

# COMMERCE COMMISSION **DECLINES** FIRST MERGER SINCE 2018

## THE ALPHATHETA / SERATO MERGER: WHAT WE KNOW

The New Zealand Commerce Commission (NZCC) has declined the NZD \$100M merger between local DJ software provider Serato and Japanese-based DJ product supplier AlphaTheta. These are our key observations:

### NO DE MINIMIS THRESHOLD

NZCC does not have or seem to apply a de minimis threshold (i.e. the ability to conclude that the market is of insufficient importance to warrant further investigation) for enforcement on merger control. We think it should.

Once parties seek clearance, the NZCC must apply the substantial lessening of competition in a market/s test. It cannot then say the deal is too small to worry about. In such a small country it may be hard to set a minimum threshold especially with international concerns about killer acquisitions of “nascent competitors”.

### CLEARANCE REGIME: VOLUNTARY(ISH)?

The clearance regime is a voluntary process in New Zealand. Interestingly, the Overseas Investment Office granted consent for AlphaTheta’s acquisition subject to a special condition that it receive written clearance, authorisation, or confirmation from NZCC that it does not intend to consider the acquisition further — effectively making the voluntary clearance regime compulsory.

### KEY THEORIES OF HARM

The NZCC seemingly declined clearance due to concerns about anti-competitive effects in New Zealand, including horizontal unilateral effects (loss of competition in the DJ software supply market), foreclosure (vertical effects for DJ hardware) and access to commercially sensitive information.

### COMPETITOR CONCERNS

The NZCC was still concerned at the Statement of Unresolved Issues (SOU) stage that there was not a realistic prospect of sufficient competition from overseas. Competitor inMusic clearly had concerns and invested in objecting in the UK and NZ, including by protesting the deal in a local newspaper advertisement.

## UK CMA CANCELS INVESTIGATION

The UK's competition regulator, the Competition and Markets Authority (CMA) had referred the anticipated acquisition for an in-depth (Phase 2) investigation in May 2024, on the basis that the merger may be expected to result in a substantial lessening of competition within DJ software and DJ hardware supply markets.

The CMA had already concluded competition harm, although in theory this could have been overturned. An acquisition can be reviewed by the CMA if it meets the "share of supply" or "turnover" threshold test for UK mergers. The CMA also has a "de minimis exception" which it chose not to apply in this instance and has since cancelled its investigation given AlphaTheta's abandonment of the deal.

## NO AUTHORISATION

A merger can proceed under the authorisation process if it meets the public benefit test, meaning any anti-competitive effects are outweighed by the broader public benefits (such as investments into New Zealand or the retention of jobs that would not otherwise occur). If the merger did meet the "de minimis" threshold, arguably it could be authorised relatively easily by any countervailing public benefits.

## TECH INDUSTRY AND STARTUPS: BETTER OFFSHORE?

Moving offshore is not the answer if the goal is to sell to a major competitor with potential anti-competitive effects. Most other jurisdictions also have merger control regimes. Further, the concerns of impacts for NZ start-ups and the NZ ecosphere may be overstated. The merger has to substantially lessen competition in a NZ market.

We are not aware of many NZ tech sales blocked on competition grounds in NZ. Over time, only about 10% of clearance applications have been declined. This is the first merger NZCC has declined since March 2018 (although some applications have been withdrawn or cleared subject to divestment undertakings).

**We await NZCC's release of its written reasons for the decision, which will be available on its [Case Register](#).**

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