COMMERCE COMMISSION
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Te Komihana Tauhokohoko

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Statement of Issues

Connexa/2degrees

28 March 2023

Introduction

1. On 19 December 2022, the Commerce Commission registered an application (the Application) from Connexa Limited (Connexa) seeking clearance to acquire certain passive mobile telecommunications infrastructure assets of Two Degrees Networks Limited and Two Degrees Mobile Limited (2degrees) (the Proposed Acquisition).[1]

2. To clear an application we must be satisfied that an acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a New Zealand market.

3. This Statement of Issues (SoI) sets out the potential competition issues we have identified following our initial investigation. This is so the parties and other interested parties can provide us with submissions relating to those concerns.

4. In reaching the preliminary views set out in this SoI, we have considered information provided by the parties and other industry participants. We have not yet made any final decisions on the issues outlined below (or any other issues) and our views may change, and new competition issues may arise, as the investigation continues.

The issues we are continuing to investigate

5. Based on the evidence currently before us, we are not satisfied that the Proposed Acquisition would not be likely to substantially lessen competition in one or more relevant markets.

6. The main issues we are continuing to test relate to the fact that with the Proposed Acquisition, there would be only two large scale, national suppliers of passive infrastructure services in the factual, compared to three in the counterfactual. We are considering whether this reduction of suppliers could substantially lessen competition due to unilateral or coordinated effects by:

    6.1 reducing competition to supply uncommitted sites in local markets;[2]

    6.2 reducing competition to entry for new entrants in downstream telecommunications services markets; and/or

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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 Uncommitted sites refer to demand for future sites that customers have not contracted to have provided under long-term services agreements. See [20]-[23] for more discussion.

6.3 increasing the likelihood of coordination between suppliers of passive infrastructure services.

7. In considering the above, we are testing how competition may be impacted by clauses in long-term services agreements between mobile network operators (MNOs) and suppliers of passive infrastructure services, in particular non-discrimination clauses.

8. Separate to the above issues, the Proposed Acquisition raises a potential concern of vertical effects on 2degrees. This arises due to Spark New Zealand Trading Limited's (Spark's) ownership interest in Connexa, its ownership of Entelar Limited (Entelar), which Connexa uses as a contractor to build and maintain passive infrastructure, and the associated directors it has on the Boards of each company. With the Proposed Acquisition, 2degrees would rely on Connexa for most of its passive infrastructure needs while, without the Proposed Acquisition, most of 2degrees' passive infrastructure would be managed by a third TowerCo with no connection to Spark. We are continuing to assess whether Spark would have the ability and incentive to influence Connexa to harm 2degrees – by raising its costs, reducing the quality of services provided by Connexa, delaying site builds or by any other means.

The issues that do not currently raise concerns

9. Currently, we have no concerns that the Proposed Acquisition might:

9.1 give rise to coordinated effects in downstream telecommunications markets; or

9.2 harm competition in the supply of services by contractors relating to the physically building and maintaining of infrastructure.

Process and timeline

10. We have agreed with Connexa to extend the period in which to make a decision from the initial 40 working day statutory timeframe until 19 May 2023.

11. We would like to receive submissions and supporting evidence from the parties and other interested parties on the issues raised in this SoI. We request responses by close of business on **14 April 2023**, including a confidential and a public version of any submission made. All submissions received will be published on our website with appropriate redactions.[3] All parties will have the opportunity to cross-submit on the public versions of submissions received from other parties by close of business on **26 April 2023**.

12. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with us at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

[3] Confidential information must be clearly marked (by highlighting the information and enclosing it in square brackets). Submitters must also provide a public version of their submission with confidential material redacted. At the same time, a schedule must be provided which sets out each of the pieces of information over which confidentiality is claimed and the reasons why the information is confidential (preferably with reference to the Official Information Act 1982).

