conclusion about whether an acquisition is likely to lead to a substantial lessening of competition, the Commission makes a "with" and "without" comparison rather than a "before" and "after" comparison. The comparison is between two hypothetical future situations, one with the acquisition (the factual) and one without (the counterfactual).⁴ The difference in competition between these two scenarios is then able to be attributed to the impact of the acquisition.

Factual

90. The Applicant stated that Niro/Avalon does not have a powder handling operation, and it is for this reason that Niro/Avalon is seeking to acquire Colby. The powder handling operation is not available for sale as a separate operation from the powder filling business. In acquiring Colby's powder handling business, Niro/Avalon will also acquire its powder filling/packing business. Accordingly, the proposed acquisition would result in some concentration in the supply of powder filling/packing equipment, particularly the supply

⁴ Commerce Commission, *Mergers and Acquisitions Guidelines*, p 21.

of high output rate systems with the combined entity becoming the largest supplier of high output rate packing machines in New Zealand.

Counterfactual

91. [

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92. The Commission therefore considers that the appropriate counterfactual should be a sale of Colby to a third party.

COMPETITION ANALYSIS

93. Existing competition occurs between those businesses in the market that already supply the product, and those that could readily do so by adjusting their product-mix (near competitors). Supply-side substitution by near competitors arises either from redeployment of existing capacity, or from expansion involving minimal investment, in both cases involving a delay of no more than one year.

94. An examination of concentration in a market can provide a useful indication of the competitive constraints that market participants may place upon each other, providing there is not significant product differentiation. Moreover, the increase in seller concentration caused by a reduction in the number of competitors in a market by an acquisition is an indicator of the extent to which competition in the market may be lessened.

95. The Commission identifies market shares for all significant participants in the relevant market. Market shares can be measured in terms of revenues, volumes of goods sold, production capacities or inputs (such as labour or capital) used.

96. An aggregation that would result in a low concentration level is unlikely to be associated with a substantial lessening of competition in a market. On this basis, indicative safe harbours may be specified.

97. A business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:

- where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected or associated persons) has less than in the order of a 40% share; or
- where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.

The High Output Rate Market

Existing Competition

98. Suppliers of powder handling and filling systems compete on price, quality and innovation. Sales of high output rate powder filling systems are infrequent, and occur primarily to the dairy industry, with an estimated [] systems sold in New Zealand over

the last 5 years. Those systems were sold by Niro/Avalon Colby and Zeropak (a company that is now in receivership). The Commission understands that Zeropak exited the market due to its view that it had more expertise in the area of integrating, a function that is now performed by Innopak, a company with the same ownership.

99. Niro/Avalon and Colby estimate that they made about [] % of the sales of high output rate systems in New Zealand over the last two to three years. This estimate would place the proposed entity outside the Commission's safe harbour guidelines. However, the Commission notes that the market is very 'thin' and that the historical pattern of sales may not be a very reliable indicator of future market shares. Further, market shares are insufficient in themselves to establish whether competition in a market has been lessened. It is the interplay between various competition factors, of which seller concentration is only one, that the Commission assesses in determining the impact of an acquisition on competition. Accordingly the Commission will continue to consider the existing competition within the market.

