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Competition Policy team
Ministry of Business, Innovation and Employment

By email: competition.policy@mbie.govt.nz

Joint Submission on the Discussion Document '*Promoting Competition In New Zealand – A Targeted Review of the Commerce Act 1986*'

1. INTRODUCTION

1.1 This is a joint submission on behalf of Chapman Tripp, MinterEllisonRuddWatts, Russell McVeagh and Webb Henderson. The lawyers involved in preparation of this submission are specialist competition lawyers with significant experience and at least one of our respective firms (or the individuals involved in this submission) has acted for either the applicant or the target in 70% of the clearance applications filed with the Commerce Commission in the last 5 years.[1]

1.2 This joint submission sets out our common views on some of the key issues raised in the Discussion Document relating to the merger control regime under the Commerce Act 1986 (**Act**), and other related issues. A number of our firms will also make separate submissions on the Discussion Document.

1.3 The Discussion Document raises important policy questions and proposes potential changes to the Act. We considered it useful to discuss whether we could form a common position on some of the more substantive issues in the Discussion Document relating to the merger regime and this joint submission is the product of some debate and/or compromise, reflecting a consensus on what we think is best for competition policy and the New Zealand economy.

1.4 Overall, we consider that the merger regime in New Zealand is working well, and that there is no evidence of an inability or failure to address potentially anti-competitive mergers, but there are some improvements that can be made.

1.5 In summary, our common views are:

(a) It is not necessary to provide criteria or further clarity on how to assess effective control or a substantial degree of influence.

(b) The term "*assets of a business*" in section 47 of the Act does not lack clarity, nor is it unduly narrow.

(c) The voluntary merger regime generally works well. Market participants – both domestically and internationally – engage in the Commission's formal and informal review processes responsibly. We therefore do not see a clear case to lower the threshold for Commission intervention in transactions, or to require mandatory notification of certain transactions. Those changes will impose unnecessary public and private costs and undermine the efficient functioning of markets.

(d) There does not generally appear to us to be a clear problem with the status quo, and certainly not a problem that would justify the increase in costs and delay associated with expanding the Commission's powers to intervene.

(e) The Commission does not need a stay or hold-separate power, as the threshold for obtaining an interim injunction is low, and the requirement to persuade an independent decision-maker is a minimal – but important – constraint on the Commission's powers to intervene in

[1] This is for the period 13 December 2019 – 23 December 2024.

markets. The ability to accept behavioural undertakings could alleviate any perceived need for such powers.

(f) We do not think a call-in power would add materially to the Commission's existing enforcement tools.

(g) We support amending the Act to allow the Commission to accept behavioural undertakings to address concerns with a merger or acquisition, including as a condition of clearance or authorisation, or in relation to the enforcement of section 47. The Commission is able to accept behavioural undertakings in relation to other parts of the Act and New Zealand is out of step with other jurisdictions that accept behavioural undertakings in the merger context.

(h) New Zealand's merger regime should incorporate a de minimis threshold, which would provide guidance to firms, particularly smaller firms that tend to operate in small markets, as to when a proposed transaction will not raise competition concerns due to the transaction occurring in a market that falls under the minimum threshold for Commission review. This would reduce the compliance burden associated with merger control and is a way of improving how the merger regime responds to the realities of the New Zealand market.

2. ISSUE 2 – SUBSTANTIAL DEGREE OF INFLUENCE

Do you consider that the current test of 'substantial degree of influence' captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.

2.1 While the Act does not define the factors that make up a "*substantial degree of influence*" under section 47, as the Discussion Document notes, the High Court in *Commerce Commission v NZ Bus* considered shareholdings, rights to appoint directors, the historical relationship between the companies and financial links. In our view that is a comprehensive list of relevant factors. While the judgment does not mention veto rights over strategic decisions, we think it self-evident that this would be relevant to whether one person has a substantial degree of influence over another and does not need statutory recognition.

Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess effective control? If so, how should it be amended? Please provide reasons.

2.2 The current framework for determining a "*substantial degree of influence*" under section 47 lacks clear statutory guidance, creating a degree of uncertainty for merger parties. However, our experience is that the absence of defined statutory criteria does not act as a material barrier for businesses assessing whether a transaction may be captured under section 47, and as such, does not appear to have a deterrent effect on parties pursuing merger opportunities. The Commission's valuable courtesy letter process also provides parties with an opportunity to discuss the transaction and post-merger governance structure with the Commission if the merger parties wish to seek an additional level of comfort and certainty (recognising that this does not provide true legal certainty, given the informal, unbinding nature of that engagement). A prescriptive statutory test would necessarily be complex to take into account the different characteristics and permutations of influence. An over-inclusive test could have the undesirable effect of capturing transactions that do not raise any competition concerns.

2.3 As noted elsewhere in our submission, we would not support the adoption of a mandatory notification regime similar to Australia's, where notification is triggered by the acquirer gaining "control" of the target. We consider that there would be more of a case for clear statutory criteria if New Zealand were to adopt a mandatory filing regime. However, on the assumption that the voluntary regime is retained (which we support), we do not see a need for the Act to be amended to include statutory criteria for the assessment of control.

2.4 As an alternative to a prescriptive statutory test, we have considered whether the introduction of a statutory rebuttable presumption of substantial influence may provide merger parties with greater legal certainty while preserving flexibility. This presumption could apply where key criteria are met, guided by existing case law. Businesses would retain the ability to rebut this presumption by demonstrating that, in the specific circumstances, these factors do not give rise to substantial influence. For example, one rebuttable presumption could be holding 25% or more of the shares in the target company and having the right to appoint more than one-quarter of the directors to its board (on the understanding that a shareholding conferring on the shareholder more than 25% of the voting rights would typically provide the shareholder with a veto right over special resolutions, which require at least 75% of the voting rights in favour of the resolution).

2.5 In practice, however, there are challenges associated with defining thresholds, such as shareholdings. For example, in the *Commerce Commission v NZ Bus* judgment (also referred to in Discussion Document), the Court concluded that a 26% shareholding plus a director appointment (in the context of a board consisting of four directors) did not amount to a substantial degree of influence. It is not clear to us that 26% is materially different to, say, 30%, and therefore adopting a shareholding threshold, even if it is rebuttable, may (wrongly) entrench a view the threshold is the "*magic number*" and have an arbitrary distorting effect on the structuring of minority acquisitions (e.g. if the threshold is 30%, to below 30%). Furthermore, while there may be some efficiency gains at the margins e.g. because parties are able to proceed on the basis of meeting the rebuttable presumption threshold or not without conducting analysis, this does not eliminate entirely the need for additional analysis where there are other factors that might justify the presumption being rebutted.

3. ISSUE 3 – ASSETS OF A BUSINESS

Do you consider the term "assets of a business" in section 47 of the Commerce Act is unclear or unduly narrows the application of the merger review provisions in the Act?

3.1 No, we do not consider the term "*assets of a business*" in section 47 of the Act lacks clarity or is unduly narrow. We disagree with the comments in the Discussion Document that the term could require a focus on "*whether the assets are capable of operating as a business concern*" as such an approach would require an unnatural reading of the plain words of section 47.

If you consider there is a problem, how should the phrase be amended? For example, by:

(a) referring simply to "assets"? or

(b) should the definition of "assets" in the Commerce Act be further refined?

3.2 N/A

4. ISSUE 4 – MERGERS OUTSIDE THE CLEARANCE PROCESS

What are your views on how effectively New Zealand's voluntary merger regime is working?