The parties and the Proposed Acquisition

13. Connexa is owned 70% by the Ontario Teachers' Pension Plan Board (OTPP) and 30% by Spark. Following an acquisition in October 2022, Connexa owns almost all of the passive mobile telecommunications assets previously owned by Spark. Connexa now provides passive infrastructure services to Spark under a long-term contract.[4]

14. 2degrees is a New Zealand telecommunications service provider and, along with Spark and Vodafone New Zealand Limited (now One NZ), is one of three MNOs in New Zealand. It is ultimately owned by Macquarie Asset Management and Aware Super Pty Ltd, as trustee for Aware Super.[5]

15. With the Proposed Acquisition:[6]

    15.1 Connexa would acquire assets including leases, licences and other property rights, as well as infrastructure located on 2degrees' sites such as towers, masts, poles and fences;

    15.2 Connexa and 2degrees would enter into a long-term agreement under which Connexa would provide passive infrastructure services to 2degrees;[7] and

    15.3 Spark's ownership stake in Connexa will reduce to 17% and OTPP's stake will increase to 83%.

Relevant background

16. The Proposed Acquisition is part of a trend in New Zealand and overseas for MNOs to sell their passive mobile telecommunications infrastructure assets to specialist asset/mobile tower management companies (often referred to as TowerCos).[8] In 2022 in New Zealand:[9]

    16.1 Spark sold a majority stake in its passive infrastructure assets to OTPP (creating Connexa); and

    16.2 One NZ sold a majority stake in its passive infrastructure assets to two parties, InfraRed Capital Partners and Northleaf Capital Partners, creating Aotearoa Towers Group LP (trading as FortySouth).

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4 The Application at [2] and [23]-[24].

5 The Application at [40].

6 The Application at [3] and [19]-[20].

7 Connexa and 2degrees would enter into this long-term infrastructure services agreement in connection with the Proposed Acquisition, should the Commission grant clearance for the Proposed Acquisition. In assessing the Proposed Acquisition, we will consider the likely impact of this services agreement (and any other agreements) that Connexa and 2degrees would enter into in connection with the Proposed Acquisition. However, we note that Connexa and 2degrees are not seeking clearance or authorisation for this services agreement (or any other agreement entered into with the Proposed Acquisition). Any clearance that the Commission may give would be for the acquisition of the subject assets (being the passive mobile telecommunications infrastructure assets) only.

8 The Application at [4].

9 The Application at [4] and [91]-[92].

17. 'Passive' mobile telecommunications infrastructure comprises the structures capable of hosting 'active' telecommunications assets. Such assets can include underlying land interests, as well as physical structures such as towers, poles and fencing, as well as power systems and electricity connections. In contrast, 'active' infrastructure is the infrastructure on which MNOs run their mobile networks including antennae, cabinets, radio units, backhaul electronics and electricity meters.[10]

18. TowerCos like Connexa and FortySouth own, manage and invest in passive mobile telecommunications infrastructure assets, providing MNOs and other parties with access to those assets.[11] In addition to Connexa and FortySouth, other organisations in New Zealand also own smaller networks of infrastructure that are, or can be used as, passive mobile telecommunications infrastructure.[12]

19. Connexa and FortySouth each have long-term agreements with MNOs to provide passive infrastructure services. Specifically:[13]

    19.1 Spark and Connexa have entered into a long-term Master (or Mobile) Infrastructure Services Agreement (MISA) for an initial period of 15 years;

    19.2 One NZ and FortySouth have entered into a long-term Master Services Agreement (MSA) for an initial period of 20 years; and

    19.3 with the Proposed Acquisition, 2degrees and Connexa would enter into a long-term MISA for an initial period of 20 years.

20. Each MISA/MSA contains rights of renewal (or extension rights), which have the potential to extend the total term of the relevant agreement to [ ] years (as applicable).[14] At the end of the applicable term, each MNO would need to consider whether to further extend the relevant agreement or negotiate terms for a new long-term supply agreement.[15]

21. The agreements set the prices that MNOs will pay their respective TowerCo for services for the term of the agreement (both where they are the sole tenant on a site and where they co-locate on a site, including for sites that are yet to be built). The agreements also set out processes for how an MNO and its TowerCo will agree on details relating to the building of new sites, along with commitments on the number of new sites an MNO will have built with their TowerCo.

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10 The Application at [55] and [57].
11 The Application at [48].
12 The Application at [104].
13 The Application at [19.1], [24] and [92].
14 [ ]
15 [ ]

22. The effect of the agreements is to provide the MNOs and TowerCos with a framework for pricing and to set service levels for the majority of their passive infrastructure requirements (noting that a portion of each of the MNOs' passive infrastructure requirements remain uncommitted to any TowerCo) over the term of each of the agreements. The ability of MNOs to contract with third parties for a portion of their uncommitted sites is intended to discipline the TowerCos into providing high quality, competitively priced services to 'win' MNOs' uncommitted site business.

