

## Statement of Preliminary Issues

### One NZ/Dense Air

15 November 2023

#### Introduction

1. On 2 November 2023, the Commerce Commission registered an application (the Application) from One New Zealand Group Limited (One NZ) seeking clearance to acquire 100% of the shares in Dense Air New Zealand Limited (Dense Air) from Dense Air Limited and SoftBank Corp (the Proposed Acquisition).<sup>1</sup>
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.<sup>2</sup>
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 **29 November 2023**.

#### The parties

##### One NZ

5. One NZ (formerly Vodafone NZ) is one of New Zealand's largest telecommunications companies and one of three mobile network operators (MNOs) in New Zealand.<sup>3</sup> One NZ is 99.91% owned by Infratil 2019 Limited. Relevant to the Proposed Acquisition, One NZ provides:
  - 5.1 retail mobile and broadband services to residential and business customers, including fixed wireless access (FWA) broadband; and
  - 5.2 wholesale services to other telecommunications companies, including mobile virtual network operators (MVNOs).

##### Dense Air

6. Dense Air is owned by Dense Air Limited (67.03%) and SoftBank Corp (32.97%).

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<sup>1</sup> 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/>.

<sup>2</sup> 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.

<sup>3</sup> The other MNOs are Spark New Zealand Limited (Spark) and Two Degrees Mobile Limited (2degrees).

7. Dense Air's only assets in New Zealand are the management rights to 2 x 35 MHz of 2600MHz radio spectrum, specifically:<sup>4</sup>
  - 7.1 management right number 473 (2620-2655MHz); and
  - 7.2 management right number 474 (2500-2535MHz).
8. Dense Air does not currently use this spectrum. The management rights for this spectrum expire on 31 December 2028.

## Our framework

9. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>5</sup> As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
10. 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).<sup>6</sup> This allows us to assess the degree by which the proposed acquisition might lessen competition.
11. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance.

## Market definition

12. Market definition is a tool that helps identify and assess the close competitive constraints a merged entity is likely to face. We define markets in the way that we consider best isolates the key competition issues that arise from a specific merger or acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.<sup>7</sup>
13. One NZ submits that the relevant markets for assessing the Proposed Acquisition are the national markets for:<sup>8</sup>
  - 13.1 mobile telephony services (in a single product market for 2G, 3G, 4G and 5G services, which it submits are interchangeable); and

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<sup>4</sup> As recorded in the Register of Radio Frequencies under the Radiocommunications Act 2001.

<sup>5</sup> Commerce Commission, Mergers and Acquisitions Guidelines (May 2022). Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>6</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>7</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81] and Commerce Commission, Mergers and Acquisitions Guidelines (May 2022) at [3.7]-[3.10].

<sup>8</sup> The Application at [14.1], [15.1] and [16.2]-[16.3].

- 13.2 residential broadband services (whether FWA, fibre, copper or satellite broadband, which it submits are functionally similar and substitutable).
14. Given that spectrum is used as an input into mobile or FWA broadband services, One NZ further submits that there is no need to separately assess other market segments based on customers or any other parameters. It submits that mobile and FWA broadband services provided to business or wholesale customers would not use different spectrum than that used by residential customers.<sup>9</sup>
15. We will consider whether the markets submitted by One NZ are the relevant markets for the purposes of assessing the Proposed Acquisition, or whether other markets (including narrower markets) may be relevant to our assessment. In particular, we will consider:
- 15.1 the substitutability of different spectrum bands and frequencies, including between 2300MHz and 2600MHz;
  - 15.2 the types of spectrum suitable for providing 5G mobile services, in both urban and rural areas;
  - 15.3 the types of spectrum suitable for providing FWA broadband services, in both urban and rural areas;
  - 15.4 the extent to which FWA broadband services are substitutes for fixed-line (fibre or copper) or satellite broadband services and fall within the same retail market, or whether we should define a market for FWA broadband services to isolate the competitive effects of the Proposed Acquisition; and
  - 15.5 the extent to which wholesale markets in which MNOs supply services to MVNOs and retail telecommunications service providers are relevant to our assessment of the Proposed Acquisition, and the scope of any markets in which MNOs wholesale mobile or FWA broadband.

