

Statement of Preliminary Issues

Infratil Limited / Vodafone New Zealand Limited

30 May 2019

Introduction

1. On 17 May 2019, the Commerce Commission registered an application (the Application) from Infratil Limited (Infratil) to acquire up to 50% of the shares in Vodafone New Zealand Limited (Vodafone) (the proposed acquisition).¹
2. The Commission will give clearance if it is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.²
4. We invite interested parties to provide comments on the likely competitive effects of the proposed acquisition. We request that parties who wish to make a submission do so by **14 June 2019**.

The parties

5. Infratil is an NZX-listed investment company. Infratil mainly invests in energy, transport, data and social infrastructure in New Zealand, Australia and the United States.³ In New Zealand, Infratil's interests include a 51% share of Trustpower Limited (Trustpower).
6. Trustpower is active in electricity retail, power generation, telecommunications, irrigation, and reticulated and bottled gas services.⁴ It operates as a multi-utility retailer, selling fixed broadband and voice services in bundles with its electricity and gas products. Trustpower has recently entered into an arrangement with Spark New Zealand Limited (Spark) to offer wireless broadband and mobile services.⁵

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

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

³ The Application at [10].

⁴ Ibid at [14].

⁵ Ibid at [54].

7. Vodafone is a telecommunications company offering fixed broadband, mobile and content/TV services to consumer and business customers.⁶ Although Infratil submitted that Trustpower and Vodafone will continue to operate as separate entities post-acquisition,⁷ for convenience we may refer to them in this document as “the merged entity”.

Our framework

8. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.⁸ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
9. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁹ This allows us to assess the degree by which the proposed acquisition might lessen competition.
10. If the lessening of competition resulting from the proposed acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
- 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;¹⁰
 - 10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 10.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

Market definition

11. We define markets in the way that we consider best isolates the key competition issues that arise from the proposed acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately

⁶ The Application at [20].

⁷ Ibid at [4].

⁸ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at www.comcom.govt.nz

⁹ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

¹⁰ References to price increases in this document should be taken to include a reduction in quality, service or innovation.

determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.¹¹

12. The proposed acquisition would result in overlap in the supply of fixed line broadband and voice services to consumers, as well as limited overlap in the supply of those services to business customers.¹² Given Trustpower's plan to supply wireless broadband and mobile services to consumers, there are also potential future overlaps in those markets.
13. In the Application, Infratil adopted market definitions based on past Commission decisions.¹³ Infratil submitted that the relevant markets to assess the proposed acquisition are the national retail markets for:¹⁴
 - 13.1 residential broadband services (fixed-line and wireless);
 - 13.2 residential fixed voice services;
 - 13.3 business fixed data services; and
 - 13.4 mobile phone services.
14. However, Infratil further submitted that there is a limited degree of overlap and a high level of existing competition, and that it is therefore not necessary to precisely define each individual market. Instead, it focused its analysis in the Application more generally on the broadband market and the mobile market.
15. We will assess whether the markets we have adopted in previous decisions are appropriate to assess the issues arising from the proposed acquisition. For example, we will look at:
 - 15.1 whether regional geographic markets may be appropriate in some instances, for example, if Trustpower and/or Vodafone are stronger competitors in some regions than others;
 - 15.2 whether it is appropriate to define market(s) for the bundled services that telecommunications retailers such as Trustpower and Vodafone offer; and
 - 15.3 whether different types of broadband connection (such as DSL, UFB, wireless, and mobile broadband) are substitutable.

¹¹ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

¹² Trustpower's business is focused on residential customers but it does supply broadband and voice services to some business customers.

¹³ Including *Vodafone New Zealand Limited and TelstraClear Limited* [2012] NZCC 33, *Spark New Zealand Trading Limited and Craig Wireless New Zealand Spectrum Operations Limited and Woosh Wireless Holdings Limited* [2016] NZCC 7, and *Vodafone Europe B.V. and Sky Network Television Limited* [2017] NZCC 1 / *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2.

¹⁴ The Application at [59]-[62].