23. The MNOs are in the process of rolling out 5G, or fifth generation mobile network technology. The roll out of 5G, coupled with growth in fixed wireless broadband, requires densification of MNOs' existing networks and for additional sites to be built, increasing the demand for passive infrastructure services. Under the MISAs/MSAs, MNOs have committed, or propose to commit, to have their respective TowerCo build a specified number of future passive infrastructure sites (referred to as build to suit, or BTS sites). Spark's BTS commitment with Connexa is for 671 sites, One NZ's BTS commitment with FortySouth is for 390 sites and 2degrees' proposed BTS commitment with Connexa (under the MISA that it would propose to enter into with the Proposed Acquisition) is for 450 sites.[16] Each MNO has additional demand for future sites beyond these BTS commitments.

24. The Spark and 2degrees MISAs both contain non-discrimination clauses to ensure that Connexa does not favour one MNO over another.
[
]
[17]

25. [
][18]

The relevant markets

26. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. In many cases this may not require us to precisely

16 The Application at Table 4 and [92].
17 MISA between Spark and Connexa at [ ] and MISA between 2degrees and Connexa at [ ].
18 [ ]

define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints.

Connexa's submissions

27. Connexa submits that the markets relevant to our assessment of the Proposed Acquisition are:[19]

    27.1 in terms of passive mobile telecommunications infrastructure services provided by TowerCos, wholesale markets for:

        27.1.1 the national supply of MISAs to MNOs;

        27.1.2 the local supply of sites not covered by MISAs with MNOs; and

        27.1.3 the national supply of passive mobile infrastructure services to non-MNO customers; and

    27.2 the national market for the retail supply of mobile services.

28. Connexa submits that the markets set out at [27.1.1] and [27.1.2] likely include both existing MNOs and new entrant MNOs (should entry occur).[20]

Our view

29. We have not reached any definitive views on the relevant markets for assessing the Proposed Acquisition.

30. For the purposes of this SoI, we have analysed the competitive effects of the Proposed Acquisition in relation to:

    30.1 the supply of passive infrastructure services in local markets for uncommitted sites (of existing MNOs, new entrant MNOs and non-MNO customers);

    30.2 the downstream retail and wholesale telecommunications markets; and

    30.3 the supply of services by contractors relating to the physical building and maintaining of infrastructure.

31. We invite submissions on our current approach to market definition.

With and without scenarios

32. Assessing whether a substantial lessening of competition is likely requires us to:

    32.1 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

19 The Application at [10] and [115]-[151].

20 The Application at [148].

32.2 determine whether competition is likely to be substantially lessened by comparing those scenarios.

The factual

33. With the Proposed Acquisition:

33.1 Connexa would own passive infrastructure assets at approximately 2,367 sites (being 1,243 existing sites acquired from Spark and 1,124 sites of 2degrees), compared to the estimated 1,484 sites of FortySouth.[21] Connexa would own around two-thirds of the passive infrastructure assets previously owned by MNOs in New Zealand;

33.2 Spark would have a minority (17%) shareholding in Connexa and two Spark senior management employees (currently, the chief financial officer and general counsel) would continue to be directors on the Board of Connexa;

33.3 2degrees and Connexa would enter into a long-term MISA for an initial period of 20 years, under which 2degrees would commit to build 450 future passive infrastructure sites with Connexa; and

33.4 pursuant to an Operational Services Agreement (OSA) entered into between Connexa and Spark regarding the use of Entelar to build and maintain passive infrastructure, [ ].[22]

34. In the factual there would be two large scale, national suppliers of passive infrastructure services to both MNO and non-MNO customers.

The counterfactual

35. We have considered what 2degrees would do with its passive infrastructure assets if the Proposed Acquisition did not go ahead.

36. Connexa submits that, absent the Proposed Acquisition, there is a real chance that 2degrees would sell its passive infrastructure assets to an independent third party. In such a counterfactual, Connexa submits that the assets of all three MNOs in New Zealand (Spark, One NZ and 2degrees) would be majority owned by parties with no involvement in the downstream market for the retail supply of mobile services.[23]

37. 2degrees has told us that [ ].[24]

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21 The Application at Appendix 7 and NERA Report (for Connexa) at Table 3.1.

