

Statement of Preliminary Issues

Mayborn / Jackel

4 December 2014

Introduction

1. On 20 November 2014, the Commerce Commission received an application from Mayborn Group Limited (Mayborn) seeking clearance to acquire certain assets in the ownership of Jackel Pty Limited (Jackel), including intellectual property rights to the Tommee Tippee brands and trademarks relating to New Zealand.
2. The public version of the application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/detail/849>.
3. This Statement of Preliminary Issues outlines the key competition issues we currently consider will be important in deciding whether or not to grant clearance. The issues highlighted in this statement are based on the information available at the time of publication, and may change as our assessment of the application for clearance progresses. Therefore, the issues highlighted in this statement are not binding on us.
4. We invite interested parties to make comment on the likely competitive effects of the proposed acquisition and request that parties who wish to make a submission do so by **Thursday 18 December 2014**.
5. All information we receive is subject to the principle of availability under the Official Information Act 1982.
6. However, we recognise that preserving the confidentiality of commercially sensitive information and providing protection against disclosure is necessary. If your submission contains confidential information, please clearly identify this.

The parties and the transaction

7. Mayborn is a UK-based supplier of baby and toddler feeding accessories. In New Zealand, Mayborn's main brand of baby and toddler products, Closer to Nature, is distributed by Newborn Brands (NZ) Limited.
8. Jackel is an Australia-based, supplier of baby and toddler feeding accessories. In New Zealand, Jackel supplies baby and toddler products under the Tommee Tippee and Happy Baby brands.
9. Mayborn already owns the intellectual property rights to the Tommee Tippee brand in most other countries, but not in New Zealand or Australia. With the transaction, Mayborn would effectively have global ownership of the Tommee Tippee brand.

10. The baby and toddler feeding accessories supplied by Mayborn and Jackel under their Closer to Nature and Tommee Tippee brands (and products in which the parties overlap) include:
 - 10.1 baby bottles and associated products (eg, bottle sterilisers and teats);
 - 10.2 breastfeeding products (eg, breast pumps and nursing pads);
 - 10.3 milk formula dispensers;
 - 10.4 toddler feeding products (eg, cups, bowls and cutlery); and
 - 10.5 other baby and toddler products (eg, dummies and bids).

Our framework

11. As required by the Commerce Act 1986, we assess whether an acquisition is likely to result in a substantial lessening of competition. How we assess this is set out in our Mergers and Acquisitions Guidelines.¹
12. We ask whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).²
13. A tool used to assess competitive effects is market definition. Market definition provides a framework to help identify and assess the close competitive constraints a merged firm would likely face.³ A market is defined in the Commerce Act as a market in New Zealand for goods or services as well as other goods or services that are substitutable for them as a matter of “fact and commercial common sense”.⁴
14. We define markets in the way that we consider best isolates the key competitive constraints on the parties to an acquisition. In many cases this may not require us to precisely define the boundaries of a market.
15. We analyse the extent of competition in each relevant market both with and without the acquisition to determine whether the acquisition would be likely to substantially lessen competition.
16. We assess the following three factors when considering whether this is likely to be the case.

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

² *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

³ *Commerce Commission v New Zealand Bus Limited* (2006) 11 TCLR 679 (HC), at [123]. *Brambles New Zealand Ltd v Commerce Commission* (2003) TCLR 868 (HC) at [137].

⁴ Similarly, the courts have said that “[t]he boundaries of the market are defined by substitution between one product and another and between one source of supply and another, in response to changing prices”. See *Commerce Commission v New Zealand Bus Limited* (HC), above n 3 at [123] citing *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,247.

- 16.1 Existing competition – the degree to which existing competitors compete.
 - 16.2 Potential competition – the extent to which existing competitors would expand their sales or new competitors would enter and compete effectively if prices were increased.
 - 16.3 The countervailing market power of buyers – the potential for a business to be sufficiently constrained by a purchaser’s ability to exert substantial influence on negotiations.
17. A comparison of the extent of competition both with and without the acquisition enables us to assess the degree by which the proposed acquisition might lessen competition. If the lessening is likely to be substantial, we may not give clearance to the proposed acquisition.