4.1 We agree with MBIE that the voluntary merger regime works well, that market participants – both domestically and internationally – engage in the Commission's formal and informal review processes responsibly, and that the Commission's monitoring and enforcement strategy when it decides to intervene in a transaction is effective. We therefore do not see a clear case to lower the threshold for Commission intervention in transactions, or to require mandatory notifications of certain transactions. Those changes will impose unnecessary public and private costs and undermine the efficient functioning of markets.

4.2 We do, however, suggest that empowering the Commission to accept hold-separate undertakings from applicants for clearance to allow transactions to partially close while New Zealand merger review is ongoing would add useful flexibility to our merger regime. We explain that proposal further below.

4.3 As MBIE notes, New Zealand has had a voluntary merger regime since 1990. We made a deliberate choice to move away from the mandatory notice requirement included in the original 1986 Act. There are a number of downsides to mandatory/suspensory merger regimes. By definition, mandatory regimes hold up pro-competitive and anti-competitive deals alike. That is a significant barrier to transaction activity and imposes both public and private costs that in many cases will be unnecessary and unjustified. Many New Zealand advisors have had experience with the European Commission's mandatory notification regime. Even the so-called "short" Form CO under the EU's simplified procedure is a substantial exercise. There should be a compelling reason to move away from a voluntary regime or otherwise increase the Commission's powers to intervene.

4.4 Designing appropriate thresholds for mandatory notification is also a significant challenge, particularly in a small economy. Bright line thresholds such as turnover are relatively straightforward to assess and apply, but the fact that a transaction is large says little about its competitive effects. In any event, large deals are unlikely to be missed by the Commission's monitoring programme and so mandatory notification offers little benefits relative to the status quo but substantially increases the private and public costs of M&A activity. On the other hand, thresholds intended to screen for concentrative mergers, such as market share or share of supply, require judgement on the part of the potential applicant (at a minimum the market must be defined). If an acquirer is having to exercise significant judgement to determine whether the threshold applies, the regime in practice is not that different to the status quo. In both cases, engagement with the Commission is contingent on the acquirer making its own assessment of whether the deal sufficiently affects the market that it warrants engagement with the Commission.[2]

4.5 We therefore agree with MBIE's assessment that moving to a mandatory/suspensory regime is not required.

4.6 As regards the options included in the Discussion Document, there are several features of the New Zealand voluntary regime that should be borne in mind.

4.7 First, there are several avenues for merger review in New Zealand: (i) the formal clearance or authorisation regimes, (ii) the informal 'courtesy letter' process, and (iii) investigation and enforcement under section 47 of the Act. The courtesy letter process, in particular, has evolved over the past ten years and is now a well-understood and important component of merger review in New Zealand. The courtesy letter process offers applicants a low-cost means of engaging with the Commission to pre-empt any queries the Commission might have. That incentivises constructive engagement with the Commission in circumstances where reasonable market participants might disagree whether formal clearance is required. While the Commission does not publish statistics on how many courtesy letters it receives, the experience of the authors of this submission is that a significant number of transactions are dealt with under this process, at least in the first instance.[3] Across all those avenues, the Commission's footprint in the M&A sector is already substantial.

4.8 Second, the Commission has an effective market monitoring and enforcement programme, which is a further incentive for market participants to both seek advice and then, if appropriate, engage with the Commerce Commission. The Commission's case register indicates the Commission has undertaken 12 publicly disclosed merger investigations since 2018. This does not include those inquiries the Commission has undertaken that have not progressed to the point where public disclosure is appropriate, or those cases in which parties submitted clearance applications in response to an inquiry from the Commission. Those investigations include both pre-closing intervention (e.g. *Platinum Equity LLC / OfficeMax Holdings Limited*), post-closing proceedings for pecuniary penalties (e.g. *Objective Corporation / Master Business Systems Limited*), and post-closing divestments of assets acquired in breach of section 47 (e.g. *Wilson Parking New Zealand Limited / Penrith Holdings Limited*). That enforcement record suggests both that the Commission's monitoring and enforcement mechanisms are robust, and that there are appropriate tools to address anti-competitive mergers both pre- and post-closing.

