

Statement of Issues

Public version

NEP/Sky (OSB)

30 November 2020

Introduction

1. On 25 September 2020, the Commerce Commission registered an application (the Application) from NEP Broadcast Services New Zealand Limited (NEP) to acquire from Sky Network Television Limited (Sky) the assets of its outside broadcasting business, Outside Broadcasting Limited (OSB) (the Proposed Acquisition).¹
2. To clear an application, the Commission must be satisfied that an 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 Issues (Sol) sets out the potential competition issues we have identified following our initial investigation. This is so NEP and Sky (the Parties) and other interested parties can provide us with submissions relating to those concerns.
4. In reaching the preliminary views set out in this Sol, we have considered information provided by the Parties and other industry participants. We have not yet made any final decisions on the issues outlined below (or any other issues) and our views may change, and new competition issues may arise, as the investigation continues.

The concerns we are testing

5. We are still to conclude on the relevant markets in this investigation. However, at this stage, we are testing whether the Proposed Acquisition would substantially lessen competition due to:
 - 5.1 horizontal unilateral effects from a loss of competition between NEP and OSB in the supply of outside broadcasting (OB) services as a result of the Proposed Acquisition; and/or
 - 5.2 vertical effects due to a ten year supply agreement that the Parties will enter into if the Proposed Acquisition completes, under which Sky will acquire OB services in New Zealand from NEP (Supply Agreement).²

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 Neither NEP nor Sky are seeking clearance or authorisation for the Supply Agreement.

6. At this time, we are not investigating further and do not require any further information from the Parties or interested parties in respect of the possible loss of competition from coordinated effects.
7. We explain our reasons below and invite submissions on our position.

Process and timeline

8. We have agreed with the Parties an extension of time from the initial 40 working day statutory timeframe until 19 February 2021 in which to make a decision.
9. The Commission would like to receive submissions and supporting evidence from the Parties and other interested parties on the issues raised in this Sol. We request responses by close of business on **14 December 2020**, including a public version of any submission made.
10. All submissions received will be published on our website with appropriate redactions.³ All parties will have the opportunity to cross-submit on the public versions of submissions from other parties by close of business on **21 December 2020**.
11. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

Background to the industry

12. Both NEP and OSB provide OB services to customers. The provision of OB services entails the filming of sports, entertainment and other events (both indoors and outdoors) on behalf of broadcasters, rights holders and other third parties. Providers of OB services provide engineering and technical expertise, as well as equipment and personnel to physically film events. Filmed content is then transmitted back to a central location (on-site with the event, or off-site), where additional creative production elements can be added before the content is broadcast.
13. OB services have traditionally been provided from OB units, which are trucks or vans containing the cameras and control room computers needed to film an event on-site at a location. Depending on the event and the expectations and budget of the customer, OB services can also be provided using flyaway kits (which are portable packs of cameras and equipment that can be transported to an event), or using IP/streaming cameras, which send live feeds via the internet directly to screens or a remote production centre.

³ Confidential information must be clearly marked (by highlighting the information and enclosing it in square brackets). Submitters must also provide a public version of their submission with confidential material redacted. At the same time, a schedule must be provided which sets out each piece of information over which confidentiality is claimed and the reasons why the information is confidential (preferably with reference to the Official Information Act 1982).

The Parties

14. NEP is the world's largest technical production company, facilitating the outside broadcast of live events in over 80 countries. NEP has been providing OB services in New Zealand on an ongoing basis since 2018, when it acquired the assets of NZ Live. Before 2018, NEP provided technical production facilities for the outside broadcast of the 2015 Cricket World Cup, using equipment brought into New Zealand from overseas. NEP currently provides studio and OB services to TAB New Zealand, TVNZ, MediaWorks and other parties for sporting and entertainment events.
15. Sky is a New Zealand entertainment company that broadcasts live sport and makes a range of other entertainment content available to consumers through television broadcasts and digital streaming channels and apps. Its OB business, OSB, films and produces a substantial portion of local sports content. Sky also provides OB services for facilitators of entertainment events.
16. Under the Proposed Acquisition, NEP would acquire six OB trucks from OSB, each of which contains between 10 and 12 HD cameras.⁴

Other industry participants

17. In addition to NEP and OSB, the other suppliers, or potential suppliers, of OB services in New Zealand include international suppliers such as Gravity Media Group Limited (Gravity) and smaller New Zealand-based suppliers such as Image NZ, Kiwi Outside Broadcast and Whitebait Media.
18. The customers that demand OB services are broadcasters, rights holders and other third parties that need to have sports, entertainment and other events filmed. In terms of sports content, major customers are Sky and Spark Sport. Other customers (in terms of a range of content) include TVNZ, Mediaworks and Māori Television.