The Applicant's View

100. The Applicant submitted that purchasers of high tech systems are able to choose between a number of suppliers as powder packing systems are sold by several international companies, including Chronos-Richardson, Bud-Pak Pty Ltd, Design Engineering Ltd (Dendy), Behn & Bates, and Slidell.
101. The Applicant submitted that imports represent a significant constraint on domestic suppliers. With the exception of Niro/Avalon, Colby and Innopak, all the major suppliers of industrial powder packing systems are overseas suppliers. This is typical of industrial processing systems generally as New Zealand does not have the local demand sufficient to make local manufacture attractive. Around 90% of Niro/Avalon and Colby's New Zealand production is exported though they do both supply the New Zealand market.
102. The Applicant advised that although overseas suppliers incur international transportation costs, these are largely off-set by lower employment and overhead costs. Powder packing systems range in price from \$250,000 to \$3 million, depending on the size and speed required. Transportation costs would comprise less than 1 – 2% of this price.
103. The Applicant also submitted that a possible response to the merger of Avalon and Colby in New Zealand would be an increased focus by local and international competitors on those segments of the industrial powder packing systems markets, where the reputations of Avalon and Colby are the strongest. Both supply predominantly into the dairy powders segment and, as with most industries, customers like to ensure they have more than one reliable supplier. Fonterra is the major customer for high-tech systems, with in excess of 95% of the dairy powders market in New Zealand. This makes Fonterra the single most significant purchaser of powder packing equipment.
104. The Applicant was of the view that if the combined entity were to attempt to raise its prices above a competitive level, Fonterra could look overseas to meet its demand, or could invest in another company to develop the technology. Furthermore, Fonterra works with suppliers of powder filling systems on turnkey projects that involve the sale of other equipment that can be supplied by a number of suppliers. The combined entity could stand to lose these lucrative projects to competitors if they were to attempt to price powder filling equipment uncompetitively. The Applicant submitted that accordingly, the acquisition represents an opportunity for companies such as Innopak locally, and the

international suppliers, to develop strategic relationships with Niro/Avalon and Colby's key customers in New Zealand.

Fonterra's View

105. Fonterra was of the view that, post-acquisition, there would be enough competition in the market to prevent the combined entity from exercising market power. Fonterra deals with Innopak on a regular basis and []. It pointed out that, in New Zealand, []. It stated that Niro/Avalon is well aware of Fonterra's buying power and its ability to source alternatives if necessary. It gave the example of a preferred supplier of [] Fonterra went to Europe and bought another machine.
106. Fonterra advised that for turnkey projects, it invites tenders internationally as well as in New Zealand. It has regularly used machines from all over the world in its packing lines, and had recently [] It pointed out that the cost of shipping is not great in comparison to the overall cost of equipment. Fonterra stated that it would purchase from Chronos Richardson, Amtec or any other company if it was not satisfied with Avalon, Colby or Technopak. Fonterra said it is []

The Commission's View

107. In this market, the only two suppliers historically are Niro, Colby and Zeropak (which has exited the market). Under the counterfactual the competition between Niro and Colby is presumed to continue.
108. Innopak and Downer MBL were both mentioned by Fonterra and the Applicant as existing competitors. However, the Commission considers that, rather than direct competitors in the market, they are integrators and in many instances purchase their machines from Niro/Avalon and Colby. As such it may be more accurate to view them as customers rather than competitors of Niro/Avalon and Colby.
109. The proposed acquisition would appear to result in a 100% aggregation. However, the Commission has found other companies (near competitors) on the verge of supplying the New Zealand market and several overseas suppliers that could easily switch to supplying New Zealand.
110. The Commission considers that near competitors are companies that do not currently supply the product to the market, but could easily switch to supplying the product in the future. Near competitors are treated as being existing competitors for the purpose of analysing the competitive impact.
111. []

