

## Statement of Preliminary Issues

### St John/Securely

17 January 2024

#### Introduction

1. On 12 December 2023, the Commerce Commission registered an application (the Application) from The Priory in New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem (St John) seeking clearance to acquire certain assets<sup>1</sup> from Electra Limited, which trades as Securely (Securely) (the Proposed Acquisition).<sup>2</sup>
2. With the Proposed Acquisition, St John would acquire assets relating to Securely's medical alarm and monitoring business for use in private homes, commercial premises such as retirement homes and retirement villages, duress alarms for lone workers and personal alarms used in conjunction with New Zealand Police monitoring. The Proposed Acquisition excludes Securely's property security alarms business.
3. 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.
4. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.<sup>3</sup>
5. 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 **31 January 2024**.

#### The parties

##### St John

6. St John is a charitable trust which provides a range of health and social care services, its core activities including ambulance services, first aid training, medical services at events, medical alarms and youth and community programmes. These services are partly funded by its supply of medical alarm and monitoring services.

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<sup>1</sup> As described at [2] of this statement of preliminary issues.

<sup>2</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>3</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.

7. St John is a Ministry of Social Development (MSD) accredited supplier of medical alarms and associated monitoring services. It provides devices to private customers (both MSD-funded and self-funded) and commercial customers (which may typically consist of retirement villages and rest home providers).<sup>4</sup> St John manages its monitoring station and call centre operations in-house.

### Securely

8. Securely is a wholly-owned subsidiary of Electra Limited, an electricity network provider in the lower North Island.<sup>5</sup> Like St John, Securely is an MSD accredited supplier of medical alarms and associated monitoring services to private and commercial customers. Securely operates its own monitoring station and call centre in-house. It also provides duress alarms for lone workers, personal alarms and property security alarms.<sup>6</sup>

### 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>7</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>8</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. When making that assessment, we consider, among other matters:
- 11.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
  - 11.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and

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<sup>4</sup> The Application at [6.10].

<sup>5</sup> The Application at [7.1]-[7.2].

<sup>6</sup> The Application at [7.10].

<sup>7</sup> Commerce Commission, Mergers and Acquisitions Guidelines (May 2022). Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>8</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

- 11.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

## Industry background

12. Medical alarms are devices that allow a user who suffers a medical incident to push a button and connect to a monitoring station, which then arranges for an ambulance or other appropriate care to be provided. Such devices can be installed in the user’s home, worn personally when the user is away from home, or a combination of the two.
13. Two main groups of users of medical alarm and monitoring services were identified by St John in the Application:<sup>9</sup>
- 13.1 private customers, of which a significant portion are, if eligible, funded by MSD, with the remainder paying for the medical alarm themselves; and
- 13.2 commercial customers, typically comprising of retirement home and retirement village providers, which may have different requirements in terms of the devices they need.<sup>10</sup>
14. MSD performs a significant role in its capacity as the government agency responsible for the funding of medical alarms to private customers who are eligible to receive such funding, and for the accreditation of providers of such devices to funded customers.<sup>11</sup>

## Market definition

15. 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 determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.<sup>12</sup>
16. In the Application, St John submits that the relevant markets are the separate nationwide markets for the supply of medical alarms and monitoring services to:
- 16.1 end users (the End User Market); and
- 16.2 commercial customers (the Commercial Market).

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<sup>9</sup> The Application at [2.1], [6.9]-[6.10] and [7.8].

<sup>10</sup> Using the same equipment as that offered for medical alarms, Securely also offers personal alarms (Family Safety alarms) for use in conjunction with New Zealand Police monitoring and duress alarms for lone workers. The Application at [7.10]-[7.11].

<sup>11</sup> The Application at [13.8] and [18].

<sup>12</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

17. However, St John also notes that the relevant markets are subject to disruption with emerging technologies available to end users through smart watches and smartphones which are developing very quickly to meet a variety of needs. St John considers that such developments are likely to make existing monitored medical alarms obsolete.<sup>13</sup>
18. We will consider whether the markets submitted by St John are the most appropriate for the purpose of assessing the competitive effects of the Proposed Acquisition, or whether the competitive effects are better assessed with different relevant markets. Some issues we will consider are whether:
  - 18.1 to define broader market(s) incorporating both private and commercial customers;
  - 18.2 the supply of medical alarms to MSD-funded and self-funded customers should be considered as separate relevant markets;
  - 18.3 to segment medical alarm services by product or customer requirements (such as home, mobile and combined offerings); and
  - 18.4 to define separate markets within what has been submitted as the Commercial Market (eg, by particular offerings or customer requirements).
19. As part of our investigation, we plan to assess the extent to which technological change and disruption are likely to affect how the relevant markets are defined.
20. We will also consider whether it is appropriate to define a nationwide market.

