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New Zealand: Comments on the potential review of the Commerce Act 1986

Dear Competition Policy team,

We have great pleasure in enclosing a submission prepared jointly by the Mergers Working Group and the Cartels Working Group of the Antitrust Section of the International Bar Association in response to the public consultation process initiated by New Zealand's Ministry of Business, Innovation and Employment (MBIE) on Potential Changes to New Zealand's Commerce Act.

The Co-Chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with the representatives of the Competition Policy team as appropriate.

Yours Sincerely,

Kyriakos Fountoukakos
Co-Chair Antitrust Section

Julián Peña
Co-Chair Antitrust Section

SUBMISSION TO NEW ZEALAND'S MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT ON POTENTIAL CHANGES TO NEW ZEALAND'S COMMERCE ACT

1. INTRODUCTION

1.1. On behalf of both the Mergers Working Group and the Cartels Working Group of the Antitrust Section of the International Bar Association ("**IBA**") (the "**Working Groups**") this submission is provided in response to the public consultation on potential changes to New Zealand's Commerce Act, as announced by MBIE on December 2024 and described within the consultation paper titled "Promoting competition in New Zealand - A targeted review of the Commerce Act 1986"[1] (the "**Consultation**").

1.2. The Working Groups are grateful for the opportunity to provide these comments to the MBIE for its consideration, and, at the outset, expresses its willingness to be consulted (or to otherwise contribute constructively where possible and as appropriate), in terms of the development of any changes to the merger and cartel enforcement rules and processes, including any related guidelines, in due course.

1.3. The IBA is the world's leading international organisation of legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession throughout the world. The IBA has a membership of more than 80,000 individual lawyers from over 170 countries, including New Zealand, and it has considerable expertise in providing assistance to the global legal community.[2] The IBA Antitrust Section, which is broadly representative of the global antitrust community, regularly makes submissions on developments related to the implementation and refinement of competition laws worldwide.

1.4. The IBA's Antitrust Section includes antitrust / competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The Working Groups' contributions draw on the vast experience of the Section's members in merger control law and practice and cartel enforcement around the world.[3]

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[1] Available at: Discussion document - Promoting competition in New Zealand - A targeted review of the Commerce Act 1986.

[2] Further information on the IBA is available at: http://ibanet.org.

[3] Further information on the Antitrust Section and its Working Groups is available at: https://www.ibanet.org/unit/Antitrust+Section/committee/Antitrust+Section/3001.

2. MERGERS

(A) General Observations

2.1. The Merger Working Group welcomes the efforts in improving the merger control regime in New Zealand and respectfully recommends that the aim should be at striking a balance between preventing anticompetitive mergers whilst not unduly overburdening businesses undertaking M&A activity or expending substantial agency resources reviewing mergers that are unlikely to raise competition concerns. With this, the Merger Working Group respectfully suggests that MBIE assesses, based on evidence, (i) whether some concerns raised by the New Zealand Commerce Commission ("**Commission**") are indeed a result of the current regime; and (ii) whether such concerns might be more appropriately addressed by making incremental enhancements to the existing elements of the current regime rather than undertaking a major regime overhaul. For this purpose, the Merger Working Group encourages the MBIE to consider the experiences of other jurisdictions, both for the relevant competition authorities and merging parties.

2.2. As a general principle, the Merger Working Group believes that there should be a convergence toward agreed best practices by all jurisdictions in terms of the development and operation of merger control regimes, and for this convergence to be rooted deeply in the principles of transparency, consistency, predictability, certainty, and procedural fairness.

2.3. The International Competition Network ("**ICN**") has issued Recommended Practices for Merger Notification and Review Procedures (the "**ICN Recommended Practices for Merger Notification Document**") and the Recommended Practices for Merger Analysis (the "**ICN Recommended Practices for Merger Analysis Document**"), which the Merger Working Group believes are relevant and insightful in the context of considering the implementation of the potential changes to the existing merger rules and processes. The ICN Recommended Practices for Merger Notification Document and the ICN Recommended Practices for Merger Analysis Document are further referred to in this submission where relevant.

(B) The "substantial lessening of competition test"

2.4. The MBIE has noted that the effectiveness of the "substantial lessening of competition test" (SLC) in capturing harmful mergers has shown mixed results over the past decade and thus the MBIE is considering whether the test would merit any changes.

2.5. The options under consideration include maintaining the current approach or aligning with proposed Australian reforms. According to the MBIE, these reforms would: (i) clarify that

the test includes creating, strengthening, or entrenching market power; (ii) allow for the aggregation of acquisitions over a short timeframe to assess their cumulative impact on competition; and (iii) provide clearer guidance for businesses and support the objective of maintaining a Single Economic Market with Australia.

2.6. Best practices indicate that the SLC test should consider whether the merger would significantly reduce competition in the market, not just creating, strengthening or entrenching a dominant position in a static sense. Factors such as potential competition, countervailing buyer power, and efficiencies are considered as well. The elements of "substantial" and "lessening competition" are defined as meaning 'real or of substance' and 'including "hindering or preventing of competition" and thus this test requires a forward-looking approach, comparing the likely future state of competition if the merger occurred to the future state of competition if the merger did not happen, taking into account the counterfactual.

2.7. We understand that recent Commission *ex post* reviews of selected merger cases looked at whether forward assumptions the Commission may have relied on in assessing the proposed merger actually occurred.[4] Some of the findings in these reviews are that the likelihood and extent of potential entry and expansion is commonly overstated by market participants. Additionally, market participants tend to overestimate the ability and likelihood of third parties to exercise countervailing buyer power. Dynamic markets may require alternative analytical frameworks for defining relevant markets and assessing likely competitive effects.

2.8. These reviews highlight the challenges in conducting a forward-looking assessment in dynamic markets. These challenges extend to the complexities of assessing the likely risk of increased coordination in concentrated markets. While these challenges exist, they do not of themselves indicate a failing in the competition test.

2.9. The Merger Working Group respectfully submits that, with regard to the practical experiences in other jurisdictions, the forward-looking counterfactual test is appropriate in identifying merger transactions that result in a substantial lessening of competition.

2.10. The forward-looking counterfactual test is a commonly accepted and adopted test in the assessment of mergers in most jurisdictions, including other voluntary regimes such as the UK and Singapore.

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[4] Commerce Commission, (2023). Ex-post merger review report 2023/24 (available here: https://comcom.govt.nz/__data/assets/pdf_file/0022/344830/Ex-post-merger-review-report-29-February-2024.pdf.

2.11. The review of merger transactions requires competition agencies to conduct competitive effects analysis to identify the transactions likely to harm competition significantly by creating or enhancing market power. This is recognised in the ICN Recommended Practices for Merger Analysis Document, which states that the agency's assessment of the counterfactual should be "*informed not only by the existing conditions of competition, but also by any significant changes in the state of competition likely to occur without the merger*".[5]

Extracts from CMA's Merger Assessment Guidelines (3.6-3.8 and 3.14)[6]

2.12. The Mergers Working Group has extracted below relevant principles relating to the assessment of the counterfactual from the Merger Assessment Guidelines of the Competition and Markets Authority (the "CMA").