4.9 Third, the threshold for intervening in mergers in New Zealand is already low by international standards. Section 47 prohibits mergers that have the "*likely*" effect of "*substantially*" lessening competition. A "*substantial*" lessening of competition is a lessening of competition that is real, of

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[2] One response is: but the current regime is voluntary, so an acquirer may conclude that a transaction lessens competition but nonetheless decide to take the risk. Our experience is that acquirers, both domestically and internationally, tend not to ignore competition law risk. For that small minority that are less compliance-oriented, the fact that notification is mandatory, as opposed to merely prudent, is unlikely to change their decision-making.

[3] If the Commission considers the transaction raises potential competition issues, and is not suitable for resolution via a courtesy letter, it will encourage the parties to apply for clearance.

substance or more than nominal.[4] Contrary to the ordinary understanding of the term "*substantial*", the lessening in competition need not be large. A substantial lessening in competition is "*likely*" if there is a real and substantial risk, or a real chance, that it will occur. It need not be more likely than not.[5] Accordingly, a merger may be prohibited even where there is a less than 50% probability of a merely 'more than nominal' effect on competition. The Act therefore already errs on the side of intervention, deliberately preferring to decline potentially pro-competitive deals rather than to approve potentially anti-competitive deals.

4.10 The threshold for intervention is lower still in an application for interim relief to block closing of a merger. The court adopts a two-stage approach. The first inquiry is whether there is a "serious question to be tried". If that threshold is met, the court moves on to consider whether the balance of convenience favours granting or refusing relief. The inquiry into whether there is a serious issue to be tried is in effect an inquiry into whether there is a "*real prospect*" that the court will ultimately grant relief against the defendant.[6] As a general rule, if the completion of the transaction would crystalise the alleged competition harm, and unwinding the deal at a later date is not feasible, then the balance of convenience will tend to favour interim relief.

4.11 The combined impact of the low threshold for intervention under section 47, the similarly low threshold for obtaining interim relief, and the fact that unlike every other applicant for interim relief, the Commission is not obliged to provide security for any harm caused by the relief sought, means that the Commission does not bear an unduly onerous burden of proof when trying to block completion or integration. Against that background, there is no particularly compelling reason to further strengthen the Commission's powers to intervene in mergers.

Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.

4.12 No, there does not appear to us to be a clear problem with the status quo, and certainly not a problem that would justify the increase in costs and delay associated with expanding the Commission's powers to intervene. We are not aware, for example, of a significant number of allegedly anti-competitive transactions that completed before the Commission could intervene. And even where transactions have completed before coming to the Commission's attention, the Commission has obtained remedies including pecuniary penalties and divestment.

4.13 The Commission's case register shows that the Commission is actively involved in enforcing against non-notified mergers. But the information on the register also shows that:

(a) the number of potentially problematic non-notified mergers is still low in comparison to the number of mergers that are notified to the Commission (12 non-notified merger investigations since 2018 against 84 clearance or authorisation applications).[7] If non-notified mergers were a significant problem, we would expect that investigations would represent a larger share of the Commission's work; and

(b) the majority of the Commission's investigations into non-notified mergers are completed with no action taken (8 out of 12 since 2018), which in turn suggests that there is not a substantial proportion of non-notified mergers (whether investigated by the Commission or not) that present competition risks.

4.14 In theory it is possible that there is a body of transactions out there that were not notified to the Commission, that the Commission has not identified after the fact for investigation, and which lessened competition. But the evidence does not support that conclusion, and our view – as M&A advisors with, collectively, reasonable visibility of a substantial part of all of New Zealand's

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4 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

5 Ibid at [111].

6 *Commerce Commission v Viagogo* [2019] NZCA 472 at [30], [85].