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112. The Commission has also identified several overseas suppliers, such as Chronos-Richardson, Amtec and Slidell which could switch to supplying the New Zealand market very quickly and easily.
113. Chronos-Richardson manufactures and supplies high capacity powder packing systems for milk powder primarily in North America and Europe. A representative of the Canadian branch of Chronos-Richardson, Premier Tech Packaging, confirmed that it was involved in supplying equipment for packaging milk powder at high output rates. He also advised that Premier Tech/Chronos Richardson would be willing to sell its technology into New Zealand.
114. Amtec's current powder packing equipment packs at a rate of 5 tonnes an hour [
-]
115. Amtec advised that it would definitely tender for projects in New Zealand if invited to do so, and would be able to build machines for Fonterra if asked to.
116. Slidell advised that while the proposed acquisition could make it difficult for Slidell to obtain contracts in New Zealand because of the strong local supplier, if the combined entity were to increase prices by 5% it would actively seek new clients in New Zealand and it would be very interested in bidding for packing systems for Fonterra.
117. Slidell currently produce systems, sold primarily in North America, designed specifically to handle and package milk powder. Slidell stated that it could supply the New Zealand market almost immediately if they were approached to do so. It said that provision of after-sales support is an issue due to it being based in the US, but this could be addressed by using local engineers and training the client as it already does with clients in other countries. Slidell also provides on-line support.
118. Several industry participants spoken to confirmed that the cost of transporting equipment from Europe or the US to New Zealand was not considered to be an issue as it was a small percentage of the overall cost of the equipment. They also confirmed that overseas companies were able to provide the necessary post-sale support.
119. All suppliers spoken to advised the Commission that although it was easier for a local New Zealand company than an overseas company to provide after-sales support, an overseas company could provide support by appointing local agents, training the client, providing on-line support, and making occasional visits for major problems. The cost of such service was considered to be minimal given the value of the systems involved. They stated that support had to be covered in the contracts, but was not something that would inhibit their ability to compete with the New Zealand based companies necessarily.
120. Additionally, although exogenous to the industry, the exchange rate may affect the willingness or ability of overseas suppliers to compete in the market. Slidell pointed out that whether it would be competitive in the market in a tender process would depend on the exchange rate, but that at present it would be very competitive in New Zealand. However, the Commission is of the view that due to the value of the machines involved the exchange rate will be less of a concern. This was confirmed by Ralf Hoelmann of Behn & Bates who suggested that normally the exchange rate only causes slight concern to smaller companies who are more sensitive to increases in price, but that these

concerns are generally alleviated when they are assessed against the quality of the machine supplied.

121. Therefore, the Commission considers Technopak, Amtec, Chronos-Richardson and Slidell to all be near competitors in the high spec market due to their ability to supply the New Zealand market quickly (if they were approached to do so) and with virtually no need for additional investment.
122. As near competitors, it is not possible to assess market shares as they are yet to supply systems into the market. The Commission is of the view, however, that the presence of these near competitors is sufficient to constrain the combined entity from attempting to exercise market power in the factual. Accordingly the Commission is of the view that the constraint provided by near competitors in this case is sufficient to prevent a substantial lessening of competition in the factual vis-à-vis the counterfactual.

Conclusion on Existing Competition

123. The Commission considers that, due to the number of near competitors who have the potential to enter the market quickly and with minimal additional investment, the combined entity is likely to be constrained from attempting to exercise any degree of market power post-acquisition. Therefore, the Commission is of the view that competition is unlikely to be substantially lessened in the factual compared with the counterfactual.

Potential Competition

124. An acquisition is unlikely to result in a substantial lessening of competition in a market if the businesses in that market are subject to real constraints from the threat of market entry.
125. The Commission's focus is on whether businesses would be able to enter the market and thereafter expand should they be given an inducement to do so, and the extent of any barriers they might encounter should they try. Where barriers to entry in a market are clearly low, it may be unnecessary for the Commission to identify specific businesses that might enter. In other markets, where barriers are higher, the Commission may seek to identify possible new entrants as a way of testing the assessed entry barriers.

Barriers to Entry

126. The likely effectiveness of the threat of new entry in preventing a substantial lessening of competition in a market following an acquisition is determined by the nature and effect of the aggregate barrier to entry into that market. The Commission is of the view that a barrier to entry is best defined as anything that amounts to a cost or disadvantage that a business has to face to enter a market that an established incumbent does not face.
127. The Applicant submitted that there are few barriers to entry or expansion into industrial powder packing systems. It submitted that there are no regulatory barriers or restrictions, commercial premises and key inputs are readily available, the manufacture of component parts can be outsourced, and there is no shortage of engineering design skills.
128. The Applicant submitted that while the small size of the New Zealand market could be seen as a deterrent to potential entrants, Fonterra, and the opportunities it presents in the other international markets in which it operates, could represent an opportunity for lucrative entry for a potential competitor.

129. The Applicants also claimed that the plant and equipment needs of local customers can be met by several leading off-shore firms that have access to immense financial and human resources.
130. The Commission considers that the entry requirements in the high output rate market are:
- capital investment;
 - technical knowledge and experience; and
 - ability to supply after-sales support.
131. Each of these potential barriers to entry is discussed in detail below.