> *In determining the counterfactual, the depth of analysis in the CMA's assessment is usually not to the same level as in its competitive assessment. Indeed, in many cases the counterfactual assessment is likely to be brief, although this will vary across cases.*
>
> *The counterfactual is not intended to be a detailed description of the conditions of competition that would prevail absent the merger. Those conditions are better considered in the competitive assessment.*
>
> *The counterfactual assessment will often focus on significant changes affecting competition between the merger firms, such as entry into new markets in competition with each other, significant expansion by the merger firms in markets where they are both present, or exit by one of the merger firms.*
>
> *[…]*
>
> *Establishing the appropriate counterfactual to assess the merger against is an inherently uncertain exercise and evidence relating to future developments absent the merger may be difficult to obtain. Uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual. As part of its assessment, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger firms to pursue alternatives to the merger, which may include reviewing evidence of specific plans where available.*

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[5] Section IV(A) at page 16 of the ICN Recommended Practices for Merger Analysis Document.

[6] CMA Merger Assessment Guidelines 18 March 2021, CMA 129: Merger Assessment Guidelines (CMA129) (publishing.service.gov.uk).

2.13. The Competition Appeal Tribunal's 2022 judgment in *Meta / Giphy* also provides insights into the way the counterfactual should be assessed in respect of dynamic competition.[7]

2.14. The CMA's forward looking counterfactual test does not appear to have made it harder for the UK competition authority to find an SLC - with a relatively high enforcement rate in respect of those cases reviewed. Of the seven Phase 2 decisions in 2022, only two were unconditionally cleared, two were blocked, two remedied and one abandoned.

The counterfactual test is effective in identifying merger transactions with competition law issues in Singapore

2.15. The focus of the analysis of the Competition and Consumer Commission of Singapore (the "CCCS") is on evaluating the impact of the merger in Singapore and how competition between the merger parties and their competitors may change as a result of the merger. In its review of whether a particular merger transaction results in a substantial lessening of competition, CCCS will evaluate the competitive situation, with and without the merger. This is known as the counterfactual test, and the applicability and use of this test is ubiquitous and unchallenged in Singapore. The Merger Working Group has extracted relevant principles relating to the identification of the appropriate counterfactual based on CCCS' Guidelines on the Substantive Assessment of Mergers below (4.14-4.24):

> 4.15 *Typically, where the substantive assessment is conducted prior to the completion of the merger situation or shortly thereafter, the relevant counterfactual is forward looking. The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable. A counterfactual should not involve a violation of competition law.*
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> 4.16 *In most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition, as this may provide a reliable indicator of future competition without the merger. However, in some cases, status quo may not be the appropriate counterfactual. CCCS may need to take into account likely and imminent changes in the structure of competition in order to reflect as accurately as possible the nature of rivalry without the merger.*
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> 4.23 *CCCS will consider all available evidence to decide on the relevant counterfactual.*
>
> 4.24 *The focus of CCCS's analysis is on the effects that the merger situation has on competition. Competition concerns that do not result from the merger situation under consideration and are likely to exist in the counterfactual are outside CCCS's remit in merger assessment.*

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[7] Competition Appeal Tribunal [2022] CAT 26: 1429/4/12/21 Meta Platforms, Inc. v Competition and Markets Authority - Judgment | 14 Jun 2022 (catribunal.org.uk).

2.16. The application of the forward-looking counterfactual test remains effective and gives effect to identifying and enforcing against merger transactions that adversely affect the competition incentives and abilities of the merger parties and their competitors in Singapore. This forms a key focus of CCCS's analysis.[8]

(C) Serial Acquisitions

2.17. The Commission has expressed concern with serial (or creeping) acquisitions. Specifically, the Commission and the MBIE note that New Zealand, like many other countries, has experienced serial or roll-up strategies in sectors such as veterinary and funeral-related services. These strategies can lead to supply efficiencies and consumer benefits, but there is a risk that, over time, an unchecked series of consolidations will harm competition. Section 3(7) of the Commerce Act permits the aggregation of other conduct or arrangements by the relevant parties when assessing certain anticompetitive arrangements or conduct. The proposed changes would include the introduction of a creeping acquisition provision for the merger regime seeking to ensure consistency in applying the 'substantial lessening of competition' test to help address the potential cumulative impact of multiple small acquisitions on market competition.

2.18. The Consultation aims to provide that acquisitions by the acquiring party in the past three years for target firms supplying or acquiring the same goods or services may be combined when assessing the competition impact of the current acquisition (creeping acquisitions). The issues raised relate to the possibility that small-scale mergers or acquisitions that individually do not significantly alter market concentration, when followed by a series of other smaller mergers, can collectively lead to substantial market power and reduced competition.

2.19. In this way, creeping acquisitions could allow firms to incrementally increase their market share without triggering regulatory scrutiny that a single large merger might attract. Over time, this could lead to market concentration, reducing competition and potentially leading to higher prices, reduced innovation, and fewer choices for consumers. The concerns expressed by the Commission and the MBIE relate to the fact that traditional merger control provisions often focus on the competitive impact of individual transactions. However, they may not adequately capture the cumulative effect of multiple small acquisitions. This approach can result in regulators approving a series of transactions that, when viewed collectively, significantly lessen competition.

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[8] CCCS Guidelines on the Major Provisions, paragraph 6.6.

2.20. The Organization for Economic Cooperation and Development ("**OECD**") has sponsored a series of policy papers on "**Serial Acquisitions and Industry Roll-ups**". When discussing measures to enable competition authorities to monitor and address future serial acquisition activities, the OECD highlighted the use of remedies, exemplifying with precedents from the US and Brazil:[9]

> *Moving away from broader legislative measures, some jurisdictions have utilised remedies in specific contested merger cases to enable them to monitor and potentially address future serial acquisition activity by certain companies. These expand the circumstances under which the company must inform the authority of future acquisitions, and in some scenarios, seek their prior approval. For example, in the US, in reaching its recent settlements with JAB Consumers Partners, which were outlined in detail in Box 2.5, the FTC put in place somewhat controversial notification and pre-approval requirements for JAB.*
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> *In the case of the Sage acquisition, the settlement included a requirement for JAB to notify the FTC of any future acquisition, within the next ten years, of any emergency or speciality veterinary clinic located within 25 miles of a JAB-owned clinic anywhere in the US, despite the fact that the markets of concern in the FTC's complaint were limited to a narrower set of speciality veterinary services in Texas and California only (see also (Kattan, Breed and Battaglia, 2022)). JAB is also required to seek prior approval for any acquisition of a specialty or emergency veterinary clinic within 25 miles of a JAB-owned clinic in California or Texas. Similar conditions were agreed in relation to JAB's acquisition of Ethos.*
>
> […]
>
> *In Brazil, remedies have also been used by the authority to assist it to both monitor and slow the pace of serial acquisition activity. In 2018, following a complaint by a market participant, the Brazilian authority, CADE, assessed the acquisition of All Chemistry do Brasil Ltda. by SM Empreendimentos Farmacêuticos Ltda, which were both active in the pharmaceutical input distribution market. The complaint raised a concern that previous acquisitions by the acquirer's parent company had already resulted in significant market consolidation, and that the firm was undertaking a deliberate strategy of sequential acquisitions that would not trigger notification thresholds. In clearing the acquisition, CADE imposed remedies preventing SM Empreendimentos from making any further acquisitions in the same market within the following two years and requiring it to notify the authority of any further acquisitions in the following four years. CADE considered that the remedies were an appropriate mechanism "to solve the competitive problem, which resides not specifically in the effects of this operation in isolation, but*

[9] See OECD (2023), Serial Acquisitions and Industry Roll-ups, OECD Competition Policy Roundtable Background Note, http://www.oecd.org/daf/competition/serial-acquisitions-and-industry-roll-ups-2023.pdf. Pages 25-26.

in the movement of acquisitions seen over the last few years".