7 This does not include either courtesy letters, which substantially outnumber clearance applications, or non-notified merger inquiries that were not disclosed on the register, so the comparison is incomplete, but our general point is that the evidence is consistent with a culture of compliance with New Zealand's competition laws.

transaction activity – is that there is not such a body of transactions. We therefore do not believe there is a problem with non-notified mergers that warrants a change in approach in the Act.

What are your views on amending the Act to confer additional powers on the Commission to strengthen its ability to investigate and stop potentially anti-competitive mergers? In responding, please consider the merits of each of the options:

a. A stay and/or hold-separate power

4.15 As we understand it, the proposal is that the Commission would have the ability, on its own initiative and without recourse to the court, to stay completion or require the buyer to hold the target business separate until the Commission has concluded its inquiries.

4.16 It follows from the earlier discussion that we do not see a clear case for introducing this power given our conclusion that non-notified mergers do not appear to be a significant problem. It is also worth bearing in mind that this is not a power the Commission needs in the context of clearance applications. The Court of Appeal in the *NZ Bus* case emphasised that, once a party has chosen to apply for clearance:[8]

> *…it is distinctly unwise not to complete the clearance process. It really should be an all-or-nothing situation: go to the Commission and complete the clearance procedure, or do not go at all because anything in between is fraught with risk.*

4.17 The threat of increased penalties if a party chooses to withdraw its clearance application, or close over an outstanding clearance process, is an effective deterrent. To our knowledge, no applicant for clearance since NZ Bus has withdrawn an application or closed over an active Commission investigation.

4.18 Furthermore, as described above, in practice the burden on the Commission in an application for interim relief is low. Affording the Commission the power to stay a transaction on its own initiative implies that the Commission should be allowed to prevent a transaction from going ahead in circumstances where it could not convince a court that there is a "*real prospect*" of a "*real chance*" of a merely "*more than nominal*" lessening of competition. Given the low threshold that applies, the requirement to persuade an independent decision-maker is a minimal – but important – constraint on the Commission's powers to intervene in markets.

4.19 However, we have a different but related proposal that we would like MBIE to consider. We frequently act on global transactions involving notifications in several jurisdictions including New Zealand. Often the New Zealand business is functionally largely separate from the global business. However, seeking clearance from the Commission means the global transaction is unable to complete, even if all other merger processes are completed and New Zealand is the only outstanding condition precedent.

4.20 In those circumstances, there is often a case for allowing the global deal to close while holding the New Zealand business separate. Currently the Commerce Commission does not have a power to accept an undertaking from an applicant for clearance to hold the New Zealand business separate in order to allow the global deal to close while the New Zealand process is ongoing. Obviously to accept such an undertaking the Commission would need to be satisfied that: (i) the New Zealand business is capable of operating independently from the remainder of the global business, and (ii) that closing of the deal outside of New Zealand would not prejudice the Commission's ability to prevent the merger from proceeding in New Zealand (or, more likely, prevent the Commission from obtaining a suitable divestment remedy to address its concerns). But, subject to those points, it would be appropriate for the applicant to offer an undertaking and for the Commission to accept it, and we think the Act should allow for this possibility.

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8 *New Zealand Bus v Commerce Commission* [2007] NZCA 502 at [2-8].

4.21 In contrast to the proposal MBIE is consulting on, under this approach the onus would be on the applicant to offer a hold separate undertaking, rather than empowering the Commission to require a hold separate on its own initiative.

4.22 This could also be addressed through a more general power to accept behavioural undertakings in a clearance process, which is discussed below.

b. A call-in power

4.23 Because we have concluded there is no current problem with non-notified mergers, we equally do not think there is a case for allowing the Commission to call-in a transaction. In any event, we do not think a call-in power would add materially to the Commission's existing enforcement tools. When the Commission decides to commence an investigation into a non-notified merger, it has powers to request information and documents and require the parties to appear and give evidence. This is, for all intents and purposes, equivalent to calling-in the transaction.