The relevant markets

Background

19. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services that fall outside the market, but which would still impose some degree of competitive constraint on the merged entity.
20. When assessing relevant markets we consider whether in response to a small price increase in the relevant products:
 - 20.1 customers could easily switch to alternative products or locations (known as 'demand side' substitution); and

⁴ The Application at [28].

- 20.2 firms could easily switch production to the products or locations in question without incurring significant costs (known as ‘supply side’ substitution).

The supply of OB services

21. NEP and OSB overlap in the supply of OB services in New Zealand.

The Parties’ view of the relevant OB market

22. NEP⁵ submitted that the relevant market is a national market for the supply of outside technical production services (or OB services) but noted that the precise boundaries to the relevant product markets are unclear.⁶ NEP submitted that in this market:

- 22.1 on the supply-side, there are a range of participants selling differentiated offerings and supplying services by different methods (including OB units, flyaway packs and IP/streaming cameras);⁷ and
- 22.2 on the demand side, customers face different options for outside production services depending on the quality of broadcast required and the type of event they want to broadcast.⁸ NEP considers it useful to assess four different types of events:⁹

22.2.1 4K (ultra-high definition) events;

22.2.2 large one-off internationally significant sporting events (eg, a Rugby World Cup tournament);

22.2.3 local recurring sport events (eg, All Blacks tests, New Zealand cricket); and

22.2.4 other (non-4K) third-party events.

Our current views and evidence on the relevant OB markets

23. We have not reached any final views on the relevant OB markets. However, we currently consider that the potential competition issues arising from the overlap between NEP and OSB are best assessed using narrower markets than those suggested by the Parties. Our preliminary view is that there may be at least three relevant OB product markets based on the magnitude, complexity and value of the specific OB services required.
24. These OB products demand significantly different service offerings from suppliers and there are differences in suppliers’ ability to satisfy these demands.

⁵ The Application is drafted from the perspective of the Parties, however as NEP is the Applicant, we refer to submissions made in the Application as NEP’s submissions.

⁶ The Application at [97]-[98].

⁷ The Application at [104]-[105].

⁸ The Application at [102].

⁹ The Application at [134].

- 24.1 A Tier A Events Market, comprising the supply of OB services to large global and national live sports events held in New Zealand (eg, world cup tournaments, New Zealand Cricket, Super Rugby). These require significant OB assets to provide the sufficiently sophisticated¹⁰ coverage required by rights holder customers. These may or may not include broadcasts in 4K and are the most valuable OB contracts.
- 24.2 A Tier B Events Market, comprising the supply of OB services to medium-sized or medium-complexity live sports events,¹¹ live or near-live entertainment events that require moderately sophisticated OB operations and relatively large live events of national significance (eg, Dancing with the Stars, memorial services, elections).
- 24.3 A Tier C Events Market, comprising the supply of OB services to small live or near-live sports and non-sports events for which relatively unsophisticated OB assets are required (eg, winter games, kapa haka). These are the least valuable OB contracts.
25. Further to the information above describing the events currently categorised as Tiers A-C, Table 1 below lists the suppliers that we have identified as being present in each market.

Table 1: OB markets and their suppliers

Market	OB Suppliers
Tier A Events Market	OSB, NEP and other international suppliers (eg, Gravity, Circle-o, Euro)
Tier B Events Market	OSB and NEP
Tier C Events Market	OSB, NEP and other New Zealand-based suppliers (eg, Image NZ, Kiwi Outside Broadcast, Volt)

26. We invite further views and information from the Parties and interested parties on the relevant markets in which NEP and OSB compete to supply OB services.

¹⁰ By 'sophisticated' we mean the overall level of technical capability that an OB services provider is able to bring to bear on its broadcasting of an event, including (but not limited to) a higher number of cameras, logistical capability, layers of redundancy in live recording and/or specialised equipment/technologies such as ultra-slow-motion or high frame-rate cameras.

¹¹ Examples of sports events potentially falling within the scope of the Tier B Events Market are major sporting codes for which there are only occasional premier grade games held in New Zealand (eg, Warriors rugby league or Phoenix football matches), sports tournaments that only run for a few days a year (eg, rugby sevens in Hamilton, New Zealand golf open) and smaller or lower profile sporting codes or events (eg, basketball, hockey and club football or rugby finals).

27. For completeness, we are also continuing to consider whether it may be appropriate to define a broader product market encompassing all OB services in New Zealand.