22 The OSA is between Spark and Connexa, but for readability hereafter we refer to the OSA as being between Connexa and Entelar.

23 The Application at [7]-[8], [111] and [113].

24 Commerce Commission interview with 2degrees (2 February 2023).

38. We consider that, absent the Proposed Acquisition, 2degrees' assets are likely to be sold to a third-party who would own and operate those assets as a third TowerCo in the relevant passive infrastructure markets, in competition with Connexa and FortySouth.

39. In connection to any third-party's acquisition of 2degrees' assets in the counterfactual, 2degrees and the third-party purchaser would likely enter into a long-term passive infrastructure services agreement. Any MISA reached in the counterfactual is likely to include commitments for 2degrees to acquire a proportion of its future site needs from that third-party, in order to create value for 2degrees from the sales process. As such, the factual and counterfactual are likely to be similar in terms of the quantum of opportunities that TowerCos would have to compete for uncommitted sites.

40. Beyond the above, it is uncertain how the terms of any MISA between 2degrees and a third-party purchaser in the counterfactual would compare to the terms of the proposed MISA between 2degrees and Connexa that would exist in the factual. However, Connexa has suggested that that 2degrees would obtain similar contract terms in the counterfactual to those proposed in the factual.[25]

41. Accordingly, there would be three large scale, national TowerCos in the counterfactual (each with a MISA/MSA with a different MNO), compared to two TowerCos in the factual (where Connexa will have a MISA with 2degrees and Spark, and FortySouth will have an MSA with One NZ).

The differences between the factual and counterfactual

42. Both with and without the Proposed Acquisition, Connexa would own the passive infrastructure assets previously owned by Spark, provide passive infrastructure services to Spark under a MISA for an initial period of 15 years and have an OSA with Entelar relating to the physical building and maintaining passive infrastructure. With and without the Proposed Acquisition, FortySouth would similarly own the passive infrastructure assets previously owned by One NZ, and provide passive infrastructure services to One NZ under a MISA for an initial period of 20 years.

43. Figures 1 and 2 below depict the factual and counterfactual and seek to highlight the differences between these scenarios.[26]

[25] The Application at [10.2(b)].

[26] Note in terms of Figure 1 and Figure 2, that Infratil (which owns 20% of FortySouth) is also a major shareholder in One NZ (having a 49.95% stake).