4.24 This is in contrast to, for example, the call-in power for strategically important businesses that appears in the Overseas Investment Act 2005. Under that Act, the Overseas Investment Office's powers to inquire into a transaction are narrowly circumscribed. The OIO can only review those transactions for which consent is required and those transactions the Minister decides to call-in. The call-in power is therefore necessary to establish a jurisdiction to review transactions the OIO otherwise would not be able to examine. The Act, on the other hand, gives the Commission broad discretion to inquire into any transaction that it believes may substantially lessen competition.

c. A mandatory notification power for designated companies

4.25 As MBIE has noted, there are significant downsides to mandatory/suspensory regimes. We therefore consider that a rigorous cost-benefit analysis should be undertaken before any proposed change to the voluntary merger regime to include a mandatory notification power is implemented, to ensure that any perceived benefits of such a power will exceed its costs.

4.26 If, following that cost-benefit analysis, it is determined that a mandatory notification power should be introduced for designated companies, the Act should clearly define the criteria that must be met before a company (or industry) can be designated for the purposes of the mandatory notification regime. MBIE should also consider implementing notification thresholds, if a mandatory notification regime for designated companies is introduced to ensure that the Commission is focusing its resources on reviewing more significant transactions that could harm competition, while avoiding scrutiny of smaller deals which are less likely to have such an effect, or deals which may not have any competition implications, such as acquisitions of a minority shareholding or acquisitions of a single business asset.

5. ISSUE 5 – BEHAVIOURAL UNDERTAKINGS

Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?

5.1 We support amending the Act to allow the Commission to accept behavioural undertakings to address concerns with a merger or acquisition, including as a condition of clearance or authorisation, or in relation to the enforcement of section 47. This could be achieved by amending section 69A(1) to remove the words: "*as the case may be, to dispose of assets or shares specified in the undertaking*", and repealing sections 69A(2) and 74B(2) of the Act (other consequential amendments may also be needed).

5.2 As MBIE has identified, New Zealand is currently out of step with other jurisdictions that allow regulators to accept behavioural undertakings in the merger context, including Australia, the European Union and the United Kingdom. We agree with the concerns identified in the 2024 OECD Economic Survey that the Commission's inability to accept behavioural undertakings may prevent some potentially beneficial mergers from proceeding, including global transactions where such undertakings have been accepted in other jurisdictions.

5.3 The Commission already has the power to accept behavioural undertakings for other types of conduct, including anti-competitive behaviour under Part 2 of the Act, and therefore there is no logical reason why the Commission should not be given a power to accept behavioural undertakings to remedy potential issues with a business acquisition or merger. Giving the Commission this power will provide greater flexibility for parties and the Commission to tailor remedies to the specific competition concerns that may arise with a merger leading to more effective and responsive outcomes, and ensuring that competition is preserved without blocking mergers that may offer substantial economic and consumer benefits. Moreover, this flexibility could prevent the overreach of structural remedies, which may be disproportionate (such as in the context of a cross-border merger or where the competition concerns relate to only a small part of the overall transaction), and thus ensure a more balanced and efficient regulatory response.

5.4 While we agree that regulators generally prefer structural remedies over behavioural remedies in the merger context, we disagree with the comment in the Discussion Document that "*behavioural remedies are not as effective than structural remedies*".[9] The effectiveness of a behavioural remedy will depend on the nature and context of the transaction in question. In any event, it will be at the discretion of the Commerce Commission to determine whether an undertaking provided by merging parties will be sufficient to remedy potential competition issues with a merger or acquisition (which would necessarily involve considerations of the Commission's ability to monitor and enforce such undertakings).