Other markets we are considering

28. In addition to the OB markets discussed above, we consider that two further markets are relevant to our assessment of the potential vertical effects arising from the Supply Agreement. Our preliminary view is that these markets are national markets for the:
- 28.1 acquisition of sports broadcasting rights; and
 - 28.2 broadcast of New Zealand premium live sports content.
29. In terms of the market for the acquisition of sports broadcasting rights, we are continuing to investigate whether:
- 29.1 sports broadcasting rights are likely to be continued to be licensed on a national basis; and
 - 29.2 there are any sports rights that are must haves such that there are separate markets for those rights.

With and without scenarios

30. Assessing whether a substantial lessening of competition is likely requires us to compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the acquisition, often referred to as the factual) with the likely state of competition if it does not (the scenario without the acquisition, often referred to as the counterfactual) and to determine whether competition is likely to be substantially lessened by comparing those scenarios.
31. NEP submitted that in both the factual and the counterfactual, it will become a significant supplier of OB services in New Zealand.¹²
32. With regard to what is likely to happen if the Proposed Acquisition does not proceed, the Parties have submitted that:
- 32.1 in terms of how Sky would procure OB services:
 - 32.1.1 initially
[
];¹³
 - 32.1.2 in a more recent submission, that absent the Proposed Acquisition,
Sky would

¹² The Application at [91].

¹³ The Application at [79].

[
],¹⁴ and

32.1.3 most recently indicated that

[
];¹⁵

32.2 Sky has not identified any other out-of-market third-party buyer as or more suitable than NEP to serve the market's needs;¹⁶

32.3 the Parties do not consider Gravity to be an out-of-market third-party buyer because they say it is now within the market, meaning that an acquisition of the OSB assets by Gravity would be no more competitive than the Proposed Acquisition;¹⁷ and

32.4 Sky would not sell OSB to a third party, because
 [].¹⁸

33. We are continuing to investigate matters relevant to our assessment of the counterfactual and whether there are any other likely alternative counterfactual scenarios to that submitted by the Parties, in particular:

33.1 the state of the OB trucks owned and operated by OSB, including their remaining useful life and any investment required to replace or upgrade them;

33.2 whether Sky would [];

33.3 whether OSB would []; and

33.4 whether Sky would be likely to sell OSB to any other third-party purchaser, whether an alternative purchaser would likely also need a supply agreement with Sky (and, if so, on what terms) and whether the sale to NEP would be substantially less competitive than a sale to a third-party.

34. In **Attachment A** we set out further detail on the counterfactual.

Horizontal unilateral effects relating to OB services

35. Horizontal unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that a market participant can profitably

¹⁴ Submission from Chapman Tripp on behalf of Sky (12 November 2020) at [14].

¹⁵ Letter from Chapman Tripp on behalf of Sky (23 November 2020).

¹⁶ The Application at [88].

¹⁷ The Application at footnote 21.

¹⁸ Submission from Chapman Tripp on behalf of Sky (12 November 2020) at [21].

increase prices above the level that would prevail without the merger (and/or reduce quality).

36. NEP submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the national market for the supply of outside technical production services due to unilateral effects. NEP's position is that:¹⁹
- 36.1 there would be no, or no substantial, difference between the factual and counterfactual in any timeframe relevant to the Commission's assessment of the Proposed Acquisition;
 - 36.2 the Proposed Acquisition would only remove limited competition between NEP and OSB; and
 - 36.3 there are a range of global and local alternative suppliers that will continue to constrain NEP's market pricing for all event and customer types, including Gravity which has recently entered the market to provide OB services for cricket.
37. We continue to test concerns about whether the Proposed Acquisition would give rise to horizontal unilateral effects due to lost competition between NEP and OSB in the supply of OB services. Our primary concerns are focused on the supply of OB services in any Tier B Events Market.
38. While, as we have stated, we are currently of the view that it is appropriate to define separate product markets for "Tier A", "Tier B" and "Tier C" Events, we are also considering whether a substantial lessening of competition could also occur under a broader market definition encompassing all OB services.