Figure 1: The factual

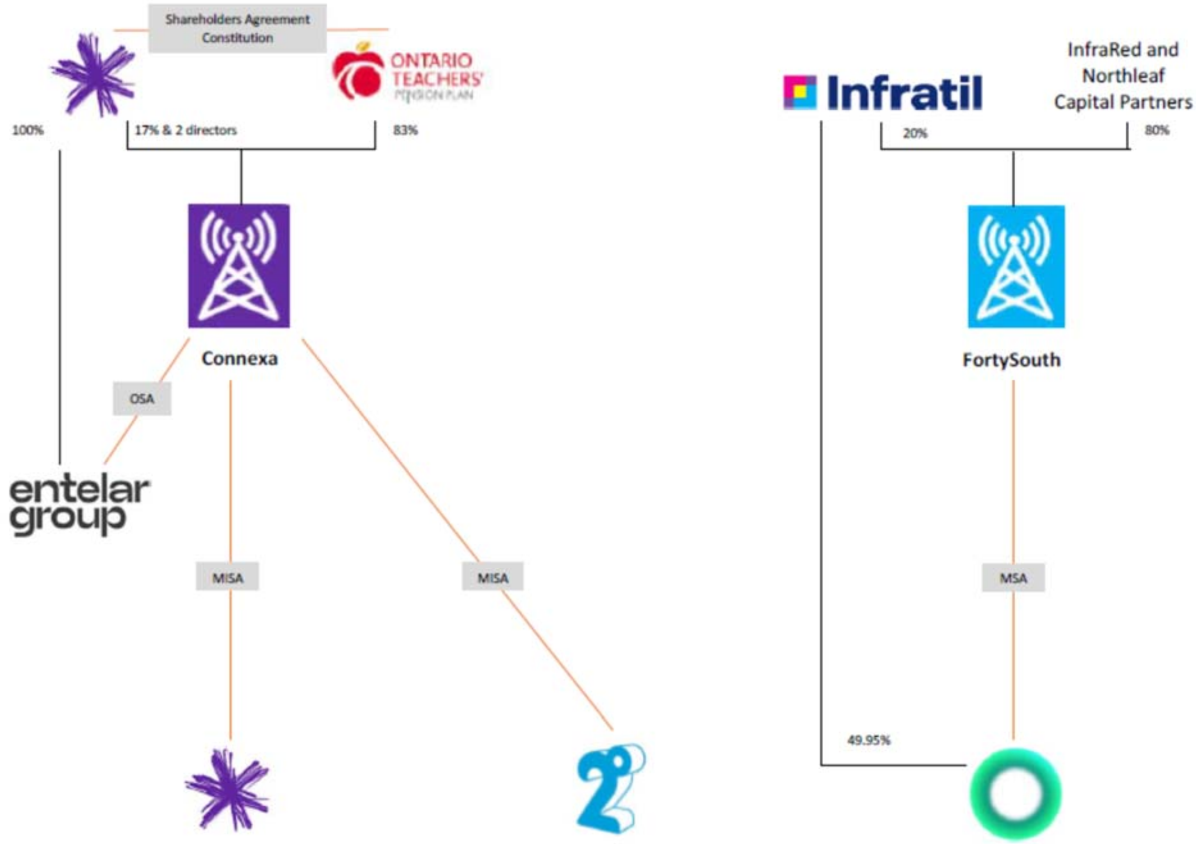
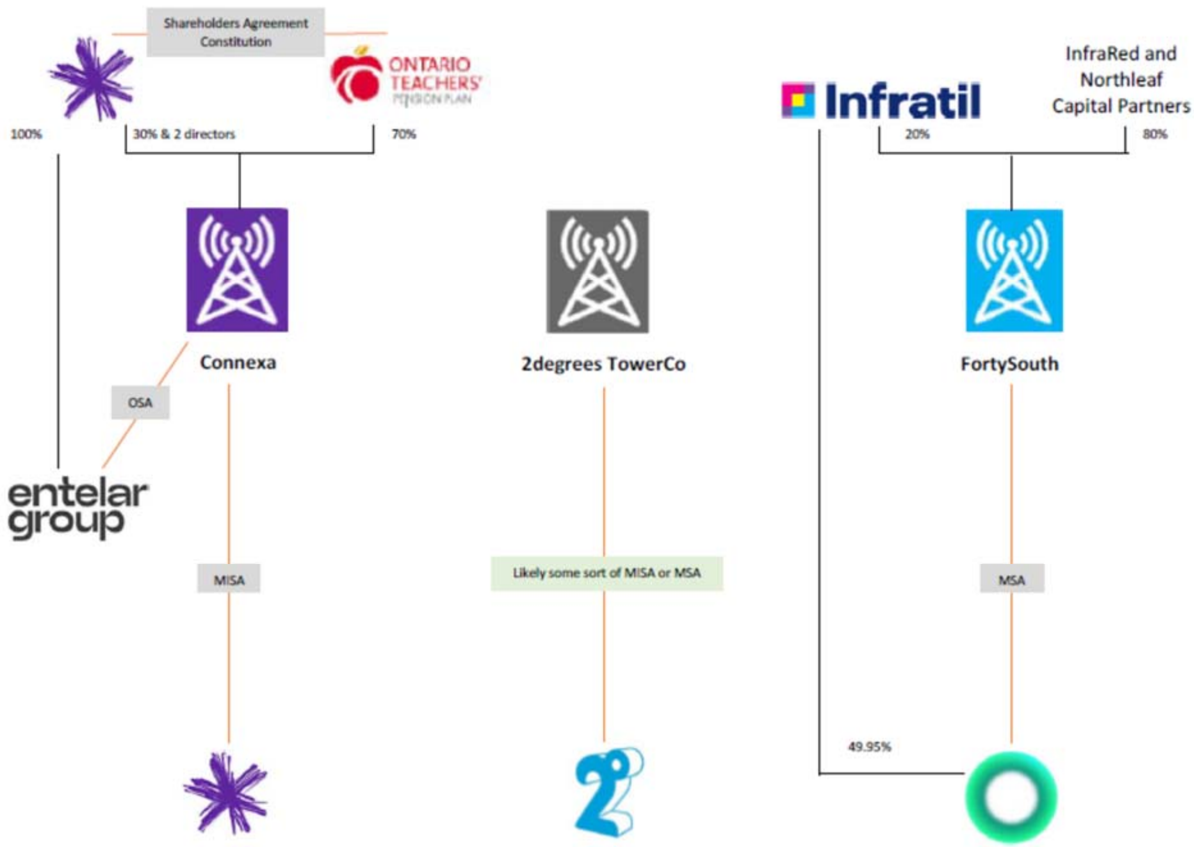


