Commerce Commission rejects merger of two media heavyweights, citing democracy concerns

NEW ZEALAND

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The New Zealand Commerce Commission (NZCC) has had a busy year so far, blocking two complex, high-profile mergers in the telecommunications and media space. In each case, the respective applicants lodged legal appeals against the NZCC's decision – one of these appeals has since been withdrawn, while the other was to be heard in October.

NZME/Fairfax

On 2 May 2017, the NZCC declined to authorise a proposed merger between Wilson & Horton (NZME) and Fairfax, which would have brought New Zealand's two biggest newspaper networks and online news sites under common ownership. The resulting merged entity would have had a combined monthly reach of 3.7 million New Zealanders, with a news media business that would have included nearly 90 per cent of the daily newspaper circulation in the country, as well as a majority of the traffic to online news.

The parties' application was for 'clearance or authorisation'. This meant that, in the event that the NZCC declined to give clearance (on the basis that it was not satisfied that the merger would not be likely to substantially lessen competition), the transaction could still be 'authorised' on the basis that the public benefits (essentially economic efficiencies) exceeded anti-competitive detriments. The NZCC must grant authorisation 'if it is satisfied that the acquisition will … be likely to result, in such a benefit to the public that it should be permitted, by notice … to grant an authorisation for the acquisition.'

Ultimately, in its draft determination, the NZCC confirmed the view that the proposed merger would be likely to substantially lessen competition (by increasing prices and decreasing quality for both readers and advertisers in markets such as the provision of online national news, Sunday newspapers and community newspapers) in ten New Zealand regions, and would not be of such a benefit to the public that it should be authorised.

A determining factor in the NZCC's decision was the loss in 'plurality' (ie, the range of voices and views in NZ news reporting) that would result if the merger proceeded, and the harm that this would cause to the country's democracy. In the NZCC's press release, Chair of the NZCC, Dr Berry, noted that '[the] merger would concentrate media ownership and influence to an unprecedented extent for a well-established modern liberal democracy. The news audience reach that the applicants have provide the merged entity with the scope to control a large share of the news consumed by a majority of New Zealanders. This level of influence over the news and political agenda by a single media organisation creates a risk of causing harm to New Zealand's democracy and to the New Zealand public.'

The NZCC recognised that NZME and Fairfax face a challenging commercial environment as they transition from traditional news media model to a 'digital first' multi-media strategy. However, it did not agree with the counterfactual scenarios put forward by the applicants, including that they would continue to operate in the short term as separate entities, but that this would 'inevitably lead to the rationalisation or closure of some uneconomic print publications'. While the NZCC agreed that both applicants would increasingly be focused on their developing online news businesses and that their print products would likely diminish in number and comprehensiveness over time, its view was that each business would continue to offer some combination of online and print products over the five-year assessment period for the authorisation.

Public opinion on the NZCC's decision has varied, including as to whether the NZCC was

right in concluding that quantifiable benefits from the merger (potentially up to around NZ$200m over five years) were outweighed by the unquantifiable detriment of loss of plurality and quality.

On 3 May 2017, Fairfax released a statement criticising the NZCC's decision, stating 'the regulator's failure to grasp the commercial and competitive realities of modern media is disappointing… We believe the NZCC has failed New Zealand in blocking two local media companies from gaining the scale and resources necessary to aggressively compete now and in the future… We are carefully reviewing the NZCC's reasons for the decision.' Shortly after, on 26 May 2017, the companies filed an appeal in the High Court, and a ten-day hearing was scheduled for 16 October 2017. In their notice of appeal, NZME and Fairfax argued that the NZCC was wrong in several areas, including (among other things) taking plurality considerations into account – or at least attributing insufficient weight to evidence put forth by the applicants showing that plurality would not be adversely affected.

Sky/Vodafone

As outlined in previous issues of this newsletter, the NZCC announced its decision to decline to grant clearance to a proposed merger of Sky Network Television ('SKY') and Vodafone New Zealand ('Vodafone') on 22 February 2017. The NZCC's written determination was not published until 13 April 2017, but the reasoning within was largely unchanged from the concerns cited in the Letter of Unresolved Issues that the NZCC published on 31 October 2016.

In its determination, the NZCC noted particular concerns with the ability of the merged entity to leverage its market power over premium live sports content to effectively foreclose a significant portion of telecommunications customers from its rivals. It said that, 'we cannot rule out a real chance that the merged entity would have both the ability and incentive to offer Sky Sport subscribers (and those thinking of subscribing to Sky Sport) bundles of pay TV, broadband and mobile services that are more attractive than they would otherwise be able to acquire.' The NZCC concluded that, on the basis of the evidence before it, it had been unable to exclude the real chance that the proposed merger would be likely to substantially lessen competition in both the market for broadband services and the market for mobile services.

On 22 March 2017, SKY and Vodafone lodged appeals against the decision in the High Court, arguing that the NZCC was wrong to find that the merged entity would substantially lessen competition. In their appeal, the companies argued (among other things) that the NZCC failed to properly consider the likelihood that the merged entity's rivals would be able to compete effectively in the broadband and mobile services market and retain their customers without access to SKY's premium sports content.

However, in a joint statement on 26 June 2017, SKY and Vodafone announced their decision to abandon their merger plans, as well as their appeal against the NZCC's decision, stating 'SKY and Vodafone New Zealand will continue to work together to strengthen our commercial relationship for the benefit of the customers and the shareholders of our respective organisations.'

Other New Zealand merger news

After a relatively quiet start to the year on the merger front, the NZCC registered six new clearance applications between 3 March 2017 and 11 July 2017. These included proposed mergers in insurance (Vero/TOWER), community and home healthcare (Healthcare of New Zealand/Geneva Healthcare), ophthalmic lenses (Essilor International SA/Luxottica Group SpA), and online vehicle classified advertising (Trade Me/Limelight Software trading as Motorcentral).