Preliminary issues

18. The Commission will assess the horizontal effects that might arise as a result of this acquisition. In particular, we will consider:
- 18.1 whether there are separate product markets for different types of baby and toddler feeding accessories;
 - 18.2 the extent of existing competition between brands of baby and toddler feeding accessories;
 - 18.3 the ability of suppliers of competing brands of baby and toddler feeding accessories to expand (including to commence distribution of products in competition with the merged entity); and
 - 18.4 the extent of countervailing power of major retailers.
19. We discuss some of these issues further below.

Market definition

20. Mayborn submits that the relevant market for considering the proposed acquisition is the national market for the wholesale supply of baby and toddler feeding accessories. It submits that while the different baby and toddler feeding accessories described at paragraph 10 are not substitutable on the demand side, from a supply side perspective there is no reason why distributors offering a particular product cannot extend into offering other products.
21. We will consider whether there is a single market for the wholesale supply of baby and toddler feeding accessories or, alternatively, separate product markets for different types or categories of baby and toddler feeding accessories.
22. We note that in order for products to be considered supply-side substitutes, firms would have to be in a position to “easily, profitably and quickly (generally within one year) switch production to the products or locations in question without significant

cost...”⁵ An important consideration in the likeliness of the profitability of supply-side substitution is the extent to which ultimate buyers are willing to substitute towards a supplier’s newly introduced product. This is a particular consideration in markets where brand plays an important role in consumers purchase decisions.

Existing competition

23. Mayborn submits that there are a wide variety of competing manufacturers and distributors of baby and toddler feeding accessories and that the competitive environment would remain robust post-acquisition.
24. We will consider the closeness of competition between the Closer to Nature and Tommee Tippee brands, and between the merging brands and other suppliers, in each of the product areas described at paragraph 10.

Potential competition

25. Mayborn submits that there are a number of global brands of baby and toddler feeding accessories not yet present in New Zealand that could easily enter the market.
26. We will consider the entry and expansion conditions and whether entry or expansion is likely, timely and sufficient in extent to prevent a substantial lessening of competition.

Countervailing power

27. Mayborn submits that the wholesale purchasers (and retailers) of baby and toddler feeding accessories include supermarkets, pharmacies, specialist baby stores and general merchandise retailers (eg, Farmers and The Warehouse). It further submits that, given their size and scale, these wholesale purchasers are in a strong bargaining position with respect to manufacturers and distributors of baby and toddler feeding accessories. Mayborn submits that supermarkets and general merchandise retailers (in particular) are strongly positioned to exert countervailing power.
28. We will consider the extent to which the merged entity would be constrained post-acquisition by the countervailing power of major purchasers.
29. In this regard we note that “a customer’s size and commercial importance is not sufficient in itself to amount to countervailing power.”⁶ Rather of consideration are factors such as the ability to discipline a price increase by switching or credibly threatening to switch suppliers for other products it acquires from the merging firms, sponsoring new entry, and self-supplying.⁷

⁵ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013 at [3.16.2].

⁶ Ibid at [3.114].

⁷ For further discussion see Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013 at [3.113-3.117].

Next steps

30. We are currently aiming to make our decision by **5 February 2015**. However, this date may change as the investigation progresses.
31. To keep up to date with any changes to our deadline and to find relevant documents, visit our clearance register on our website at <http://www.comcom.govt.nz/clearances-register/>
32. As part of our investigation, we will identify the parties we believe will provide the best information to help us assess the preliminary issues identified above.
33. We also invite submissions from any other parties who consider they have information relevant to our consideration of this matter. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference Mayborn / Jackel in the subject line of your email, or The Registrar, PO Box 2351, Wellington 6140 by close of business **Thursday 18 December 2014**. Please clearly identify any confidential information contained in the submission and provide contact details.
34. If your submission contains confidential information, please clearly identify this.