Unilateral effects in the Tier A Events Market

39. We are continuing to investigate whether the Proposed Acquisition would likely substantially lessen competition in the Tier A Events Market such that the merged entity would be able to profitably sustain a price increase or quality decrease to customers in the Tier A Events Market.
40. This could occur, for example, if NEP and OSB are the closest competitors for Tier A Events given their domestic asset footprint, and where constraint from actual and potential competitors is not sufficient to replace this lost competition.
41. NEP submitted that:
- 41.1 there will continue to be strong competition to broadcast events of this nature, including from Gravity and other global OB providers that can quickly

¹⁹ The Application at [14], [20]-[23], [153] and [170].

and easily enter New Zealand to film local events using flyaway systems;²⁰
and

- 41.2 in any case, Sky is not incentivised to commit OSB's services to sports rights competitors where Sky is competing for the same rights, meaning that there may be little to no difference between the situation with the merger from the situation without the merger.²¹
42. Our preliminary view is that the events within the Tier A Events Market are likely to be of a sufficient value to incentivise competition from international suppliers. Nevertheless, we continue to explore whether in the Tier A Events Market international suppliers may be less competitive in bidding for New Zealand-based opportunities because of the additional costs they must incur in importing OB assets to fulfil the contract.
43. At the top end of the OB sector, the contracts appear to be of sufficient value to attract a range of large, sophisticated, multinational suppliers of OB services to compete for contracts in New Zealand. This includes the likes of Gravity which is based overseas, but could viably bid for Tier A Events contracts in New Zealand.
44. However, because of the complexity and sophistication of the OB services required for these large contracts, relatively small, unsophisticated New Zealand-based OB suppliers do not appear able to viably compete for these contracts. The substantial investment in specialised equipment needed to compete for these contracts, along with the strong preference for customers to work with OB suppliers who have a well-established track record for reliability and quality, appears to create a barrier to small domestic OB suppliers competing in the Tier A Events Market. As a result, we consider that, on the supply-side, this market is likely to consist only of large, sophisticated, OB providers, including both the New Zealand-based suppliers OSB and NEP, and large, multinational OB providers based overseas.

Unilateral effects in the Tier B Events Market

45. We are investigating whether, post-acquisition, the combined entity would be able to profitably sustain an increase in prices or decrease in quality to customers requiring OB services in the Tier B Events Market.
46. The Tier B Events Market sits in-between the Tier A Events Market and the Tier C Events Market, at the upper and lower ends of the OB size spectrum. The Tier B Events Market which includes mid-sized sports events and larger or relatively sophisticated entertainment events and other events of national importance. The Tier B Events Market may only be contested by larger sophisticated suppliers that are already active in New Zealand and have spare capacity.

²⁰ The Application at [151.3].

²¹ The Application at [151.2].

47. Based on the information received to date, it appears that the Proposed Acquisition has the potential to raise competition concerns in the Tier B Events Market, by reducing the number of competitors with a physical presence in New Zealand from two to one, in circumstances where the events in question may not be of a sufficient value to incentivise competition from international suppliers, or entry/expansion from smaller domestic suppliers.
48. We understand that NEP and OSB each have extensive and sophisticated asset bases in New Zealand, and that no other competitor in New Zealand appears to have an asset base of equivalent size or sophistication that would be available for customers in the Tier B Events Market.²²
49. Consistent with this, we also understand that some customers in the Tier B Events Market play NEP and OSB off against each other in order to benefit from the competitive tension between the two.²³ For example, [] told us that it has ad hoc conversations with both OSB and NEP in relation to potential supply opportunities, and will choose the one it wants to supply OB services to it for that event based on both the supplier's availability on the relevant date and the prices offered by each of OSB and NEP.

Constraint from rivals, including potential entry or expansion

50. We invite submissions on the extent to which suppliers in the Tier A Events Market or the Tier C Events Market would be able to enter the Tier B Events Market if the merged entity sought to increase prices or decrease quality.
51. Evidence obtained to date suggests that the value of Tier B contracts may not be large enough to attract the larger, more sophisticated, multinational suppliers that are based overseas (and who may compete periodically in the Tier A Events Market), but be too large and/or complex for suppliers in the Tier C Events Market to compete for effectively.
52. We understand that opportunities may arise more frequently in the Tier B Events Market than in the Tier A Events Market. For example, one-off entertainment events of a sufficiently large scale, may become available on an ad hoc basis, and larger planned entertainment events are typically planned annually on a season-by-season basis.
53. However, this may not be true of the local seasonal sporting competitions within the Tier B Events Market. Evidence indicates that for such sports events, broadcasters tend to contract with an OB service provider for the multi-year term of any broadcasting rights agreement.

²² While TAB currently has more OB assets than NEP in New Zealand, TAB does not do any OB work for third parties and we do not see it as a competitor to NEP and OSB in the provision of OB services.

²³ [] and [].