### **With and without the acquisition**

16. Assessing whether a substantial lessening of competition is likely requires us to:
- 16.1 compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the merger, often referred to as the factual) with the likely state of competition if it does not (the scenario without the merger, often referred to as the counterfactual); and
  - 16.2 determine whether competition is likely to be substantially lessened by comparing those scenarios.
17. With the Proposed Acquisition, One NZ would increase its holdings of 2600MHz spectrum. It would own a 2 x 15 MHz block of 2600MHz plus a second 2 x 35 MHz block.<sup>10</sup>

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<sup>9</sup> The Application at [14.2].

<sup>10</sup> The only other party that currently owns 2600MHz spectrum is Spark, which owns a 2 x 20 MHz block.

18. We will consider what is likely to happen to Dense Air's holdings of 2600MHz spectrum absent it being acquired by One NZ, and what One NZ would do absent the Proposed Acquisition.
19. One NZ submits that the appropriate counterfactual for Dense Air is one where an alternative buyer is sought for its 2600MHz spectrum, either locally or internationally.<sup>11</sup>
20. Specifically in terms of Dense Air, we will consider:
  - 20.1 the likelihood of Dense Air's 2600MHz spectrum being sold to an alternative purchaser (whether that be another MNO such as 2degrees or Spark, other spectrum owner or out of market player); and
  - 20.2 the plans that any alternative purchasers would have for Dense Air's 2600MHz spectrum, in terms of it being utilised as an input to provide downstream telecommunications services.

### **Competition analysis**

21. Acquisitions of radio spectrum may substantially lessen competition due to unilateral, vertical and/or conglomerate effects, specifically:
  - 21.1 unilateral effects: if an increase in the aggregation of spectrum holdings by one party enables it to (in any relevant downstream retail and/ or wholesale telecommunications markets) profitably raise prices or reduce quality or innovation, or worsen an element of service or competition (ie, increase quality-adjusted prices); and
  - 21.2 vertical or conglomerate effects: if an acquisition prevents or inhibits or hinders the ability of competitors to compete with an acquirer in providing any wholesale and/or retail telecommunications services, or to expand and provide a greater degree of competitive constraint, or generally raises the cost of spectrum or network capacity to rivals. In assessing vertical and conglomerate effects, we consider whether a merged entity would have the ability and/or incentive to foreclose competitors, and the likely effect of any foreclosure on competition (including whether it would substantially lessen competition, considering other competitive constraints).<sup>12</sup>
22. In this case, the Proposed Acquisition might raise issues in the above ways if it results in a significant concentration of radio spectrum holdings in the hands of One NZ, harming the ability of other MNOs to compete with it in wholesale and/or retail telecommunications markets. Any harm to competition may result in consumers facing higher prices, less choice or lower quality for telecommunications services as a result of the Proposed Acquisition.

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<sup>11</sup> The Application at [9.1]-[9.2] and [9.4].

<sup>12</sup> Mergers and Acquisitions Guidelines (May 2022) at [5.6], [5.9] and [5.12].