Capital Investment

132. Colby submitted that the upfront engineering cost to design suitable filling systems is hugely variable and depends on the complexity and specification of the filling system. It estimated that a simple bulk bag filler suitable for food powders may cost \$20,000 to design whereas a high speed, high accuracy food grade 25 kg bag filler would have a design cost of hundreds of thousands of dollars.
133. It stated, however, that it is only necessary to do preliminary design in order to go to the market with a new product, and that the level of design required is enough to be confident that the system will work, to cost the system and to be able to show the designs to a customer. It estimated the cost of preliminary design to be in the low tens of thousands of dollars, which may be approximately 10% to 20% of the final purchase price. Once an order is obtained, detailed design can be undertaken, with the revenue of the first order at least partially funding the detailed design. Colby uses this method of funding new designs.
134. Technopak, as a new company, took a different approach to funding its first high output system. It developed and sold a lower tech system and used the revenue from that to fund the development of its higher tech system. It advised the Commission that it has cost approximately [] to develop a system that it will sell for []. However the cost of development is that high because it is the first machine of that capacity they have developed and it has involved considerable design development. The costs of production of future systems will be lower.
135. Innopak was of the view that there are no real barriers to entry or expansion, and said the only constraint was the necessity to provide bonds amounting to up to \$1 million for larger projects, and the need for considerable financial backing. It said, however, that if a company was small like Innopak, this obstacle is overcome by working with a partner. It also said that it is possible to build up financial strength by undertaking many small projects. Innopak started business with capital of [].
136. The Commission also notes that sales in the market for high output rate machines are infrequent and demand is lumpy. This makes it difficult to sustain and develop a presence in this market, a view expressed by Amtec, which stated that [].
137. The Commission considers that a reasonable level of financial backing is required to enter the high output rate market. However, this funding can be obtained, particularly by suppliers that are already involved in the low output rate market. The financial investment involved would be in highly specific assets and amount to a significant sunk

cost. As such the Commission considers that capital requirements amount to a moderate barrier to entry.

Technical Knowledge and Experience

138. Customers for high output filling equipment require reliability, speed of fill, accuracy of fill and a high degree of hygiene. Industry participants advised the Commission that developers of this type of equipment require a high level of knowledge and experience to be successful. Technopak commented that in order to be competitive in this market, it is necessary to develop new, improved concepts. It stated that this was difficult but that Technopak was able to do so because the partners have considerable experience in powder packing. The owners of Amtec and Innopak also have considerable experience in the industry.
139. The Commission considers that a considerable level of knowledge and experience in the powder filling industry is necessary to enter or expand in the high output rate market. However, a company that were to shift from supplying low output systems to high output systems would not face this problem as they would already have a fair amount of knowledge and expertise. Accordingly the Commission is of the view that technical knowledge and experience amounts to a low barrier to entry into this market.

Ability to Supply after-sales Support

140. All suppliers spoken to advised the Commission that although it was easier for a local New Zealand company than an overseas company to provide after-sales support, an overseas company could provide support by appointing local agents, training the client, providing on-line support, and making occasional visits for major problems. They stated that support had to be covered in the contracts, but was not a barrier to obtaining contracts.
141. Accordingly, the Commission considers that the ability to provide after-sales support does not amount to a barrier to entry.

Conclusion on Barriers to Entry

142. The Commission has considered the various factors relevant to the assessment of the entry barrier in the high output rate market. The Commission concludes that the barriers to entry in aggregation present a low to moderate obstacle to entry.

The “LET” Test

143. In order for market entry to be a sufficient constraint, entry of new participants in response to a price increase or other manifestation of market power must be Likely, sufficient in Extent and Timely (the LET test).

Likelihood of Entry

144. The mere possibility of entry is, in the Commission’s view, an insufficient constraint on the exercise of market power, and would not alleviate concerns about a substantial lessening of competition. In order to be a constraint on market participants, entry must be likely in commercial terms. An economically rational business would be unlikely to enter a market unless it has a reasonable prospect of achieving a satisfactory return on its investment, including allowance for any risks involved.
145. Behn & Bates informed the Commission that it had no plans to enter the New Zealand market but that if they were approached by Fonterra, or a lucrative opportunity presented itself it might reconsider.