- 54. Additionally, some market participants have noted to us that even to the extent that contracts churn in the short term, there is currently insufficient supply opportunities available in New Zealand to facilitate entry or expansion.
- 55. We consider that entry into the Tier B Events Market is unlikely unless a supplier is already established year-round in New Zealand in the Tier A Events Market providing OB services for major local sport. NEP and OSB are currently the only such suppliers in the Tier A Events Market. There are limited opportunities for other suppliers to enter the Tier A Events Market on the same scale as NEP and OSB because the provision of OB services for major local sport falling within the Tier A Events tend to be provided under long-term supply contracts.
- 56. We consider that Gravity, which recently won a contract in the Tier A Events Market to provide OB services for cricket, is not a likely entrant into the Tier B Events Market. Gravity advised that
[

24

].²⁵

- 57. Our preliminary view is that there may be some ability for existing competitors in the Tier C Events Market to expand into providing services to some events in the Tier B Events Market (such as smaller entertainment events). However substantial investment would likely be required for suppliers in the Tier C Events Market to enter the Tier B Events Market, and the small number of opportunities available in the Tier B Events Market makes such investment risky and unlikely to be profitable in the short to medium term.
- 58. We invite submissions on:
 - 58.1 the investment that would be required for suppliers in the Tier C Events Market to begin providing OB services to Tier B Events;
 - 58.2 the circumstances that would make entry/expansion into the Tier B Events Market more or less attractive for suppliers in the Tier A Events Market and suppliers in the Tier C Events Market; and
 - 58.3 which existing suppliers in the Tier A Events Market and suppliers in the Tier C Events Market may be most willing and able to enter into/expand within the Tier B Events Market.

²⁴ []

²⁵ [].

Constraint from countervailing power

- 59. We are investigating the extent to which customers would be able to resist any attempt by the merged entity to increase prices or reduce the quality of its service after the Proposed Acquisition.
- 60. Based on current information customers do not appear to have any material countervailing power. In particular:
 - 60.1 customers interviewed so far indicated that they would be unlikely to sponsor new entry or expansion either through investment or the awarding of a sufficiently long-term contract;²⁶ and
 - 60.2 although NEP submitted that customers such as TVNZ or MediaWorks could self-supply in the event of a price increase,²⁷ customer self-supply does not appear likely.

[28]²⁹

Unilateral effects in the Tier C Events Market

- 61. We are continuing to investigate whether the Proposed Acquisition would substantially lessen competition in the Tier C Events Market such that the merged entity would be able to profitably sustain a price increase or quality decrease to customers in the Tier C Events Market.
- 62. We consider that, on the supply-side, the Tier C Events Market is likely to consist only of OB providers that are based in New Zealand. This includes OSB, NEP and other smaller suppliers such as Image NZ, Kiwi Outside Broadcast, Whitebait Media, etc. The small size of the contracts available in this market coupled with the additional costs associated with transporting the necessary assets and employees to New Zealand, means it is not viable for large multinational OB suppliers that do not already have a presence in New Zealand to bid for these contracts.
- 63. Based on the information that we have received to date, there appears to be a range of smaller suppliers of OB services active in the Tier C Events Market that compete with OSB and NEP throughout New Zealand. This group of suppliers appears to largely service small sports events and small entertainment events and programmes where customers’ OB requirements are significantly less sophisticated. Some of these suppliers are specialists at filming specific types of events (eg, off-road, in mountainous locations, on the water) or who offer filming technology not offered by NEP and OSB (eg, cameras on drones).

²⁶ [] noted the inconsistency in their funding restricted the ability to guarantee work.

²⁷ The Application at [169].

²⁸ []

²⁹ [].

64. On that basis, our preliminary view is that the merged entity would not be likely to be able to profitably sustain a price increase or quality decrease after the Proposed Acquisition in the Tier C Events Market.
65. We invite submissions on whether there would be any smaller-scale or value events for which the only current providers are NEP and OSB.

Summary of current views on horizontal unilateral effects relating to OB services

66. We are not currently satisfied that the Proposed Acquisition would not be likely to result in a substantial lessening of competition in a relevant OB services market, in particular in the Tier B Events Market. This is because NEP and OSB appear to be close competitors and we are not currently satisfied that the competition lost from the Proposed Acquisition could be replaced through the combined constraint from:
- 66.1 expansion by existing rivals and new entry; and
- 66.2 the ability of customers to resist a price increase.
67. We invite further information and submissions on these points.