2.21. The use of ex-post remedies could, in certain circumstances and with appropriate attention to fair process and uncertainty for merger parties, be an option for addressing issues arising from serial acquisitions, restore competition, and prevent future breaches. In the examples cited by the OECD in the extract transcribed above, both the US and the Brazilian authorities decided to impose only behavioural remedies that required the serial acquirer to refrain from pursuing new acquisitions in the market concerned for a certain pre-determined period (more specifically, two years in the case of the CADE's precedent) and/or to notify the competition authority of any future acquisition affecting the markets concerned within a certain time frame (five years in the case of the CADE's precedent; and ten years in the case of the FTC's precedent). By using that type of behavioural remedies the agencies created mechanisms that allowed them to monitor future conduct and market conditions without the need for a more intrusive enforcement action.

(D) Behavioural Remedies

2.22. The Commission also expressed the wish to include the possibility to use behavioural remedies when assessing merger cases, as explained on Issue 5 of the Promoting competition in New Zealand - A targeted review of the Commerce Act 1986 document. Until now, the Commission is only able to accept undertakings to divest assets or shares from merging parties to address competition concerns. This restriction applies in the merger clearance and authorisation setting, and in resolving legal proceedings in relation to enforcement merger investigations.

2.23. The 2024 OECD Economic Survey of New Zealand[10] recommends allowing the Commission to accept behavioural undertakings. The Mergers Working Group shares the OECD's opinion that the current inability to accept behavioural undertakings may result in it preventing some potentially beneficial mergers from proceeding subject to acceptable behavioural undertakings. Even though crafting behavioural remedies to cover all potential scenarios can be complex, requiring ongoing monitoring to ensure compliance by the merged entity in the months and years post-merger and sustained oversight of a company's behaviour is a task that competition agencies may not be well-equipped to undertake, behavioural remedies are better suited for vertical and conglomerate mergers, in which structural remedies may not be effective or proportional.

2.24. According to the ICN, a formal, written document imposing remedies should clearly identify, provide notice to, and bind the entities subject to its terms. These terms must be sufficiently clear and precise to offer adequate guidance to the parties concerned for

[10] OECD (2024), *OECD Economic Surveys: New Zealand 2024*, OECD Publishing, Paris, https://doi.org/10.1787/603809f2-en.

implementing the remedy.[11] The antitrust agency's interference should be limited to merger-specific harms, and not otherwise.

2.25. Additionally, the remedy order should incorporate provisions enabling the competition agency to monitor compliance and ensure full implementation of the order.

2.26. Once a suitable remedy has been designed, the OECD suggests that authorities establish effective methods for overseeing its implementation by the parties concerned. Competition authorities frequently enlist trustees and third-party stakeholders to aid in ensuring compliance with merger remedies. Whether the remedies are structural, behavioural, or a blend of both, the authority must exercise a certain degree of supervision to guarantee their successful implementation.[12] To ease the burden on the authority, third parties are often engaged to assist in the remedy implementation and monitoring process.

(E) The concepts of "substantial degree of influence" and "assets of a business"

2.27. Section 47 of the Commerce Act prohibits acquisitions that substantially lessen competition. In cases relating to a takeover or full merger between the parties, control of the acquired business or assets is clearly transferred, and the acquired firm ceases to act independently, as the merged parties are no longer distinct.

2.28. However, this assessment becomes more complex in the cases of partial acquisitions of shares or assets that do not result in entities becoming 'interconnected' bodies corporate as defined in Section 2(7) of the Commerce Act.

2.29. The Commission's Mergers and Acquisitions Guidelines outline that mergers can sometimes involve a firm (directly, indirectly or jointly) acquiring partial control of a target firm or assets. Such mergers can result in a substantial lessening of competition if they give the acquirer a "substantial degree of influence" over the target firm's business decisions, and that influence can be used to harm competition.

2.30. As of now, the assessment of the extent of influence between merging parties to establish if an acquisition contravenes the prohibition is done on a case-by-case basis. Some factors can be taken into consideration when assessing a "substantial degree of influence", such as parties' shareholdings, rights to appoint directors, the historical basis of the relationship between the companies and any significant financial links.[13]

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[11] See ICN Recommended Practices for Merger Notification and Review Procedures, page 40, Comment 1.

[12] OECD. Policy Roundtables – Remedies in Merger Cases. 2011. Page 13. Available at https://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf.

[13] See, for example, Commerce Commission v New Zealand Bus Ltd (2006).

2.31. As highlighted by the MBIE on the "Promoting competition in New Zealand - A targeted review of the Commerce Act 1986" document, another issue that merits clarification in the Commerce Act is the treatment of "assets of a business". Section 47 of the Commerce Act prohibits acquisitions of "assets of a business" or shares that would or would be likely to substantially lessen competition. The terms 'assets' and 'business' are defined in Section 2(1) as follows:

- "*assets*" includes intangible assets;
- "*business*" means any undertaking "*that is carried on for gain or reward; or in the course of which goods or services are acquired or supplied otherwise than free of charge*".

2.32. In spite of the definitions above, the phrase "assets of a business" in the Commerce Act is ambiguous, leading to uncertainty in acquisitions of assets like machinery, licenses, quotas, or undeveloped land. This ambiguity arises because it is unclear whether the term refers to any assets held by a business or specifically to those capable of operating as a business concern.

2.33. The definitions of "assets" and "business" in the Commerce Act do not clearly outline the scope of assets covered by section 47, especially in partial acquisitions. If an acquisition does not relate to a business activity, it may fall under Part 2 of the Act, which deals with contracts or arrangements that substantially lessen competition. However, Part 2 does not engage the Commission's merger clearance regime, and remedies for anticompetitive arrangements do not include divestment orders.

2.34. The Mergers Working Group welcomes the Commission's effort to provide more clarity on these topics, which would include setting out clear criteria for assessing degrees of influence and the term "assets of a business".

2.35. The ICN suggests that jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws.[14] These definitions may include categories of transactions, such as share acquisitions and assets acquisitions, and/or to broader concepts, such as the acquisition of "control" or of a "competitively significant influence," as defined by the reviewing jurisdiction. When jurisdictions opt for broader concepts, like the substantial degree of influence test established in New Zealand's merger rules, they should seek to maximize legal certainty and predictability, in particular through a consistent and transparent decision-making practice, and the use of guidelines or informal guidance.

2.36. Specifically regarding acquisitions of assets, jurisdictions should seek to clearly define in what circumstances asset acquisitions are considered sufficiently material to merit inclusion

[14] See ICN Recommended Practices for Merger Notification and Review Procedures, pages 1 and 2.

within the scope of their merger laws. The definition should screen out asset acquisitions that are unlikely to affect competition.

2.37. In Brazil, the Administrative Council for Economic Defense ("**CADE**", in its Portuguese acronym) was recently consulted by Manz Empreendimentos Ltda., active in the real estate sector, and Bompreço, a subsidiary of the Carrefour group.[15] Manz was the potential acquirer of a non-operational asset form Bompreço, which Manz stated would be used for activities different from those previously conducted by Bompreço.