5.5 The Discussion Document states that MBIE is considering amending the Act "*to allow the Commission to impose conditions (including accepting behavioural undertakings) as part of an authorisation proceeding only*". We do not consider the ability to accept behavioural remedies ought to be limited to the authorisation process only, and there is no principled reason to do so. If a behavioural remedy would resolve any competition issues such that the Commission is satisfied that the acquisition will not have the effect or would not be likely to have the effect of substantially lessening competition in a relevant market (i.e. that the test for clearance under section 66 of the Act has been met), then the Commission ought to have the power to accept that remedy and grant clearance without the need to undertake a costly, time consuming and complex consideration of the public benefits and detriments of the acquisition as would be required under the authorisation regime.

6. OTHER COMMENTS ON THE MERGER CONTROL REGIME

6.1 Currently the test under section 47 of the Act applies regardless of the size of the transaction or the market affected by the transaction. This means that small and insignificant transactions may face unnecessary scrutiny, diverting attention and resources away from potentially more harmful anti-competitive practices.

6.2 We believe it would be appropriate for New Zealand's merger regime to incorporate a de minimis threshold, to be applied either as a discretionary or mandatory consideration for the Commerce Commission based on the size of the relevant market(s) and the proposed transaction effects.[10] Incorporating a de minimis test would establish a general rule around the minimum size of mergers that would warrant the Commission's review under section 47 of the Act. This would result in mergers falling below this threshold, which are consequently unlikely to have an appreciable effect on the New Zealand economy, not generally being subject to review or investigation by the Commission.

Rationale for a de minimis threshold

6.3 The Commission's resources for enforcement and investigation are limited, and as an expert body they are expensive for the economy to support, so it is important that they are allocated efficiently and effectively to maximise benefits for New Zealand consumers in line with the purpose of the Act. The Commission is able to apply discretion as to how it enforces section 47 or investigates mergers based on their size and potential economic impact, but the size of the transaction is only one factor in the mix, and the Commission has to date prioritised the precedent and deterrent objectives achieved

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[9] Discussion Document at pg. 21.

[10] Plainly, further work would need to be undertaken to determine the correct thresholds, which is outside of the scope of the current consultation, however, we would be happy to provide further comments.

by taking action, ahead of considerations related to the size of the market or the transaction. For example:

(a) The media reporting of the Commission's decline of the AlphaTheta Serato acquisition has noted that the target company, Serato is reported to have an annual revenue in New Zealand of only around $365,000[11], whilst the cost of the Commission's 9-month investigation into the acquisition cost the Commission over $500,000.[12]

(b) The Commission filed proceedings against Alderson Logistics and related company Supa Shavings, alleging a merger of businesses substantially lessened competition for the supply of chicken and goat bedding in the Waikato region, an investigation that appears to also involve small firms and affect a small market.[13]

6.4 This creates a risk that the Commission's expensive resources are used in a way that is disproportionate to the potential harms a merger would cause the economy through a substantial lessening of competition in a small market. It also can lead to an ancillary effect of giving the impression the Commission is unduly penalising small businesses, which does not support its objectives.

6.5 The introduction of a de minimis threshold test would provide the Commission with a policy direction to focus the use of its resources on transactions and markets that have more significant impacts on the economy, which in turn is likely to result overall in achieving benefits for a larger number of New Zealand consumers. It would also avoid public costs that do not result in corresponding public benefits and align with the overarching purpose of the Act to promote competition for the long-term benefit of New Zealand consumers.[14]

6.6 The resources of small firms in New Zealand are also limited. The costs of seeking expert advice in relation to merger review can have the effect of creating a 'regulatory burden' that is overly cumbersome for small firms.[15] Ultimately, in our experience, the cost of compliance for small businesses has the possibility of creating a chilling effect on mergers that could result in greater efficiencies and, in particular, innovation.

6.7 The inclusion of a de minimis threshold test would provide guidance to firms, particularly smaller firms that tend to operate in small markets, as to when a proposed transaction will not raise competition concerns due to the transaction occurring in a market that falls under the minimum threshold for Commission review. This would reduce the compliance burden associated with merger control. We consider that it is important New Zealand's merger regime responds to the realities of the New Zealand market and economy which is characterised by a high concentration of small to medium enterprises[16] that are likely to face difficulties in affording compliance. A de minimis threshold test is a way of improving how the merger regime responds to the realities of the New Zealand market.