23. One NZ submits that the Proposed Acquisition would not give rise to any substantial lessening of competition in any relevant market. This is because:<sup>13</sup>
- 23.1 all MNOs, including 2degrees and Spark, have access to adequate spectrum to provide high quality services (including 5G and 4G mobile services, and FWA broadband services);
  - 23.2 2600MHz spectrum is not essential for the provision of 4G or 5G mobile services for FWA broadband services and there are many alternative spectrum bands that can be used to provide such services;
  - 23.3 there are a number of opportunities for MNOs to acquire additional spectrum for use in 4G and 5G services arising in the short, medium and long term;
  - 23.4 the Proposed Acquisition does not confer a material advantage on One NZ over Spark or 2degrees. Both Spark and 2degrees are strong competitors that have adequate spectrum holdings to provide high quality mobile services, grow their customer bases in the future and maintain comparable network performance to One NZ (which would not be impacted by the Proposed Acquisition);
  - 23.5 Spark is the largest holder of mobile telephony spectrum in New Zealand and would remain so following the Proposed Acquisition;
  - 23.6 building or utilising more sites is an alternative to acquiring more spectrum, and provides comparable improvements in service and network quality;
  - 23.7 2degrees is at an early stage of its 5G roll-out and has greater latitude to pursue alternative strategies and is not constrained by legacy equipment;
  - 23.8 retail mobile and broadband markets are highly competitive and the Proposed Acquisition would not impact on the ability or incentives of parties to compete;
  - 23.9 the Proposed Acquisition has no impact on barriers to entry or expansion in mobile or broadband markets; and
  - 23.10 the Proposed Acquisition would not increase One NZ's market power or materially increase the likelihood of coordination occurring.
24. We will consider whether competition in any relevant downstream retail and/or wholesale telecommunications markets would be substantially lessened with the Proposed Acquisition (in the factual) compared to the likely counterfactual. In doing so, we will consider:
- 24.1 the extent to which the Proposed Acquisition would increase spectrum disparities between 2degrees and other MNOs (ie, One NZ and Spark);<sup>14</sup>

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<sup>13</sup> The Application at [1.6], [18.1], [19.1], [19.5]-[19.6], [20.1]-[20.2], [21.2], [22.1], [22.5], [24.2]. [26.1]-[26.2] and [28.1].

<sup>14</sup> In media reporting on registration of the Application, 2degrees is publicly cited as having told media in a statement that spectrum has been crucial to its ability to disrupt and bring competition and choice to

- 24.2 the extent to which any MNOs are, or may become, capacity constrained because they have less spectrum and, therefore, face a trade-off between acquiring more customers to which they offers lower quality of services (eg, reduced average speeds, less services) and having fewer customers to which they offers higher quality services;
- 24.3 the cost and competitively effective mitigation options that would be available to MNOs that faced network capacity constraints due to lower spectrum holdings (factoring into those mitigation options the substitutability of other spectrum for 2600MHz spectrum and the commercial implications of, alternatively, building more or further utilising existing sites);
- 24.4 the opportunities that MNOs may later have to acquire other spectrum (including from IMSC) that would be substitutes for 2600MHz, and what MBIE is likely to do when the rights to 2600MHz spectrum comes up for renewal in 2028;
- 24.5 the extent to which the Proposed Acquisition might inhibit the ability of competitors to compete with, or reduce the competitiveness of rivals relative to, One NZ in retail and wholesale telecommunications markets resulting in a substantial lessening of competition;
- 24.6 the extent to which the competitive constraint provided by 2degrees might be reduced by the Proposed Acquisition;
- 24.7 the extent to which the competitive constraint provided by One NZ on Spark might differ in the factual compared to the counterfactual (eg, because it has the capacity to offer higher quality services or services to more customers); and
- 24.8 bringing all of the above together, what does this mean for consumers – are they likely to face higher prices, less choice or lower quality for telecommunications services as a result of the Proposed Acquisition?

### **Next steps in our investigation**

- 25. The Commission is currently scheduled to make a decision on whether or not to give clearance to the proposed acquisition by 19 January 2024. However, this date may change as our investigation progresses.<sup>15</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
- 26. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

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consumers, and that any acquisition that increases spectrum disparities and has the potential to cause competition harm, as the Proposed Acquisition does, must be scrutinised. Source: [NZ Herald](#) article 3 November 2023 at 2.43pm and [Reseller News](#) article 3 November 2023 at 6.32am.

<sup>15</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

## Making a submission

27. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference "One NZ/Dense Air" 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 **29 November 2023**.
28. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website. If you make a submission and we do not acknowledge receipt of that submission within two working days, you should resubmit your submission.
29. 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.