



Fibre de-regulation review draft assessment  
framework paper

Submission | Commerce Commission  
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## Introduction

1. Thank you for the opportunity to provide feedback on the Commission's proposed assessment framework for considering whether there are reasonable grounds for undertaking a deregulation review (**the draft**).
2. The Commission is required by s210 of the Act to, before the start of each regulatory period, consider whether there are reasonable grounds to start a deregulation review. The Commission may initiate a deregulation review at any time, but the reasonable grounds check is a useful reminder that regulatory settings should be reviewed regularly to ensure settings continues to promote end user interests and competition.
3. In this submission we provide feedback on:
  - a. The Commission's proposed assessment framework; and
  - b. Suggest possible implementation issues the Commission may wish to consider further.

## Proposed assessment framework

4. The Commission proposes that, in considering whether reasonable grounds exist to start a review, it will assess whether there are reasonable grounds in relation to each of the FFLAS services that are currently regulated. It will examine the change in competitive constraints that have occurred for each of the services, informed by changes in competitive constraints in retail markets.
5. We agree that understanding how the fibre network is used and competitive constraints to each of the regulated services is a useful starting point for assessing whether there are reasonable grounds to undertake a deregulation review.
6. The UFB reforms and regulatory framework established Chorus and the LFCs as the providers of the national fibre network, largely placing the Chorus fibre network at the centre of the telecommunications sector throughout the country with a regulatory framework designed to curb Chorus' ability and incentives to distort competition and end-user outcomes. As noted in the draft, the regulated fibre network underpins other networks provider services and broadband services to consumers.
7. In our view, any deregulation review would therefore need to consider the nature of competition and the technologies that support that competition in the context of Chorus' broader role in our sector, the purpose of the regulatory framework, and the timing of the current regulatory cycle. For example, the Commission will need to consider how to consider what may be variable levels of competition on a demographic or customer segment basis (as compared to the geographic basis traditionally considered by the Commission in telecommunications deregulatory reviews).
8. At this stage, a narrow focus on each FFLAS service will not adequately draw out the issues necessary to inform a regulatory review and may instead deliver false positives if not viewed in light of that broader role fibre plays. By way of example, the existence of fast 5G capacity in a particular fibre area will not constitute evidence of a meaningful competitive constraint of the kind that warrants deregulation of an LFC in that area. Although wireless services, which depend on fibre inputs themselves, do provide a degree of demand-side substitutability to fibre, the fundamental supply side features of the fibre network are materially different. Barriers to enter the market to provide FFLAS are unchanged and remain high, with no evidence of competitive investment in alternative FFLAS networks. To understand how and why they are

different could be a substantial exercise which we consider is not justified at this time and likely won't be justified until at least the next scheduled regulatory review.

9. Focusing on individual services is also likely to result in other errors as, for example, the appearance of competition may be the outcome of BBM investment and cost allocation decisions rather than reflecting consumer preferences and cost. The Chorus fibre network supports multiple FFLAS services and, to consider each of these services in isolation, has only limited informative value relating to competition for the fibre network itself.
10. Accordingly, while we agree with the Commission proposed screening questions, evidence of strong competitive constraints across a broad range of FFLAS services would be required to justify taking the next step of a deregulation review so soon after implementing the regulatory framework.
11. We also agree with the Commission that the review requires a with and without analysis to determine whether deregulation would promote the s162 outcomes across all FFLAS services.

## Possible additional considerations

12. While we appreciate that consideration of reasonable grounds is by its nature not a full deregulation review, the Commission could promote certainty by providing guidance on the wider considerations it would apply to a full review (some of which are touched on in the paper but not considered in detail). For example, how the Commission might consider:

### **The wider considerations of a deregulation review**

13. The Commission proposes to consider incremental competitive changes since January 2022 for the purposes of determining reasonable cause.
14. However, as noted in the draft, in a deregulation review it would need to take into account broader change in consumer preferences, technology change, known future developments, or new information not available at the time of original decisions. For example, the Commission noted in the context of the national roaming review<sup>1</sup> that the focus in a deregulation review is the totality of competition at the relevant point in time and that a forward-looking assessment is required:

41. A key factor in determining whether or not amending regulation best gives effect to the promotion of competition is the assessment of both current and forward-looking factors that affect competition and market development. These include existing competition and potential competition.

42. Potential competition includes the potential for entry and the significance of any barriers to entry and expansion that may exist. Barriers to entry can take a variety of forms, including structural, regulatory and strategic conditions. In the mobile market, national coverage is considered one of the main conditions of entry. This is particularly significant where a new entrant would be competing against established national mobile operators.