Vertical effects

68. Vertical effects can occur where there is a merger or agreement between firms operating at different levels of a supply chain (eg, a wholesaler and a retailer) that creates the ability and incentive for a vertically integrated merged entity to engage in strategies that weaken competitive constraints in the upstream or downstream markets that the business competes in. These strategies may involve refusing to supply, or raising the cost of, upstream inputs that rivals need to compete with the merged entity in downstream markets. Alternatively, a merged entity may have the ability and incentive to prevent or raise rivals' costs of accessing customers, therefore limiting their ability to compete with the merged entity in upstream markets.
69. As noted earlier, on completion of the Proposed Acquisition, the Parties will enter into a Supply Agreement. This Supply Agreement is for a ten-year period.³⁰ Under the Supply Agreement:³¹
- 69.1 NEP will be Sky's exclusive OB provider for all events that require six or more cameras [];
- 69.2 for other events requiring five cameras or less, Sky is free to secure OB services from NEP or any other supplier of OB services;

³⁰ The Application at [31].

³¹ The Application at [75], NEP submission (9 November 2020) at 2 and Supply Agreement at [4] and [12.8].

69.3 NEP will not be restricted from providing OB services to any third parties, including competitors to Sky; and

69.4 there is provision for [].

70. Neither NEP nor Sky are seeking clearance or authorisation for the Supply Agreement.
71. The Supply Agreement and the Proposed Acquisition are very closely connected. The Supply Agreement commences at the same time as the Proposed Acquisition closes. Given that the Supply Agreement will inevitably follow from the Proposed Acquisition, in our view, the effects of the Supply Agreement can be considered as effects of the Proposed Acquisition. ³²
72. We are considering whether the Proposed Acquisition could substantially lessen competition due to vertical effects relating to the Supply Agreement.
73. At this point, we are not satisfied that the Proposed Acquisition would not result in a substantial lessening of competition due to the Supply Agreement having the potential to:
- 73.1 restrict rival OB suppliers' access to customers therefore preventing them from achieving minimum efficient scale and being effective competitors to the merged entity in OB markets; and/or
 - 73.2 raise the costs of Sky's rivals in the national market for the acquisition of broadcast rights and/or the associated market for the broadcast of New Zealand premium live sports content by restricting their access to OB services.

The effect of the Supply Agreement on competition in OB markets

74. NEP submitted that the supply agreement would not negatively affect the ability of OB service providers to enter into and expand within OB markets because:³³
- 74.1 competitors and potential competitors in the supply of OB services can acquire contracts from entities other than Sky, including Spark Sport and other potential competitors for sports rights; and
 - 74.2 under the Supply Agreement, Sky is not obliged to use NEP for all its OB requirements and for certain events Sky is free to acquire OB services from providers other than NEP.
75. In addition to the above, Sky submitted that:³⁴

³² The Supply Agreement would also be subject to section 27 of the Commerce Act 1986.

³³ NEP submission (9 November 2020) at 2.

- 75.1 the Supply Agreement is non-exclusive and does not prevent or restrict other parties from acquiring OB services from NEP on the same (or better) terms as Sky; and
- 75.2 Sky is not an essential customer that competitors must access to compete in OB markets.
76. At this point, we cannot rule out the prospect that the exclusivity provisions of the supply contract could lock up such a substantial proportion of OB services contracts in the Tier B Events Market such that existing or potential rival OB suppliers cannot achieve minimum efficient scale and be effective competitors. The reasons for our concerns are that:
- 76.1 the profitability and therefore viability of an OB services supplier appears to turn on the efficient utilisation of its assets;
- 76.2 for a new rival OB supplier to enter, or for a smaller competitor to scale up and commence supplying OB services to customers in a higher tier, an OB supplier would require access to a sufficient number of contracts to guarantee it would achieve a minimum level of utilisation; and
- 76.3 Sky currently holds a large proportion of the available sports rights in New Zealand and is therefore the largest customer of OB services in New Zealand. The Supply Agreement appears to exclusively commit the vast majority of Sky's demand for OB services for these sports rights to NEP for at least the next ten years.
77. We do not see the same risks in the Tier A Events Market and Tier C Events Market on the basis that:
- 77.1 we consider Tier A events to be those for which the value is great enough that international competitors are willing and able to compete using imported assets, and customers may benefit from the scale of such overseas suppliers; and
- 77.2 the Supply Agreement is less likely to impact the Tier C Events Market, given that Sky holds fewer broadcasting rights for Tier C Events and, under the Supply Agreement, these events are not exclusively allocated to NEP, meaning that rival OB suppliers would still be able to compete to supply any Sky events that fall within the Tier C Events Market.
78. We continue to investigate the effect of the Supply Agreement on competition in OB markets, in particular:
- 78.1 the extent to which the ability of potential suppliers in the Tier B Events Market to achieve minimum efficient scale is already restricted, given that in