146. [

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147. The Commission is of the view that entry into the high output market is likely based on the views of industry participants, competitors in the low output market and the low to moderate barriers to entry.

Extent of Entry

148. If it is to constrain market participants, the threat of entry must be at a level and spread of sales that is likely to cause market participants to react in a significant manner.

149. If a supplier were to enter the high output rate market, it would have to be with a machine capable of sufficient output. As an average of one system a year is sold in New Zealand, any entry would be at a sufficient extent to be competitive.

Timeliness of Entry

150. If it is to alleviate concerns about a substantial lessening of competition, entry must be feasible within a reasonably short timeframe, considered to be two years, from the point at which market power is first exercised.

151. The Commission has been advised that it takes between 18 and 24 months to develop a high output rate filling system [], or to modify existing filling machinery used for non-dairy products for use for milk powders. Behn & Bates advised the Commission that it could take 18 to 24 months to make modifications on its present bagging machines to allow entry into the dairy industry, but that this would depend on the customer's requirements.

152. While the period to develop a system from scratch is close to the Commission's two year period in this case, the Commission considers that given the lengthy time between sales and the eminent entry of new suppliers, entry into the market would be sufficiently timely to amount to a constraint on the combined entity.

Conclusion on Potential Competition

153. The Commission considers that the aggregated barriers to entry in this market are low to moderate, but that entry would be likely, timely and of an extent to constrain the combined entity should the combined entity attempt to exercise market power.

Countervailing Power

154. The potential for a business to wield market power may be constrained by countervailing power in the hands of its customers. In some circumstances, this constraint may be sufficient to eliminate concerns that an acquisition would be likely to lead to a substantial lessening of competition.

155. Fonterra is the only customer in the high output rate market. Colby informed the Commission that almost 70% of its total sales, including low output systems, are made to the dairy industry, and there almost exclusively to Fonterra. Colby stated that the ability for Fonterra to seek an alternative supplier would act as a large competitive constraint on the combined entity post-acquisition

156. The Applicant submitted that the presence of Fonterra could be seen as an opportunity for a potential entrant into the New Zealand market. The Applicant also submitted that

Fonterra had previously shown a willingness to invest in system suppliers that have subsequently gone on to supply third parties. It is also noted that there are many other companies, particularly those located overseas, with the facilities and resources necessary to service Fonterra's needs as required.

157. As stated above with respect to existing competition, Fonterra advised the Commission that it has a regular relationship with Innopak [] It pointed out that, in New Zealand, Downer MBL could also supply a complete solution []. It stated that Niro/Avalon is well aware of Fonterra's buying power and its ability to source alternatives if necessary.
158. Fonterra advised that it invites tenders internationally as well as in New Zealand and it has regularly used machines from all over the world in its packing lines [] Fonterra stated that it would purchase from Chronos Richardson, Amtec or Slidell if it were not satisfied with Niro/Avalon, Colby or Technopak. Fonterra has a history of supporting innovation and development in powder packing by investing a considerable amount of money.
159. Slidell and Chronos Richardson have both suggested that they would be willing and able to deal with any of Fonterra's requirements. They advised that they have had limited dealings in the New Zealand market to date but that they would certainly consider tendering for a project if they were invited to do so.
160. As stated above with respect to existing competition, Amtec said that it would definitely build machines for Fonterra if asked to do so. It informed the Commission that its high spec system was still around 18 months from market readiness, but if it was to be approached within that time then it may be possible to enter the market sooner.
161. Several industry participants advised the Commission that, at present, the Australian companies offer very competitive prices and there would be no reason why they would not seek to enter the market given an attempted exercise in market power by the combined entity.
162. It is clear that there are several alternative suppliers for Fonterra should the combined entity attempt to exercise market power and that the threat of losing Fonterra's business to these suppliers would act as a constraint on the combined entity.
163. The nature of sales in this market would also provide some constraint on the combined entity. As sales are infrequent, of high value and won through a tender process, the incentive on the tendering firm is to price as competitively as possible. To date this competitive tension has been provided by Colby and Niro/Avalon within New Zealand.
164. The tendering process, by its very nature, forces downward pressure on suppliers' prices and gives a degree of power to even smaller purchasers of low spec machinery. An example of this was provided by New Zealand Sugar, which outlined the tendering process with regard to their recent purchase of a 9 tonne/hour system. In that situation, the price of the purchased machine was bid down from [] to [] through the purchaser's ability to receive bids and counter-bids with respect to the system.
165. Fonterra is the only customer in the high output rate market, which involves systems of much greater value, and is in an even more powerful position. The values involved would ultimately make tendering companies more willing to re-negotiate in order to win a tender, securing the right to supply a high value system and potentially securing future business.