Figure 2: The counterfactual



44. The key differences between the factual and the counterfactual scenarios are:

44.1 the presence of two versus three large scale, national TowerCos competing in passive infrastructure markets for the uncommitted sites needs of MNOs and non-MNO customers (and potentially competing to secure long-term passive infrastructure services agreements with MNOs at the end of the relevant term of each of the existing MISAs/MSAs);

44.2 less new co-location by Spark and 2degrees on the passive infrastructure of Connexa in the counterfactual (than in the factual), as 2degrees would likely have committed to acquire all its existing sites needs and a proportion of its future site needs from the third-party purchaser of 2degrees' assets;

44.3 Spark's shareholding in, and directors on the Board of, Connexa essentially extending, as opposed to not extending, to the passive infrastructure assets relied on by 2degrees to compete with Spark, both in the short-term and in the long-term, and as it rolls out new sites necessary to offer 5G; and

44.4 Entelar [ ] under the OSA between Connexa and Entelar.

Unilateral effects in passive infrastructure services markets

45. Horizontal 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, if any) such that the merged entity can profitably increase price above (and/or reduce quality below) the level that would prevail without the merger.

46. We are currently not satisfied that the Proposed Acquisition is unlikely to give rise to unilateral effects in passive infrastructure services markets. As noted above, there would be two large scale, national TowerCos in the factual, compared to three in the counterfactual. We are continuing to test whether this reduction of suppliers could substantially lessen competition by:

46.1 reducing competition in local markets for uncommitted sites (of existing MNOs, new entrant MNOs and non-MNO customers); and/or

46.2 reducing competition to supply a new entrant MNO seeking access to passive infrastructure services (nationally or in local markets), which could in turn lessen competition to supply downstream telecommunications services.

47. In testing these issues, we are considering how competition may be impacted by clauses of the MISAs/MSAs between existing MNOs and TowerCos, in particular any non-discrimination clauses.

Connexa's submissions

48. Connexa submits that the Proposed Acquisition would not be likely to substantially lessen competition due to unilateral effects. In summary at a high level, Connexa submits that:[27]

    48.1 the pricing outcomes where two TowerCos compete (ie, Connexa and FortySouth with the Proposed Acquisition) are unlikely to be materially different from the outcomes where three TowerCos are competing in the counterfactual;

    48.2 customers would continue to have alternative supply options and significant countervailing power to ensure competitive terms for all sites, including from the ability to self-supply; and

    48.3 competition to supply passive infrastructure services has no material impact on downstream competition for the retail supply of mobile services.

49. Connexa further submits that the Proposed Acquisition, by precluding the counterfactual of a third TowerCo, is likely to be pro-competitive due to the potential for increased co-location.[28]

Our current assessment

50. We acknowledge that Connexa and FortySouth would be incentivised to compete to win uncommitted sites in order to grow their businesses and achieve a return on their investment.[29] However, we are currently not satisfied that the Proposed Acquisition would not allow the merged entity to raise the prices or reduce the quality of passive infrastructure services provided for uncommitted sites (of existing MNOs, new entrant MNOs and non-MNO customers). We set out our reasoning below.

Would pricing outcomes be different with three Towercos compared with two?

51. At this stage, we are not yet satisfied that the pricing outcomes in a market with two large scale TowerCos (ie, the factual) would be materially the same as a market with three large scale TowerCos (the counterfactual). If a large global TowerCo entered the market (through the acquisition of 2degrees' assets in the counterfactual), it would increase the supply options available to customers for uncommitted sites. This would provide an additional constraint on Connexa and FortySouth when bidding for uncommitted sites, which could lead to lower prices or better quality terms for MNO and non-MNO customers (including new entrants).[30]

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[27] The Application at [10.2]-[10.5], [149], [153], [155]-[157], [190.2], [218]-[220], [238] and [241], and NERA Report at [76].

[28] The Application at [153].