³⁴ Submission from Chapman Tripp on behalf of Sky (12 November 2020) at [24] and [29].

the status quo OSB effectively functions as an in-house supplier to Sky, which holds a significant number of broadcasting rights;

- 78.2 the extent to which the Supply Agreement effectively replicates any foreclosure effects already observable in the status quo, by transferring the exclusive right to service Sky's OB demand from OSB to NEP;
- 78.3 the extent to which the factual is likely to be substantially less competitive than a counterfactual in which a third party purchases the OSB assets;
- 78.4 the total size of the Tier B Events Market, as well as the proportion of that market which is effectively locked up by the Sky/OSB relationship (using the status quo as a proxy for the volume that would be locked up with the Proposed Acquisition); and
- 78.5 the minimum number and size of contractual commitments that an OB services provider is likely to require in order to incentivise it to enter or expand within the Tier B Events Market, and the level of utilisation that is required before a supplier is efficient.

79. We invite further information and submissions on these points.

The effect of the Supply Agreement on competition for broadcast rights and content

80. NEP submitted that historically Sky's vertical integration into OB services has given it an advantage in acquiring sports rights, but that the entry of NEP and other global OB suppliers has eroded this advantage.³⁵ More recently, NEP submitted that the ability of Sky's competitors to secure sports rights is not affected by the Supply Agreement, as the cost of OB services is de minimis relative to the costs of the broadcast rights themselves and [].³⁶ In addition, Sky submitted that NEP is incentivised to increase competition for sports broadcast rights because more competition for sports rights means more work for NEP.³⁷

81. At this point, we cannot rule out the prospect that the Supply Agreement could advantage Sky in the acquisition of broadcast rights and the broadcast of New Zealand premium live sports content. The reasons for our concerns are that:

- 81.1 the exclusivity provisions in the Supply Agreement could result in NEP having limited capacity or incentive to perform work for third parties (input foreclosure) and/or prevent other OB suppliers from achieving minimum efficient scale by denying them the ability to compete for a significant amount of Sky's demand (customer foreclosure). NEP is likely to be incentivised to maximise Sky's share in the national markets for the acquisition of sports broadcasting rights and the broadcast of New Zealand

³⁵ The Application at [47]-[50].

³⁶ NEP submission (9 November 2020) at 3

³⁷ Submission from Chapman Tripp on behalf of Sky (12 November 2020) at [31.1].

premium live sports content. This could mean that potential rival acquirers of broadcasting rights in New Zealand would have limited supply options for OB services, and must therefore either self-supply, or invest to encourage overseas entry or domestic expansion, raising their overall costs of acquiring OB services relative to Sky;

- 81.2 the pricing mechanisms in the Supply Agreement could offer Sky a more favourable price than NEP is prepared to offer other broadcasting customers, raising the costs of those parties of acquiring OB services relative to Sky; and
 - 81.3 in either case, the consequences of raising other broadcasters' costs of acquiring OB services may be to discourage them from competing for broadcasting rights or mean that their overall bid for those rights is uncompetitive reflecting their higher costs of acquiring OB services.
82. We continue to investigate the effect of the Supply Agreement on competition for the acquisition of broadcast rights and the associated downstream broadcast of New Zealand premium live sports content, in particular:
- 82.1 whether or not OB services represent a sufficiently large proportion of a broadcaster's total cost in bidding for and performing its obligations under a broadcasting rights agreement, such that an increase in the cost of OB services could render a broadcaster's bid for rights uncompetitive;
 - 82.2 whether there will be any periods where the merged entity is likely to have insufficient capacity to service customers other than Sky; and
 - 82.3 the extent to which a broadcaster's ability to acquire OSB services of a certain quality is a material factor for sports organisations when determining whether to award that broadcaster the rights to an event.
83. We invite further information and submissions on these points.

Coordinated effects

- 84. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all, or some, of its remaining rivals to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase across the market. Unlike unilateral effects, 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.
- 85. We do not consider that the Proposed Acquisition is likely to materially increase the likelihood of coordination.
- 86. Our key reason for this view is that the Proposed Acquisition would not remove a particularly aggressive or destabilising competitor and would not materially increase the symmetry in market shares or cost structures of the remaining firms.
- 87. For these reasons we do not plan to investigate coordinated effects further.

Next steps in our investigation

88. The Commission is currently scheduled to decide whether or not to give clearance to the Proposed Acquisition by 19 February 2021. However, this date may change as our investigation progresses.³⁸ In particular, if we need to test and consider the issues identified above further, the decision date may extend.
89. As part of our investigation, we are identifying and contacting parties that we consider will be able to help us assess the issues identified above.