Conclusion on Countervailing Power

166. The Commission considers that, post-acquisition, due to the existence of several near competitors, Fonterra is able to and would switch its demand to an alternative supplier if the combined entity were to attempt to exercise market power. Accordingly the Commission considers that Fonterra has a sufficient degree of countervailing power to prevent a substantial lessening of competition in this market post acquisition.

Conclusion on High Output Rate Market

167. The Commission is satisfied that the proposed acquisition would not have nor would be likely to have the effect of a substantial lessening of competition in the high output rate market, in the factual compared to the counterfactual, due to the constraint on the combined entity that would be provided by both the degree of existing competition and Fonterra's strong countervailing power.

The Low Output Rate Market

Existing Competition

168. As with high output rate systems, suppliers of low output rate systems compete on price, quality and innovation. The comments made by the Applicant regarding the high output rate market also apply to the low output rate market, except that Niro/Avalon estimated that Niro/Avalon and Colby combined would only have around [] (by dollar value) of all sales of powder packing equipment – both high output rate and low output rate – in New Zealand over the last two to three years.
169. The aggregation in this market would appear to fall within the Commission's safe harbour guidelines for assessing mergers and acquisitions.
170. All industry participants – both suppliers and customers – spoken to by the Commission confirmed that there were many suppliers of low output rate powder packing equipment, and that competition is strong. Suppliers include New Zealand companies Nucon, Innopak, Fresco and Alert Engineering, and overseas companies Amtec, Dendy, Bud-Pak, Chronos Richardson, Duler, Acrom and Sataki.
171. Dominion Salt advised the Commission that it is currently upgrading its line to package salt for medical purposes in 25 kg bags. The system must be able to pack under very hygienic conditions at the rate of 7.5 tonnes an hour. Dominion Salt has obtained prices from Colby, Niro/Avalon, Technopak and two suppliers in Australia – Amtec and Dendy. [
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172. NZ Sugar packs sugar and a blended sugar and milk powder product. For its 25 kg bag powder packing line it considered Dendy, and second-hand equipment from Australia. It said that currently, if it were packing just sugar, it would consider European companies and Bud-Pak Pty Ltd in Australia, but if it were packing dairy products it would look at New Zealand companies as they are better at serving the needs of the dairy industry. Post-acquisition it would take a closer look at overseas suppliers or a smaller New Zealand supplier such as Innopak.
173. Canpac, a subsidiary of Fonterra, packs milk powder in cans and sachets. It advised that it has dealt with non-New Zealand suppliers. As part of the Fonterra operation, it has operations in several countries and can go elsewhere in the world for equipment. It