2.38. CADE decided that asset acquisitions are subject to mandatory merger review in Brazil if the asset in question is part of an active commercial establishment, has installed productive capacity that can be utilized by the buyer, includes other assets, or is subject to regulatory limitations making it essential. CADE emphasized that competition authorities should not analyze transactions that do not impact market structure or consumer welfare, and that the merger review regime should target operational productive assets, while non-operational asset transfers without directly usable productive capacity are merely patrimonial transfers. The sale of the property in question did not include tangible assets or business activities, making it a simple real estate transaction not subject to notification.

2.39. With respect to the European Union, (the "EU"), a concentration, as defined in Article 3(1)(b) of the EU Merger Regulation (Regulation 139/2004, henceforth referred to as the "EUMR"), occurs when there is an acquisition of control. "Control" fundamentally pertains to the capacity to exert "decisive influence" over an enterprise through rights, contracts, or alternative mechanisms. Control may be obtained by the acquisition of assets, or via a contractual arrangement that grants rights over the management and resources of the other entity, analogous to those obtained through the purchase of assets.

2.40. The subject of control may include undertakings that are legal entities, their assets, or even a portion of those assets. Consequently, a concentration may occur when only certain assets of an entity, such as intellectual property rights (trademarks, patents, or copyrights), are acquired or licensed exclusively, provided that these assets form a business with a market presence to which a market turnover can be distinctly attributed.[16]

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[15] Consultation No. 08700.007814/2024-75.

[16] In M.8672 easyJet/Certain Air Berlin Assets (12 December 2017), the target assets were previously part of Air Berlin's operations at Berlin Tegel airport, encompassing slots, overnight parking stands, and relevant customer bookings. Similarly, in M.8633 Lufthansa/Certain Air Berlin Assets (21 December 2017), the target assets primarily included aircraft, crew, and an airport slot package. The Commission determined that, in both instances, the assets represented a business with market presence, allowing for the attribution of market turnover.

(F) Mergers outside the clearance process

2.41. The Commission has an active enforcement programme for non-notified mergers. While the Commission has successfully blocked some mergers, investigating a merger outside of the clearance process and taking an enforcement proceeding presents challenges. For example, when mergers move quickly or involve non-public companies, it may be difficult to gather evidence for injunctions, closed mergers can be hard to unwind, and competition may be impaired in the interim.

2.42. The 2022 OECD Economic Survey of New Zealand noted these risks and recommended granting the Commission a "call-in" power to order merger parties to apply for clearance whenever the Commission sees a risk the proposed merger could substantially lessen competition. It recommended that this call-in power should be complemented with a power to halt the integration of the merger parties until the Commission had completed its investigation.

2.43. As noted by the MBIE, the voluntary regime in New Zealand is effective, with the Commission detecting most non-notified mergers through monitoring and complaints. The voluntary regime allows the Commission to focus on high-risk mergers without minimum thresholds, providing flexibility to allocate resources based on transaction size and complexity. A mandatory regime would require significant additional resources due to the volume of technical filings.

2.44. The Mergers Working Group agrees that the Commission should maintain its voluntary mergers review regime if it is working well. Other jurisdictions that employ well developed and reliable voluntary systems are the United Kingdom and Singapore.

2.45. The UK has a voluntary and non-suspensory regime. It has existed for decades and is considered to work well based on certain factors.[17] In 2021, the UK government launched a consultation on the UK's competition regime, including its merger control regime. The government concluded that it would retain the voluntary regime in light of the considerable overall cost savings to significant numbers of businesses that do not undergo merger review in the UK, unlike in comparable jurisdictions.[18]

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[17] Note, the mergers reforms expected in 2024 will introduce a notification requirement for firms with 'strategic market status' to report a merger / relevant transaction to the CMA.

[18] Reforming Competition and Consumer Policy: Government Response to Consultation Presented to Parliament by the Secretary of State for Business, Energy and Industrial Strategy by Command of Her Majesty April 2022. Reforming competition and consumer policy: government response to consultation (web accessible PDF) (publishing.service.gov.uk).

2.46. In its April 2023 impact assessment of its proposed reforms to the merger regime, the UK government noted the following:

The UK's voluntary notification regime is a key feature of the framework, with the CMA investigating roughly 60 transactions per year which is significantly less than comparable mandatory regimes. For example, in 2020 Germany's Federal Cartel Office (FCO) which operates a mandatory notification regime reviewed roughly 1,200 cases. In 2019/20, the CMA reviewed a total of 62 cases, for context, in the same period the Office for National Statistics (ONS) reported 881 mergers and acquisitions involving UK companies worth £1 million or more (the total number including firms worth under £1 million would be larger). This demonstrates that the CMA formally reviews only a small portion of all merger and acquisition (M&A) activity in the UK. This provides more certainty to businesses pursuing a benign merger that the majority of transactions will not undergo the costs of merger review in comparison to a scheme with broader jurisdictions. Therefore, if the regime is to retain the benefits to business of reviewing relatively few mergers, the jurisdictions must reflect those transactions likely to raise a competition concern as opposed to capturing a broad range of mergers which are likely benign.[19]

2.47. The April 2023 impact assessment of proposed reforms to the merger regime also noted that the UK government "*seeks to have a merger control system that imposes proportionate requirements on benign or low risk mergers while ensuring robust scrutiny of mergers that raise potential concerns. The objectives of the reforms proposed are to help the UK merger control system operate more effectively:*

4.7.1 Ensure the UK's merger control regime is focused on mergers which are likely to cause harm to consumers and markets, whilst reducing or removing the burden to businesses where transactions are less likely to be harmful.

4.7.2 Reduce the time and costs of merger review faced by businesses during self-assessment and provide greater clarity and certainty to businesses about when they will be covered by the UK's merger control regime.

4.7.3 *Improve market efficiency and consumer outcomes through increased competition*".[20]

2.48. Singapore also has a voluntary and non-suspensory regime. It is recognised that the competition and merger control regime in Singapore is modelled with the need to "*balance regulatory and business compliance costs against the benefits from effective competition*" in mind.

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[19] Paragraph 6, Reforms to Merger Control IA No: BEIS057(F)-22-CCP RPC: Reforms to merger control: annex 3 impact assessment (publishing.service.gov.uk).

[20] Paragraph 31, Reforms to Merger Control IA No: BEIS057(F)-22-CCP RPC: Reforms to merger control: annex 3 impact assessment (publishing.service.gov.uk).

Instead of attempting to catch all forms of anticompetitive activities, the principal focus is on those mergers that have an appreciable adverse effect on competition in Singapore or that do not have any net economic benefit.[21] The voluntary merger regime best gives effect to this principle, as firms would not be mandated to seek approval or to notify the CCCS of any merger, and only mergers that substantially lessen competition and have no offsetting efficiencies are prohibited. This reduces the business costs for unproblematic mergers, while also allowing CCCS to utilise its resources to take necessary enforcement action against mergers that lead to competition law issues.[22]

2.49. Notably, the voluntary merger regime in Singapore also ensures that there is effective enforcement in this jurisdiction against consummated mergers that are anticompetitive. In Singapore, this is achieved through a multipronged approach of (i) a voluntary notification regime; (ii) prompt and strict enforcement action against errant merger parties; (iii) the power to impose financial penalties as a punishment and deterrent; and (iv) wide powers to impose remedies to restore competitive outcomes, or at least contestability, even if the merger cannot be completely reversed.[23]

2.50. Enforcement by CCCS has historically been robust but targeted. To date, there have been 106 mergers reviewed or under review by CCCS. In the past five years (2019 to 2023), five out of 33 (or approximately 15%) of merger notifications have proceeded to a Phase 2 review (or were notified of CCCS's intention to move into Phase 2).