Making a submission

90. We are continuing to undertake inquiries and seek information from industry participants about the impact of the Proposed Acquisition. We welcome any further evidence and other relevant information and documents that the Parties or any other interested parties are able to provide regarding the issues identified in this Sol.
91. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "NEP/Sky" 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 **14 December 2020**.
92. 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 be likely to unreasonably prejudice the commercial position of the supplier or subject of the information.

³⁸ 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.

Attachment A: Confidential material relating to the counterfactual

A1. We are continuing to investigate matters relevant to our assessment of the counterfactual and whether there are any other likely alternative counterfactual scenarios to that submitted by the Parties, in particular:

A1.1 the state of the OB trucks owned and operated by OSB, including their remaining useful life and any investment required to replace or upgrade them;

A1.2 whether Sky would [];

A1.3 whether OSB would []; and

A1.4 whether Sky would be likely to sell OSB to any other third-party purchaser, whether an alternative purchaser would likely also need a supply agreement with Sky (and, if so, on what terms) and whether such a sale would be substantially more competitive than a sale to NEP.

The fitness for purpose of OSB's assets in the future

A2. The Commission has received confidential submissions in relation to whether OSB's assets will continue to be used in the future.

A2.1 NEP submitted that OSB's assets are [],³⁹ and [].⁴⁰

A2.2 However, several market participants have claimed that [].

A3. We are continuing to investigate the state of the OB trucks owned and operated by OSB, including their remaining useful life and any investment required to replace or upgrade them. We are also looking at how OSB's assets will be affected by the degree of likely technological change in broadcasting and content distribution, including the likely uptake of 4K for Tier B Events.

Whether Sky would [] and whether OSB would []

A4. Information received from the Parties to date has not been entirely consistent as regards Sky's approach to the OSB assets, and in particular whether OSB [].

³⁹ The Application at [58] and [83].

⁴⁰ The Application at [13].

A5. NEP submitted that in the counterfactual []^{.41}

A6. In our interview with Sky, Sky advised us that []^{.42}

A7. Chapman Tripp’s 12 November 2020 submission on behalf of Sky noted that in the counterfactual Sky would:

A7.1 []^{.43}

A7.2 []^{.44} and

A7.3 []^{.45}

A8. Sky also provided []^{.46}

A9. Most recently, Sky indicated that it []^{.46}

A10. We continue to investigate Sky’s specific plans in the counterfactual. As part of this investigation, we intend to consider whether the sporting rights that Sky currently holds, and the connected obligations that Sky has to those codes, would impact on its ability to []. We welcome submissions on these points.

A11. We are also considering whether []^{.46}

⁴¹ The Application at [80]-[82].

⁴² Commerce Commission interview with Sky (22 October 2020).

⁴³ Submission from Chapman Tripp on behalf of Sky (12 November 2020) at [14.1].

⁴⁴ Submission from Chapman Tripp on behalf of Sky (12 November 2020) at [14.2].

⁴⁵ Submission from Chapman Tripp on behalf of Sky (12 November 2020) at [14.3].

⁴⁶ Letter from Chapman Tripp on behalf of Sky (23 November 2020).

Sale of OSB or its assets to a third party

A12. Chapman Tripp’s submission on behalf of Sky dated 12 November 2020 states that Sky would not sell to a third party.⁴⁷ Nevertheless, we cannot currently exclude an alternative likely counterfactual in which OSB or its assets are sold to a third-party.

A12.1 First, we understand that []. We also understand that [].⁴⁸

A12.2 Second, while Chapman Tripp’s submission on behalf of Sky dated 12 November 2020 states that [49].

A12.3 Third, and relatedly, we cannot currently exclude the prospect that, [], NEP may be paying for some degree of market power, which is recognised in the purchase price of the assets.

A12.4 Finally, we are currently not convinced that a listed entity such as Sky, with obligations to its shareholders, would not explore further sale options if the Proposed Acquisition were not to proceed, particularly given the existence of [].

A13. On this basis, our preliminary view is that, consistent with the approach of assessing any lessening of competition in the factual against the most competitive counterfactual that has a real chance of occurring, the appropriate counterfactual in this instance is one in which a third party acquires the relevant assets. We welcome any submissions on this, and on whether an alternative purchaser would likely also need a supply agreement with Sky and, if so, on what terms.

⁴⁷ Submission from Chapman Tripp on behalf of Sky (12 November 2020) at [21].

⁴⁸ [].

⁴⁹ []