Mechanics of introducing a de minimis threshold test

6.8 The de minimis threshold test could be introduced to the Act as a discretionary consideration for the Commission as part of the section 47 assessment, or (the better approach) a legislated minimum level of New Zealand wide turnover (either for the transaction or for the size of market affected) below which section 47 would not apply. The purpose of either approach would be to allow a practice to develop that a firm would not need to seek clearance and a transaction would be

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[11] As reported by the owners of Serato in an interview with the National Business Review (**NBR**) on 20 June 2024.

[12] Pursuant to information released under the Official Information Act at the request of NBR, as explained here.

[13] https://comcom.govt.nz/news-and-media/media-releases/2023/commission-files-proceedings-against-alderson-logistics-limited-over-alleged-anti-competitive,-non-notified-merger.

[14] Commerce Act 1986 s 1A.

[15] For example, it is reported that Serato's legal costs related to the merger clearance application process were over $800,000.

[16] As reported by the Ministry of Foreign Affairs and Trade SMEs account for around 97% of New Zealand businesses and generate over a quarter of New Zealand GDP. See also MBIE's 2022 statistics .

effectively safeguarded from investigation for a breach of section 47 of the Act where the transaction occurs in a market that falls under the minimum market size threshold.

6.9 The United Kingdom's regime contains a discretionary de minimis exception. This allows the Competition Markets Authority (**CMA**) to decide not to refer a merger for an in-depth investigation if it believes the market(s) the merger will affect are not of sufficient importance to justify investigation.[17] Where the market value falls under the minimum threshold[18] the CMA will consider further factors in deciding whether to exercise its discretion not to refer for investigation.[19] We query, however, how much difference such an approach would make if only included in the Commission's enforcement guidelines, which already indicate that the Commission takes such matters into account when deciding whether to take enforcement action, including in respect of mergers.

6.10 If introduced to New Zealand's merger regime as a statutory discretionary consideration, we submit that it would be beneficial, similar to the United Kingdom approach, for the inclusion of further considerations the Commission should take into account when deciding whether to exercise its de minimis discretion. These factors could include whether the merger is of public importance, whether the merger may cause particular harm to consumer welfare and whether the relevant market is expanding. Similarly, if the de minimis test was introduced as a mandatory consideration for the Commission in section 47, a discretionary call-in power could be included in the Act, allowing the Commission to call in mergers where these factors appear to be of concern, notwithstanding the transaction being exempted by virtue of the relevant market size(s).

6.11 It is vital that thresholds set for de minimis transactions are calibrated to the New Zealand economy and are subject to periodic review and adjustment. This could be achieved by the de minimis threshold being set through a regulatory instrument similar to the Initial Pricing Standard under the Retail Payment System Act 2022, which can be reviewed and adjusted by the Commission from time to time, after undertaking a public consultation process.

7. OPPORTUNITY TO DISCUSS

7.1 The collective experience of our respective firms means that we can offer MBIE a uniquely informed perspective on the operation and effectiveness of the existing merger control regime. We would welcome the opportunity to discuss our views with MBIE in person.

Simon Peart / Lucy Cooper	Jennifer Hambleton / Dr Ross Patterson	Petra Carey / Troy Pilkington / Bradley Aburn	Sarah Keene / Jordan Cox
Chapman Tripp	**MinterEllisonRuddWatts**	**Russell McVeagh**	**Webb Henderson**

[17] Competition and Markets Authority *Mergers: Exceptions to the duty to refer* April 2024 at [2.1].

[18] In the UK the threshold is currently whether the annual value of the market in the UK, in aggregate, is more than £30 million pounds annually.

[19] Competition and Markets Authority *Mergers: Exceptions to the duty to refer* April 2024 at [2.3].