2.51. In the absence of a notification, CCCS may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for suspecting that Singapore's Competition Act 2004 has been infringed or will be infringed. The CCCS's powers to investigate a transaction and to impose fines and/or directions is evergreen, and CCCS can, and has done so, even after the transaction has closed for several years. Indeed, CCCS has called in several mergers over the years at various stages, including where it believes there are real risks despite no transaction being entered into.

2.52. With regard to the establishment of call-in powers, the Mergers Working Group proposes that, like other jurisdictions with voluntary regimes, the Commission should only be

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[21] The Senior Minister of State for Trade and Industry (Dr Vivian Balakrishnan), Col. 86 Second Reading of the Competition Bill: https://www.cccs.gov.sg/~/media/custom/ccs/files/media%20and%20publications/speeches/second%20reading%20speech%20for%20the%20competition%20bill%20by/19oct042ndreadingspeechfinal.ashx.

[22] Organisation for Economic Co-operation and Development (OECD), "*Disentangling Consummated Mergers – Experiences and Challenges – Note by Singapore*" (2022), page 4: https://one.oecd.org/document/DAF/COMP/WD(2022)44/en/pdf.

[23] Organisation for Economic Co-operation and Development (OECD), "*Disentangling Consummated Mergers – Experiences and Challenges – Note by Singapore*" (2022), page 7: https://one.oecd.org/document/DAF/COMP/WD(2022)44/en/pdf.

allowed to call for mergers to be notified within a specified period of time from the date of the implementation of the transaction.

2.53. The Merger Working Group also encourages elaboration on the types of transactions that may be seen as raising competition concerns and have a significant effect on the market structure to minimize uncertainty around how such powers will be enforced by the Commission.

2.54. While the ability to call-in unnotified transactions is fundamental to the Commission's ability to effectively mitigate the competition concerns posed by a problematic merger transaction, the Mergers Working Group also respectfully stresses that such powers, particularly when used extensively and without prior warning, can be significantly disruptive to the merger parties' legitimate interests in ensuring predictability and certainty related to the timing of their proposed transaction. This need for restraint against extensive use of such call-in powers is reflected in the ICN Recommended Practices for Merger Notification Document, which recognises that merger investigations should be conducted in a manner that promotes an effective, efficient, transparent and predictable merger review process, and competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties.[24] Jurisdictions should adopt mechanisms allowing for flexibility in their review of transactions, and competition agencies should seek to limit the information sought from parties to transactions that do not appear to present material competitive concerns.[25]

2.55. For example, under the UK's current regime, a qualifying transaction only falls within the CMA's jurisdiction (and therefore may be reviewed by the CMA, either further to being voluntarily notified by the parties or as a result of being called in for review by the CMA) where:

4.10.1 the enterprise being acquired has turnover in the United Kingdom exceeding GBP70m (the 'turnover' test); or

4.10.2 the merger itself creates or enhances a 25 per cent share of supply or purchases of any goods or services in the United Kingdom, or in a substantial part of the United Kingdom (the 'share of supply' test).

2.56. While the turnover test is straightforward to apply, the share of supply test is less so. The test is not a market share test and allows wide discretion in describing the goods or services,

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[24] Section VI(A) at page 18 and VI(E) at page 20 of the ICN Recommended Practices for Merger Notification Document.

[25] Section V(B) at pages 15 and 16 of the ICN Recommended Practices for Merger Notification Document.

which need not amount to relevant economic markets and may differ from the relevant economic market identified for the purposes of the CMA's substantive assessment of the merger.

2.57. As a result, the share of supply test may create a degree of unpredictability for merging parties when self-assessing whether the regime applies and if so, whether to notify the CMA. Furthermore, such a test is arguably not consistent with ICN Recommended Practices for Merger Notification Document, which state that notification thresholds should be "*clear and understandable*" and "*based on objectively quantifiable criteria*".[26]

2.58. The CMA recently indicated that it would be bringing forward proposals to clarify certain concepts and use them in a more precise manner, as part of an overall initiative to further improve the predictability and process of its voluntary merger review regime. The broad share of supply and material influence tests in the UK regime are identified as areas in which further guidance will be provided to reduce uncertainty for businesses.[27]

2.59. In Brazil, Law No. 12.529/2011 (the "**Brazilian Competition Law**") establishes a mandatory merger review regime. The Brazilian Competition Law also stipulates that, even if a merger does not meet the mandatory filing thresholds, CADE is allowed to require the submission of those mergers within one year from the closing date, in the event the authority has reasons to believe that the unreported transaction is likely to give rise to competition concerns in Brazil.

2.60. If CADE is interested in calling in an unreported transaction, it will first open a preliminary investigation, which is usually confidential, and will send the relevant companies a Request for Information asking them to explain why a filing was not made, and to provide a brief explanation about horizontal overlaps and vertical links arising from the transaction and relevant market shares. If the information made available publicly, by competitors/clients (in situations where a complaint is made) and by the parties indicate that the transaction at issue merits further review, CADE will order the parties to make a formal filing; if not, the investigation is then closed. In cases in which CADE orders the parties to make a formal filing, the transaction is from then on reviewed by CADE the same way that any other transaction submitted for merger review is.

2.61. While there are numerous cases in which CADE has opened a preliminary investigation to look into a given transaction and check whether further antitrust scrutiny would be

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[26] ICN Recommended Practices for Merger Notification Document, II(D) and (E): Microsoft Word - ICN NP Recommended Practices I-XIII.doc (internationalcompetitionnetwork.org).

[27] https://competitionandmarkets.blog.gov.uk/2025/02/13/new-cma-proposals-to-drive-growth-investment-and-business-confidence/

required, since the enactment of the Brazilian Competition Law in 2012, there have only been eight occasions in which the Brazilian enforcer ultimately concluded that the parties needed to make a formal filing of the transaction.[28] This shows that CADE uses its call-in powers moderately and exceptionally.

3. ANTICOMPETITIVE CONDUCT

(A) General Observations

3.1. The Cartel Work Group ("**CWG**") welcomes efforts to ensure that New Zealand's cartel regime remains fit for purpose and responsive to new challenges facing cartel enforcement globally. As described in this section, several jurisdictions provide exemptions for certain categories of pro-competitive agreements that bring about efficiencies and have also issued guidance concerning certain types of agreements distinguishing between benign cooperation between competitors and conduct that is more akin to a classic cartel. Authorities have recently in particular issued guidance with regard to sustainability agreements concerning their approach to such agreements. With respect to "concerted practices", international examples are more mixed. Some jurisdictions prohibit "concerted practices" and see such prohibitions as essential to combating emerging concerns around information sharing and algorithmic price fixing. Others maintain a narrower enforcement regime that depends on proof of an agreement or arrangement among competitors. The ongoing diversity demonstrates that prohibitions on non-agreement conduct, such as prohibitions on "concerted practices" need to be carefully considered and tailored to ensure that they do not capture and chill potentially procompetitive conduct. Whilst most jurisdictions seek to exempt agreements between competitors which have a net economic benefit or economic efficiencies, there are some which take a different approach. In Japan, for example, under the Japanese Antimonopoly Act, there are exemptions from cartel laws for beneficial cooperation between competitors, which relate to specific industries such as certain type of insurance business, transportation services in rural areas for the purpose of maintaining transportation services for residents, cooperations at small and medium business associations. Those exemptions need to be based on specific laws and to be approved by the relevant ministry, and some of them are subject to discussions with and consent from the Japan Fair Trade Commission (the "JFTC") to be effective. In case where the exemptions are subject to the approval by the relevant ministry, the exemptions should be notified to the JFTC. The current trend is to reduce the number of these exemptions generally, but still, there are some exemptions existing.