### **Without the acquisition**

21. We will consider what the parties would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or whether the parties would seek alternative options, for example, finding a different buyer for Securely.
22. In the Application, St John submits that absent the Proposed Acquisition, the merging parties would continue to operate independently of each other.<sup>14</sup>
23. We will consider what the parties would do absent the Proposed Acquisition, including whether Securely would be likely to be acquired by a third party.

### **Preliminary issues**

24. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether

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<sup>13</sup> The Application at [10.2].

<sup>14</sup> The Application at [15.1c].

horizontal unilateral, coordinated or vertical effects might result from the Proposed Acquisition. The questions that we will be focusing on are:

- 24.1 unilateral effects: would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?<sup>15</sup>
- 24.2 coordinated effects: would the Proposed Acquisition change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable?
- 24.3 vertical or conglomerate effects: would the Proposed Acquisition increase the merged entity's ability and/or incentive to foreclose rivals?

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

- 25. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses. A merger could also reduce competition if one of the merging firms was a potential or emerging competitor. In such a case, the merger may preserve the market power of the incumbent firm.
- 26. The parties overlap in the supply of medical alarms and monitoring services to both private and commercial customers.
- 27. In the Application, St John submits that the Proposed Acquisition would not be likely to substantially lessen competition in any market because:<sup>16</sup>
  - 27.1 St John would remain subject to the countervailing power of MSD for funded customers;
  - 27.2 St John would also remain subject to the countervailing power of MSD for self-funded customers. St John states that self-funded prices bear a close relationship to the prices agreed with MSD by licensed sellers, often being the same or similar regardless of whether the seller is licensed;<sup>17</sup>
  - 27.3 for commercial customers:

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<sup>15</sup> For ease of reference, we only refer to the ability of the merged entity to "raise prices" from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

<sup>16</sup> The Application at [2.3].

<sup>17</sup> The Application at [2.3b].

27.3.1 the Proposed Acquisition is outside the Commission's concentration indicators and there is no realistic prospect of an SLC;<sup>18</sup> and

27.3.2 in any case, St John is constrained by the countervailing power of commercial customers; and

27.4 for all customer groups (ie funded and self-funded private customers, and commercial customers), St John would be constrained by existing competition.

28. We will consider:

28.1 closeness of competition: the degree of constraint that St John and Securely impose upon one another. To the extent that any constraint is material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors;

28.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;

28.3 countervailing power: whether customers (such as MSD or commercial customers) have special characteristics that would enable them to resist a price increase by the merged entity;<sup>19</sup> and

28.4 entry and expansion: how easily rivals could enter and/or expand.

**Coordinated effects: would the Proposed Acquisition make coordination more likely?**

29. An acquisition 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 or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.<sup>20</sup>

30. We will assess whether any of the relevant markets are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in the relevant markets so that coordination would be more likely, more complete or more sustainable.<sup>21</sup> We will consider, amongst other things as appropriate, the implications of the tender processes which are involved in the identified markets.

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<sup>18</sup> The Application at [2.3c] and [17.9].

<sup>19</sup> Including (non-exhaustively) the extent to which MSD would be able to apply countervailing power in the supply of medical alarms and monitoring services to non-funded private customers.

<sup>20</sup> Mergers and Acquisitions Guidelines above n7 at [3.84].

<sup>21</sup> St John did not submit specifically on coordinated effects in the Application.

### **Vertical or conglomerate effects: would the merged entity be able to foreclose rivals?**

31. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively.
32. We will consider whether the Proposed Acquisition would give the merged entity the ability and incentive to foreclose rivals.<sup>22</sup> We will assess the implications of St John and Securely offering both medical alarms, as well as the associated monitoring services. Further, we will also consider the parties' products and service offerings in other related areas.

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

33. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by 29 February 2023. However, this date may change as our investigation progresses.<sup>23</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
34. 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.

### **Making a submission**

35. 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 "St John/Securely" 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 **31 January 2024**. If you have difficulty submitting within this timeframe, please get in touch.
36. 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.
37. 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.

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<sup>22</sup> St John did not submit specifically on vertical effects in the Application.

<sup>23</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.