With and without the proposed acquisition

16. Infratil submitted that, should the proposed acquisition proceed:¹⁵
- 16.1 Trustpower and Vodafone would continue to operate as separate independent entities and would not be interconnected bodies corporate;
 - 16.2 any agreement or arrangement between Trustpower and Vodafone would be subject to the Commerce Act; and
 - 16.3 company law and corporate governance would prevent Infratil from treating the two firms as a single entity.
17. Infratil further submitted that, without the proposed acquisition, Trustpower and Vodafone would continue to operate as separate independent entities as they do currently.¹⁶
18. We will consider how the proposed acquisition would affect Infratil's ability to influence the decisions of Trustpower and Vodafone. We will also consider what would likely happen should the proposed acquisition not proceed.

Preliminary issues

19. We will investigate whether the proposed acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal or vertical effects might result from the proposed acquisition. The questions on which we will be focusing are:
- 19.1 *horizontal unilateral effects*: would the loss of competition between Trustpower and Vodafone enable any market participant to profitably raise prices by itself?
 - 19.2 *horizontal coordinated effects*: would the proposed acquisition change the conditions in the relevant market(s) so that coordination between market participants is more likely, more complete, or more sustainable?
 - 19.3 *vertical/conglomerate effects*: would the merged entity have the ability and incentive to foreclose rivals and render them less able to compete as a result of the proposed acquisition?

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

20. Unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that a market participant can profitably increase prices above the level that would prevail without the merger. A merger could also reduce

¹⁵ Ibid at [36]-[42].

¹⁶ The Application at [44].

competition if one of the merging firms was a potential or emerging competitor which may have provided stronger competition in the future.

21. Infratil submitted that the proposed acquisition would not be likely to substantially lessen competition in the relevant market(s), arguing that:¹⁷
 - 21.1 the number and strength of existing and potential competitors in the national markets for residential broadband and voice services means that there would be no substantial difference in competitive constraint post-merger;
 - 21.2 several other providers offer multi-utility bundles that would continue to compete strongly with the merged entity's offerings;
 - 21.3 barriers to existing utility providers expanding their offerings to include bundled services are low;
 - 21.4 it is easy for customers to switch between different providers;
 - 21.5 despite Trustpower currently having a stronger market share in some regional markets, those markets are nonetheless subject to the same competitive conditions as national markets, and this would remain the case post-acquisition; and
 - 21.6 despite Trustpower's current plan to begin offering mobile services, the proposed acquisition would not affect the strength of existing competition between mobile network operators.
22. We will assess whether the evidence supports Infratil's claims.

Coordinated effects: would the proposed acquisition make coordination more likely?

23. A merger can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power such that prices increase across the market.
24. Infratil submitted that the proposed acquisition would not enhance the ability for Trustpower and/or Vodafone to coordinate their behaviour with competitors, arguing that the relevant markets are highly competitive and would still contain large, aggressive players, such as Spark, post-acquisition.¹⁸
25. We will assess whether any relevant market is vulnerable to coordination and whether the proposed acquisition would change conditions in any market so that coordination is more likely, more complete, or more sustainable.

¹⁷ The Application at [77]-[109].

¹⁸ The Application at [110].

Vertical/conglomerate effects: would the merged entity be able to foreclose rivals?

26. A vertical merger is a merger between firms that operate at different levels of the supply chain (for example, a wholesaler and a retailer). A conglomerate merger is a merger between firms that supply products that may relate to each other (for example, complementary products). These mergers can increase a merged entity's ability and incentive to hinder rivals from competing.
27. Infratil submitted that the proposed acquisition would not raise vertical effects.¹⁹ We will assess whether the proposed acquisition would increase the merged entity's ability and/or incentive to foreclose rivals by utilising market power for a product or service. We will also consider whether any such foreclosure would have an adverse effect on competition.

Next steps in our investigation

28. The Commission is currently scheduled to decide whether to give clearance to the proposed acquisition by **15 July 2019**. However, this date may change as our investigation progresses.²⁰ In particular, if we need to test the issues identified above further, the decision date is likely to extend.
29. As part of our investigation, we will speak to parties that we think can help us assess the issues identified above.

Making a submission

30. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Infratil/Vodafone" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **14 June 2019**.
31. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will publish the public versions of all submissions on the Commission's website.
32. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

¹⁹ The Application at [111].

²⁰ The Commission maintains a case register on our website at <https://comcom.govt.nz/case-register> where we update any changes to our deadlines and provide relevant documents.