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[28] Proceedings No. 08700.006497/2014-06 (Greca Distribuidora de Asfaltos Ltda., Betunel Indústria e Comércio Ltda. and Centro Oeste Asfaltos Ltda.); No. 08700.009828/2015-32 (Guerbert Produtos Radiológicos Ltda. and Mallinckrodt do Brasil); No. 08700.006355/2017-83 (SM Empreendimentos Farmacêuticos S.A. and All Chemistry do Brasil Ltda.); No. 08700.005079/2019-06 (Sacel-Serviços de Vigilância e Transporte de Valores Eireli and Prosegur Brasil Transportadora de Valores e Segurança S.A.); No. 08700.003903/2020-19 (Fleury S.A., Sabin Medicina Diagnóstica S.A. and Wang & Andrade Informática, Comércio e Serviço Ltda.); No. 08700.006454/2023-11 (Connexio Participações Ltda. and Schwabe International SE); No. 08700.004240/2023-01 (MM Turismo & Viagens S.A. and 123 Viagens e Turismo Ltda.); and No. 08700.007319/2024-66 (Sintokogio, Ltd. and Elastikos (France) S.A.S.).

(B) Exemptions for Certain Types of Beneficial Cooperation

3.2. Many international jurisdictions exempt certain types of potentially beneficial agreements from their cartel provisions on policy grounds. As described below, these have traditionally been based on considerations of economic efficiency or exemptions for export cartels. More recently, some jurisdictions – we discuss the Netherlands and Singapore specifically – have expanded these traditional exemptions to sustainability agreements and provided specific guidance concerning them which tries to provide a framework for assessing such agreements and deciding whether they have effects on competition and, if so, whether their efficiency-enhancing effects outweigh any harm to competition such that the agreement could be deemed to be overall compatible with the competition laws prohibiting anticompetitive agreements.

3.3. The Cartel Working Group recognizes the important goal of sustainability. Whether competition law has a role to play in this regard is subject to debate with some authorities opting not to issue specific exemptions or guidelines regarding sustainability agreements and other authorities issuing guidance that at least aims at providing a framework to assess the compatibility of sustainability initiatives with competition laws. Ultimately, whether to exempt sustainability agreements from cartel laws is a question of policy best left to the jurisdiction in question, namely for the purposes of the present consultation New Zealand. Should New Zealand decide that an exemption is an appropriate tool to achieve its policy goals, the Cartel Working Group would point the authority to the guidance provided recently by other authorities including the European Commission, the Dutch, and Singapore competition authorities. We focus below on the Dutch and Singaporean approaches in particular as examples that the Working Group believes provide an effective framework for analysing such agreements and have resulted in practical outcomes for specific collaborations already.

3.4. By way of background, European competition law provides an example of the more traditional approach to exemptions for certain types of agreements based on economic benefit considerations. (Article 101(3) TFEU exempts agreements, concerted practices and decisions of associations of undertakings that would otherwise be prohibited if they fulfil the following four cumulative conditions:

(a) they contribute to improving the production or distribution of goods or to promoting technical or economic progress (efficiency gains)
(b) they allow consumers a fair share of the resulting benefits
(c) they impose only restrictions that are indispensable (i.e., proportionate to the benefits obtained)
(d) they do not eliminate competition in a substantial part of the relevant market

3.5. Generally, the exemptions are based on a self-assessment regime, meaning that undertakings must ensure that the exemption criteria are met without prior approval by the European Commission.

3.6. India is another example, its Competition Act, 2002 ("Act") exempts "export cartels" and efficiency enhancing join ventures from the application of the provisions of the Act relating to horizontal anticompetitive agreements i.e., Section 3(3) of the Act, and Section 3(5) which provides as follows:

> *"Nothing contained in this section shall restrict –*
> […]
> *(ii) the right of any person to export goods in from India to the extent to which the agreements relates exclusively to the production, supply, distribution or control of goods or provision of services for such export*."

3.7. Singapore has similar provisions. Specifically, Section 35 of the Competition Act operates to exclude certain matters set out in the Third Schedule from the purview of the Section 34 Prohibition, which will be explored in Section **Erro! Fonte de referência não encontrada.** of this Part. This section of the chapter will deal specifically with Paragraph 9 of the Third Schedule, which applies only to the Section 34 Prohibition.

3.8. Paragraph 9 of the Third Schedule provides that the Section 34 Prohibition does not apply to agreements with net economic benefits. While the economic benefits should generally arise in the relevant market affected by the agreement in question, the CCCS has stated that where two or more markets are closely related, the benefits generated in the separate markets may be taken into account when assessing whether the exclusion applies.[29] In order for the net economic benefit exclusion to apply, three criteria must be met: (i) the agreement must have the objective of improving production or distribution, or promoting technical or economic progress (i.e. efficiency gains); (ii) the restrictions imposed by the agreement must be indispensable to achieving those objectives; and (iii) the agreement does not result in the possibility of eliminating competition in respect of a substantial part of the relevant market concerned.

3.9. Examples of efficiency gains recognized by the CCCS include lower costs, improvements in product quality, enhanced production and distribution methods, an expanded range of products, as well as increased innovation. Notably, in light of the total welfare approach adopted by the CCCS, it has also recognized efficiency gains that go beyond consumer benefits. For instance, in clearing several airline alliance agreements on the grounds of the net economic benefit exclusion, the CCCS has considered the improvement to Singapore's air connectivity, which in turn increases employment in the aviation industry, as well as improved tourism to Singapore, as promoting technical and economic progress in

[29] Section 34 Guidelines, ¶ 10.1.

Singapore.[30] It is insufficient for the parties to merely submit the types of efficiency gains that they are claiming. In this regard, the CCCS requires parties to substantiate their claimed efficiencies by demonstrating the following:[31]

(a) the nature of the claimed efficiencies must be objective. In other words, efficiencies are not assessed from the parties' subjective point of view;

(b) there is a direct causal link between the agreement and claimed efficiencies; and

(c) the claimed efficiencies must be of a significant value that outweighs the anticompetitive agreement. In assessing this factor, the likelihood and magnitude of the claimed efficiencies, as well as how and when these efficiencies will be achieved will be taken into account.

3.10. As well as efficiency gains, it is also necessary to show that the restrictions were indispensable. At a high level, the indispensability requirement requires both the agreement itself and the individual restrictions of competition resulting from the agreement to be reasonably necessary in achieving the claimed efficiencies. Finally, the net economic exclusion also requires that the agreement in question must not result in the elimination of competition in a substantial part of the market, thereby protecting the competitive process.

3.11. In Brazil, although there is no formal exemption in the competition law, some types of cooperation between competitors can be considered as collaboration agreements under the Brazilian merger rules and, as such, can be filed for prior approval, as long as they do not raise concerns (for instance, by the fact the combined market shares of such customers being low) and have as its objective the increase productivity or competitiveness, the improvement in the quality of goods and services or the creation of efficiency gains and the economic or technological developments.