15. We agree that the Commission would need to take a forward looking perspective considering, for example, the totality of competition in the market, changing consumer preferences, regulatory policy objectives and the purposes of the Act. A with and without analysis would need to be undertaken to determine whether the promotion of competition and end-user outcomes would be better with deregulation than the counterfactual.

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<sup>1</sup> Para 62

16. Accordingly, a deregulation review would be a significant undertaking and the Commission could usefully consider - and provide guidance - on how it would tackle these issues.

**Whether to develop a competition framework along the lines recommended by Vogelsang and Cave**

17. At the time the IMs were being developed the Commission sought expert advice from Vogelsang and Cave on how it could reflect in the new regulatory regime the competitive nature of the telecommunications sector, together with the requirement in section 166(2)(b) of the Telecommunications Act 2001 (the Act) to promote competition in telecommunication markets to the extent the Commission considers it relevant<sup>2</sup>.
18. Vogelsang and Cave set out frameworks to help the Commission decide: when/where it is relevant to promote competition, and how strongly to promote it; and when/where it is relevant to deregulate any of the regulated fibre services. Vogelsang and Cave recommended amongst other things:
- a. A nuanced deregulation decision considering competition and barriers to entry, taking a counterfactual framework that considers whether deregulation would promote (further) competition and benefit end users (relative to the regulation factual).
  - b. A framework for the promotion of competition, with four rungs relating to: addressing the legal and behavioural barriers to competition (anti-competitive behaviour); using currently available tools such as setting a cost based DFAS, cost allocations and capex approvals to reduce structural barriers to entry; and considering new tools such as duct sharing, access to civil infrastructure, or the promotion of co-investment, and
  - c. A unified framework that brought the promotion of competition and deregulation together through a sequence of steps that characterise a decision tree.
19. In the end, the Commission decided that the most appropriate way to give effect to the promotion of competition at that stage of the regulatory development process was to apply a high level “competition screening” test whereby it would consider whether each IM decision has a potential to impact competition and has a role in mitigating risks to competition or promoting competition at a given market level for expected net benefits to end-users<sup>3</sup>. The Commission noted that it may come back to the framework in the future:
- 2.260 We took note of the framework proposed by the advisory panel in developing the practical steps for our ‘competition screening’ that gives effect of s 166(2)(b) for the IMs, but as explained below, we have not directly applied the framework to our IM decisions. We note that we may give regard to the framework (or a subset of the steps suggested) in future; for example, when undertaking deregulation reviews under s 210.
20. The Commission should consider whether to develop a framework as advised by Vogel and Cave to best promote competition when applying the Part 6 framework. This would inform

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<sup>2</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0039/189894/Ingo-Vogelsang-and-Martin-Cave-Framework-for-promoting-competition-15-November-2019.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0039/189894/Ingo-Vogelsang-and-Martin-Cave-Framework-for-promoting-competition-15-November-2019.pdf)

<sup>3</sup> IMs Draft decision paper at 2.254 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0038/189893/Fibre-input-methodologies-Draft-decision-paper-19-November-2019.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0038/189893/Fibre-input-methodologies-Draft-decision-paper-19-November-2019.pdf)

issues such as the identification of relevant markets and form of deregulation that best promotes the purposes of the Act<sup>4</sup>.

### **Issues where a competitive constraint relates to a subset of FFLAS services**

21. Further, the dynamic and differentiated nature of competition in our sector creates additional complexity. For example, we are likely to see competition emerging on a segment or demographic basis and this adds complexity.
22. While the Commission notes the geographic dimension of competition, it's likely that competitive constraints will relate to a customer segment or subset of FFLAS services. For example, wireless is increasingly a viable substitute to fibre for some customer segments based on the nature, or profile, of their demand – in particular those segments that do not use broadband for low-latency gaming or that have lower data requirements.
23. This raises complex questions relating to how the Commission would consider differing competitive conditions for FFLAS services on a segment-by-segment basis rather than a geographic basis, with the fibre network likely to serve both nominally competitive and monopoly services in all areas. For example, how the Commission will consider competition for the purposes of a deregulation review - and continued regulation of residual services - where the constraint is only for a particular customer segment or segments.
24. This could result in the regulatory mistake noted above where there is the appearance of competition, but this is driven by BBM investment and cost allocation decisions than consumer preferences and cost.
25. While the Commission is unlikely to have to unpick this complexity in a reasonable grounds review, again it could promote certainty by providing guidance on how it would approach the issue in a full deregulation review.

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<sup>4</sup> Vogelsang and Cave identify that defining the markets (for both promotion of competition and deregulation) is a first step in its unified framework. In other words, the same market definition informs both the promotion and deregulation functions.