- advised that whether a company is in New Zealand or not is a factor in deciding on a supplier, but not a large factor.
174. Weston Milling, which is involved in packing flour, advised that it purchases its packing systems from Europe. It stated that transport costs are minimal as the components are shipped in containers. The post-sale maintenance work is carried out by local engineers.
 175. International Flavour and Fragrances supplies seasoning flavour used in food ingredients. It bought its powder filling system for 25 kg bags from Alert Engineering in New Zealand. It advised that if it were purchasing today it would obtain quotes from Colby, Fresco and Alert Engineering.
 176. Colby advised the Commission that foreign companies would keep the combined company from exercising market power, and that it had lost business overseas to other companies in the past. It also said that two Australasian potential competitors are Amtec and Innopak.
 177. Technopak advised that its system could be used for packing powder at a rate of 5 tonnes an hour upwards, and so it could be sold to smaller customers such as NZ Sugar and smaller dairy customers and would meet their needs.
 178. Nucon advised that while its main area of expertise is the supply of powder handling equipment, it does supply whole systems by purchasing packing machines and integrating them into its own systems. It advised that it could supply low output rate packing machines.
 179. Innopak advised the Commission that it supplies packing systems for dry powders – either packing or handling. It has supplied systems to various dairy companies in New Zealand, and to companies dealing in products such as salt, flour and sugar. Innopak also represents Behn & Bates in New Zealand for the sale of its handling and packing equipment. Innopak advised the Commission that there are many companies in Europe that supply low output rate equipment, and when it is asked by a New Zealand company to supply a powder handling and packing system, it obtains quotes from companies in Europe as well as New Zealand. Innopak was of the view that the proposed merger would open up opportunities for other suppliers.
 180. Amtec's packing machines produce up to 5 tonnes an hour and are suitable for the New Zealand market. It predominantly supplies machines for the dairy industry but has recently branched out into other areas such as gelatine and salt.
 181. Dendy stated that it designs and builds bag filling and weighing equipment for a whole range of products from milk powder to cement, and that there are a number of its machines in New Zealand. Its machines can pack at up to 10 tonnes an hour. It advised that it provides post-sales support overseas by engaging a firm to carry out the work on its behalf. Dendy was of the opinion that the proposed acquisition would not impact on its business.
 182. Downer MBL advised that low output rate machines were available from overseas including Italy.
 183. The proposed merger would result in some increase in concentration in the low output rate market. However, the Commission considers that the information received from suppliers and customers involved in the market confirms that there are several suppliers both in New Zealand and overseas that would be effective competitors of the combined entity.

Conclusion on Existing Competition

184. The Commission therefore concludes that there would be sufficient existing competition to constrain the combined entity from attempting to exercise market power in the low output rate market.

Conclusion on Low Output Rate Market

185. The Commission is satisfied that the proposed acquisition would not have nor would be likely to have the effect of a substantial lessening of competition in the low output rate market due to the constraint on the combined entity that would be provided by the existing competition.

OVERALL CONCLUSION

186. The Commission has considered the probable nature and extent of competition that would exist in the following markets:

- the national supply of systems for packing powder at a high output rate (above 12 to 14 tonnes an hour) into industrial sized bags (10-25kg) in New Zealand (the high output rate market); and
- the national supply of systems for packing powder at a low output rate (below 12 to 14 tonnes an hour) into industrial sized bags (10-25kg) in New Zealand (the low output rate market).

187. The Commission considers that the appropriate counterfactual is a sale of Colby to another party.

188. The Commission is satisfied that the proposed acquisition would not have nor would be likely to have the effect of a substantial lessening of competition in the high output rate market due to the constraint on the combined entity that would be provided by existing competition, potential competition and Fonterra's strong countervailing power.

189. The Commission also concludes that there would be sufficient existing competition to constrain the combined entity from exercising market power in the low output rate market.

190. The Commission is therefore satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition, in the following relevant markets:

- The national supply of systems for packing powder at a high output rate (above 12 to 14 tonnes an hour) into industrial sized bags (10-25kg) in New Zealand (the high output rate market); and
- The national supply of systems for packing powder at a low output rate (below 12 to 14 tonnes an hour) into industrial sized bags (10-25kg) in New Zealand (the low output rate market).

DETERMINATION ON NOTICE OF CLEARANCE

191. Accordingly, pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by Niro A/S or a wholly owned subsidiary of Niro A/S (Niro) of 100% of the shares of Colby Systems Limited (Colby) from Siemens Dematic AG.

Dated this 30th day of March 2004

Paula Rebstock
Chair