3.12. In recent cases where collaboration among competitors were filed and reviewed by the Brazilian authorities, the concerns were also focused on the exchange of information and risk of coordinated effects and the concerns were not mitigated simply by the fact that the cooperation had a beneficial goal. Given the increased number of cases, the Brazilian authorities are preparing guidelines which aimed at giving guidance on the types of collaboration that are more or less likely to raise concerns and what type of precautions should be adopted in order to avoid antitrust concerns. The expectation is that such guidelines may be available for public consultation still in 2025.

3.13. As discussed above, in addition to the traditional approach of exempting certain types of agreements for reasons such as economic efficiency, some jurisdictions have also considered and introduced a specific approach/guidance with regard to handle

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[30] *See e.g.*, *Qantas Airways/Orangestar*, ¶¶ 101-103; *see also* Airline Alliance Guidance Note, ¶¶ 60-63.

[31] Section 34 Guidelines, ¶¶ 10.3-10.4.

sustainability agreements. The Dutch ACM and Singapore's CCCS have introduced such guidelines, which we discuss below.

3.14. ACM has a particular strong focus on the exemption of sustainability agreements. In October 2023, ACM published its Policy Rule on sustainability agreements, in which it provides insight into the application of the competition rules to sustainability agreements and how it conducts its supervision in this area. The Policy Rule generally follows the approach of the European Commission in Chapter 9 of the EU Horizontal guidelines, which, in short, entails the following:

(a) The following types of benefits can be taken into account to assess if the benefits of the sustainability agreement allow consumers a 'fair share',:

(i) Individual use value benefits: the benefits derived from the direct consumption or use of the products covered by the sustainability agreement, for example better tasting vegetables because of organic fertilizers.

(ii) Individual non-use value benefits: the indirect benefits resulting from consumers' appreciation of the impact of their sustainable consumption on others, for example appreciation of a washing liquid because it contaminates water less, rather than because it cleans better.

(iii) Collective benefits: the benefits accruing to a wider section of society than just consumers in the relevant market. These benefits can only be taken into account if the consumers in the relevant market substantially overlap with or form part of the group of beneficiaries outside the relevant market. For example, drivers purchasing less polluting fuel are also citizens that would benefit from cleaner air if less polluting fuel were used. If there is a substantial overlap of drivers and citizens, the sustainability benefits of the citizens can be taken into account if they compensate the consumers in the relevant market for the harm suffered.

(b) In addition, the ACM decided in its Policy Rule not to investigate conduct in two additional situations (compared to the European Commission's approach). In the following situations, companies need not fear a fine from the ACM:

(a) The first situation relates to undertakings that conclude agreements regarding compliance with legally binding international treaties, agreements, or conventions (in line with the European Commission) and with binding sustainability standards based on other rules, such as national or European rules (additional policy choice of ACM).

(ii) The second situation relates to so-called environmental damage agreements that

contribute to meeting an international or national standard or a concrete policy objective to prevent or reduce environmental damage. ACM will not investigate such agreements if it is plausible that the agreement is necessary to achieve the environmental benefits and that these benefits sufficiently outweigh the potential competitive disadvantages. In addition, consumers in the relevant market must receive an appreciable and objective share of the benefits. In any event, this means that consumers should be part of the group that benefits from the agreement. In addition, a certain degree of residual competition should remain.

(c) Undertakings have the possibility to ask ACM for informal guidance on their sustainability agreement. Examples of informal guidance provided by the ACM, where the ACM informally approved sustainability initiatives, include:

(i) Agreements by natural stone companies in a covenant (the TruStone Initiative) to counter the negative impact on people, animals, and the environment throughout their entire production and supply chains (link).

(ii) Collaboration by banks with regards to sustainability reporting (link).

(iii) Collaboration by nine producers of coffee capsules to recycle more plastic and aluminium coffee capsules (link).

3.15. The Cartel Working Group believes that the system is working well. ACM has (informally) approved a number of sustainability initiatives and the Policy Rule is clear about the process for requesting informal guidance.

3.16. In Singapore, as with the Netherlands, CCCS introduced the Environmental Sustainability Collaboration Guidance Note ("**Guidance Note**") in March 2024. The Guidance Note, which "aims to afford greater clarity to businesses on how CCCS will assess collaborations pursuing environmental sustainability objectives", is therefore a welcome development in markets relating to environmental sustainability in Singapore.[32] Indeed, there have already been collaborations relating to environmental sustainability objectives – for instance, a consortium of beverage producers comprising Coca-Cola Singapore Beverages, F&N Foods and Pokka have jointly incorporated a not-for-profit company to operate a beverage container return scheme in Singapore pursuant to a request for proposals from the government.[33]

3.17. The Guidance Note focuses on seven common types of business collaborations, namely: (i) information sharing, (ii) joint production, (iii) joint commercialisation, (iv) joint purchasing,

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[32] *Supra* note 14, page 2

[33] *NEA Licenses Scheme Operator To Design And Operate The Beverage Container Return Scheme*. National Environment Agency. (2024, July 31). https://www.nea.gov.sg/media/news/news/index/nea-licenses-scheme-operator-to-design-and-operate-the-beverage-container-return-scheme

(v) joint R&D, (vi) standards development and (vii) standard terms and conditions in contracts. CCCS makes clear that the Guidance Note applies only to collaborations which have as their crux the pursuit of environmental sustainability objectives. This is necessarily fact-specific, and the determining elements are the "starting point and main focus of the collaboration, and the degree of integration of the different functions required in order to pursue the stated environmental sustainability objective".[34] Consequently, such collaborations can benefit from the "shield" and potentially fall outside of the scope of Section 34 of the Competition Act.

3.18. It is important to note that the Guidance Note does not provide undertakings with a safe harbour. Rather, CCCS adopts a light touch approach in allowing undertakings to assess their collaborations with reference to the Guidance Note and decide whether the collaborations comply with the Competition Act. There is also no statutory requirement for undertakings to notify their collaborations to CCCS. Undertakings may nevertheless apply to CCCS for guidance under Section 45 of the Competition Act or for a formal decision under Section 46 of the Competition Act that their collaborations are compliant with the Competition Act.

3.19. There has been one notification made pursuant to the Guidance Note in Singapore involving the setting up of the Beverage Container Recycling Scheme, which involved a collaboration between Coca-Cola Singapore Beverages, F&N Foods and Pokka, all potential competitors. The scheme was voluntarily notified to CCCS, which has since cleared the scheme.

3.20. The Cartels Working Group believes that the ACM and CCCS regimes provide practical and effective guidance for market participants and would be useful templates for New Zealand to consider should New Zealand decide to provide an exemption or guidance framework for such agreements.

(C) Concerted Practices

3.21. Prohibitions on "concerted practices" vary internationally. Some jurisdictions, such as the U.S. and Canada, require proof of an agreement or arrangement between competitors to make out their cartel offences. To the extent "concerted practices" are specifically conduct that does not rise to the level of an agreement or arrangement, they are unlikely to be caught by the cartel prohibitions in these regimes. Japan's approach is similar. Under the Japanese Antimonopoly Act, "concerted practices" are not explicitly prohibited. Cartels need agreement, collusion, or common understanding to be illegal, and sharing confidential information between competitors would be deemed as facilitating such agreement, etc., but it is not prohibited on a stand-alone basis.

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[34] *Supra* note 14, page 4

3.22. In contrast, EU competition law prohibits "concerted practices". A concerted practice is defined as "*a form of coordination between undertakings in which they have not reached an agreement but they knowingly substitute practical cooperation between them for the risks of competition. The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two*." (EU Horizontal Guidelines, marginal 14).

