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Statement of Preliminary Issues

NEP/Sky (OSB)

13 October 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. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.[2]

4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **28 October 2020**.

The parties

5. NEP is the world's largest technical production company, facilitating the outside broadcast of live events in over 80 countries. NEP has been providing outside broadcasting 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 outside broadcasting services to TAB New Zealand, TVNZ, MediaWorks and other parties for sporting and entertainment events.

6. 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 outside broadcasting business, OSB, films and produces a substantial portion of local sports content. Sky also provides outside broadcasting services for facilitators of entertainment events.

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[1] A public version of the Application is available on our website at: http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/.

[2] The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

Our framework

7. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.[3] As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.

8. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).[4] This allows us to assess the degree by which the Proposed Acquisition might lessen competition.

9. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:

   9.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;

   9.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and

   9.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser's ability to exert substantial influence on negotiations.

Market definition

10. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.[5]

11. In its Application, NEP[6] submitted that the relevant market is a national market for the supply of outside technical production services (or outside broadcasting services) but noted that the precise boundaries to the relevant product markets are unclear.[7] NEP submitted that in this market:

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3 Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz.

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

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

6 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.

7 The Application at [97]-[98].

11.1 on the supply-side, there are a range of participants selling differentiated offerings and supplying services by different methods (including outside broadcasting units, flyway packs and IP/streaming cameras);[8] and

11.2 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.[9] NEP considers it useful to assess four different types of events:[10]

11.2.1 4K (ultra-high definition) events;

11.2.2 large one-off internationally significant sporting events;

11.2.3 local recurring sport events (such as All Blacks tests, New Zealand cricket etc); and

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

12. We will test whether there should be one broad market for the supply of outside broadcasting services, or more narrowly defined markets based on the types of events and/or customer types.

With the acquisition

13. If the Proposed Acquisition completes, Sky and NEP (the parties) will enter into a ten year non-exclusive supply agreement, under which Sky will acquire outside broadcasting services in New Zealand from NEP.

14. While neither NEP nor Sky are seeking clearance or authorisation for that agreement, we will consider whether the supply agreement may give rise to any potential effect(s) on competition. Such effects could arise in markets for outside broadcasting services or in other markets. For instance, the agreement could affect the ability of other suppliers of outside broadcasting services to enter or expand, if it means that they are unable to compete for Sky's business. In terms of other markets, if the terms of the agreement between NEP and Sky made it unviable for parties to compete against Sky, this could have an impact on competition for sports broadcasting rights.

Without the acquisition

15. NEP submitted that in both the factual and the counterfactual, it will become a significant supplier of outside broadcasting services in New Zealand.[11]

16. We will consider what each of the parties would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition

[8] The Application at [104]-[105].
[9] The Application at [102].
[10] The Application at [134].
[11] The Application at [91].

scenario is best characterised by the status quo, or whether the parties would seek alternative options, for example, finding a different buyer for OSB.

Preliminary issues

17. The focus of our investigation will be to consider whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral effects might result from the Proposed Acquisition.

18. We will also briefly consider whether any coordinated effects might result from the Proposed Acquisition.

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

19. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses. A merger could also reduce competition if one of the merging firms was a potential or emerging competitor.

20. The question that we will be focusing on is would any loss of competition enable NEP to profitably raise prices or reduce quality or innovation of outside broadcasting services by itself?[12]

21. In New Zealand, both parties provide outside broadcasting services largely in relation to sporting and entertainment events.

22. In its Application, 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:[13]

    22.1 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;

    22.2 the Proposed Acquisition would only remove limited competition between NEP and OSB; and

    22.3 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.

23. We will consider:

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

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

23.1 closeness of competition: the degree of constraint that NEP and OSB impose upon one another. To the extent that any constraint is material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors;

23.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;

23.3 entry and expansion: how easily rivals could enter and/or expand; and

23.4 countervailing power: whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

Coordinated effects: does the Proposed Acquisition make coordination more likely?

24. A merger 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 a substantial lessening of competition, which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.

25. We will assess whether the Proposed Acquisition would make coordination more likely, more complete or more sustainable. As part of our assessment we will consider whether any of the relevant markets are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in the relevant markets.

Next steps in our investigation

26. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **23 November 2020**. However, this date may change as our investigation progresses.[14] In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.

27. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

Making a submission

28. 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 **28 October 2020**.

[14] 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.

29. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.

30. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.