3.23. A concerted practice could include both the direct and indirect exchange, as well as unilateral disclosure of commercially sensitive information. In the Singapore context, "Concerted practices" refer to situations whereby coordination or informal cooperation, falling short of an agreement, exists between undertakings. These undertakings therefore knowingly substitute the risks of competition with practical cooperation between them and thus no longer determine their market conduct independently. In its Section 34 Guidelines, the CCCS identified the key factors to be considered in determining whether a concerted practice exists: (i) whether the parties knowingly entered into practical co-operation; (ii) whether the behavior in the market is influenced as a result of direct or indirect contact between the undertakings; (iii) whether parallel behavior resulted from contact between undertakings, such that the prevailing competition conditions do not correspond to the normal competition conditions of the market; (iv) the market structure and the nature of the product; (v) the number of undertakings in the market; and (vi) where there are only a few undertakings, whether they have similar cost structures and outputs.[35]

3.24. In the view of the Cartels Working Group, it is important for authorities to provide clear guidance and ensure that their approach does not result in overenforcement against conduct which could be benign and/or does not properly reflect at least an understanding between competing undertakings. This is in particular in relation to the following aspects:

(a) Unilateral disclosure of commercially sensitive information (EU Horizontal Guidelines, para. 6.2.4.1): If an undertaking "accepts' unilaterally disclosed commercially sensitive information by a competitor, this could be considered a concerted practice. However, it is unclear when a competitor is considered to have "accepted" this. For example, according to the EU Horizontal Guidelines, the introduction of a pricing rule in a shared algorithmic tool is likely to be considered a concerted practice, but the sending of an e-mail message to personal mailboxes not necessarily. The IBA Antitrust Section commented in its response to the consultation on the draft EU Horizontal Guidelines that clearer guidance on this would be required, but this input does not appear to have been taken on board.

(b) Public announcement: We note that the fact that an undertaking discloses commercially sensitive information by means of a public announcement does not in itself exclude the

[35] Section 34 Guidelines, ¶¶ 2.18, 2.20.

possibility that the announcement may constitute a concerted practice under EU competition law (and national laws of EU Member States such as the Netherlands). This is the case if it is used to signal future intentions to behave in a certain way or to provide a focal point for coordination.

(c) Indirect information exchange, i.e. through a third party, such as a customer or a shared algorithm (EU Horizontal Guidelines, para. 6.2.4.2): An exchange of information via a third party could be considered a concerted practice if the information dissemination is foreseeable. The EU Horizontal Guidelines rely for this approach on the judgment of the EU Court of Justice in *VM Remonts*. However, especially where the third party is a customer, we believe this approach jeopardises legitimate market practices. While the European Commission acknowledges that competition law does not prevent customers from independently disclosing one supplier's pricing offer to another supplier with a view to obtaining better commercial conditions, the approach taken does not provide clear limiting principles as to when this becomes illegal behaviour. Several respondents to the consultation raised this issue (see for example, response ABA, p. 10 and the responses of ICC, Dentons and Clifford Chance).

3.25. There is a case in the Netherlands where ACM applied this framework to a customer/supplier relationship (the decision was issued even before the mentioned EU Horizontal Guidelines entered into force). In this case, tobacco manufacturers shared their price lists (for legitimate reasons which ACM recognized) with their customers, who in turn occasionally shared these price lists occasionally with other competing manufacturers. ACM recognized that in some instances, the customers passed on the information in their own interest (to obtain better margins). Nevertheless, ACM found a concerted practice between the tobacco manufacturers because, in short, they were allegedly aware of the passing on of information and did not do anything to stop this. The Dutch District Court confirmed ACM's approach. An appeal against the judgment of the Dutch District Court is pending.

3.26. A similar case has been brought in Belgium (see links to: decision of the Belgian competition authority and judgment of the Belgian Market Court) and is pending before the Belgian Supreme Court.

3.27. In India the recent decisional practice of the Competition Commission of India ("**CCI**") considers even the mere exchange of commercially sensitive information (including non-price information) between competitors as a violation of Section 3(3) of the Act. ***In re: Anti-competitive conduct in the paper manufacturing industry***, Suo Motu Case No. 05/2016, the CCI noted that: "*Para. 198. The Commission notes that mere attendance in meetings where commercially sensitive information like prices, is discussed, influences and takes away the independent decision-making ability of participant competitors…*"

3.28. Similarly, ***In re: Federation of Corrugated Box Manufacturers of India and Ors. v. Gujarat Paper Mills Association and Ors.***, Case No. 24/2017 ("Corrugated Box Manufacturers' Case"), the CCI observed that: "Para. 106.10…***sharing of price increase and/ or shut–down information by one competitor with other players in the market compromises the independence of all such competitors; as such, the same amounts to sharing of commercially sensitive information. It is likely to cause AAEC in India, and as such, even mere sharing of such sensitive information/discussions, even if not followed by other competitors, may amount to a violation of the competition law***.

3.29. The CCI's decision in the Corrugated Box Manufacturers' case was also referenced by the National Company Appellate Tribunal ("**NCLAT**") i.e., the appellate tribunal for competition in ***Sundaram Brake Linings and Ors. v. Chief Materials Manager, South Eastern Railway and Ors.,*** Competition Appeal (AT) 19/2020, to hold that mere exchange of information is sufficient to attract the provisions of the Act.

3.30. The CCI's Competition Compliance Manual while discussing an illustration also states that: "*The company should not discuss enterprise specific information such as cost of production, distribution/ supply, customers and other such commercially sensitive information. Dissemination of such sensitive information may be treated as arrangement amongst competitors, and in contravention of the Act. Any such discussion on the sidelines of Associations meetings shall also be avoided*."

3.31. Although, for agreements under Section 3(3) of the Act, while there exists a presumption of an appreciable adverse effect on competition ("**AAEC**") in India, the presumption of AAEC is rebuttable, in terms of the judgment of the Hon'ble Supreme Court of India in ***Rajasthan Cylinders and Containers Limited vs. Union of India & Anr.*** (2020) 16 SCC 615. Consequently, potentially beneficial information exchanges would not be considered anticompetitive if the parties can demonstrate the pro-competitive effects arising out of the information exchange.

3.32. Brazilian law has a very general provision which states that any conduct that has the object or effect of limiting or harming competitions in any way could constitute an infringement. In this sense, Brazil takes a similar approach to the EC and has been investigating practices that could be seen as concerted practices (especially the exchange of competitively sensitive information) as a potential antitrust infringement under Brazilian law, with a number of recent investigations.

3.33. This being said, there is no final decision regarding such investigations, so it remains unclear as to what the exact approach towards potentially beneficial information exchanges would be.

3.34. The Cartels Working Group recognizes that some enforcers increasingly view prohibitions on "concerted practices" as necessary tools to respond to emerging issues in competition policy, such as information sharing and algorithmic pricing. Nonetheless, international

approaches to "concerted practices" are decidedly mixed. In the Working Group's view, this diversity exists because of the concern that overly broad prohibitions could result in a lack of legal certainty of when conduct reaches the stage of at least an understanding/meeting of the minds between competing undertakings and may chill certain benign market conduct that may even have procompetitive effects (such as information exchanges that result in positive benchmarking or efficiency-enhancing transparency). In the event that New Zealand decides to legislate with respect to "concerted practices", the Working Group urges appropriate caution and careful tailoring based on the international examples provided herein to try to navigate these difficult policy considerations.

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