[29] Commerce Commission interview with FortySouth (21 February 2023) and Commerce Commission interview with Connexa (17 February 2023).

[30] NERA submits that in auction markets, the driver of price is the second cheapest competitor. If there are three competitors, the second cheapest competitor will likely have lower costs compared to the second cheapest competitor when there are only two firms in a market. NERA Report at [73].

52. We continue to test the potential, or lack thereof, for current and potential future customers to achieve materially better price/quality terms for uncommitted sites in the counterfactual, compared to the factual.

53. As noted above, Connexa submits that competition to supply passive infrastructure services has no material impact on downstream competition for retail supply of mobile services due to MNOs no longer competing on the basis of coverage, but on the basis of service offering. However, we understand that in the roll out of 5G, coverage and service offering will be, in the near term, inextricably linked. In order to facilitate 5G services, MNOs will have to densify their networks (ie, MNOs will have to increase coverage in order to provide the new technology to customers).[31] At this stage, we are not satisfied that competition between TowerCos for the roll out of passive infrastructure for 5G networks would be materially the same in the factual compared to the counterfactual.

54. We note that non-discrimination clauses included in MISAs seem intended to deal with the risk of TowerCos giving particular MNOs unfavourable treatment. This may run contrary to Connexa's submissions that passive infrastructure services do not have big impact on downstream competition.

Reduction in competition for uncommitted sites

55. With the Proposed Acquisition, there would be no large scale, national alternatives to the merged entity for MNOs and non-MNO customers in relation to uncommitted sites, other than FortySouth or to self-supply. The presence of three TowerCos in the counterfactual would mean that MNOs and non-MNO customers would have more options for supply, including potentially in less populated areas, than would be the case with only two TowerCos.

56. Some parties were uncertain if any MNO would be able to facilitate a new entrant TowerCo based on uncommitted site volumes, noting that this volume may only be incremental.[32] [ ].[33] [ ] considers that there would be competition for both new and existing uncommitted sites in the future.[34]

57. While each of Spark and 2degrees have in principle forecasted the number of uncommitted sites they may require, [ ].[35] Given this, the 2degrees and Spark MISAs with Connexa [ ].

31 Commerce Commission interview with 2degrees (2 February 2023), Commerce Commission interview with Spark (8 February 2023) and Commerce Commission interview with One NZ (2 February 2023).

32 For example, [ ].

33 [ ]

34 [ ]

35 [ ]

58. The above indicates that there may be scope for a large number of uncommitted sites, dependent on 5G roll out and other future technologies where densification may be required. Because of this, there is the possibility that a new entrant TowerCo could be assisted based on the uncommitted site volumes of each MNO.

Self-supply appears unlikely in response to a SSNIP

59. We acknowledge that in theory MNOs could self-supply passive infrastructure to countervail higher prices, poor service or quality offered by TowerCos and that this might constrain the merged entity. However, before resorting to self-supply, MNOs are likely to utilise provisions of existing MISAs/MSAs with TowerCos to have passive infrastructure provided at agreed prices and terms.

60. Self-supply would require MNOs to source locations on which to establish sites and to contract with third-parties to physically build (and later maintain) these passive infrastructure sites. In addition, self-supply would require MNOs to pay for the costs of constructing sites upfront, as opposed to a TowerCo covering these costs (which a TowerCo would likely recover over time through MNOs paying access charges). We also note that self-supplying passive infrastructure assets would run contrary to the reasons for MNOs divesting such assets, [ ].[36] In addition, in managing a small-scale operation of self-supplied passive infrastructure sites, MNOs may face comparatively or disproportionately high overhead costs. The global trend of MNOs divesting their passive infrastructure assets further suggests that self-supply is likely to be a second best option for MNOs and unlikely to occur in response to a SSNIP.

61. We continue to test the extent to which MNOs, or other customers, would, in the factual, self-supply passive infrastructure to countervail higher prices, poor price/quality offered by a TowerCo.

Reduction in competition due to non-discrimination clauses

62. In respect of the impact of non-discrimination clauses in the MISAs on competition, we are considering whether the non-discrimination clauses in MISAs with Connexa may dampen incentives for it to compete for new customers on price and/or for Spark and 2degrees to seek out competitive quotes from other TowerCos.

63. The non-discrimination clauses may mean that Connexa is not incentivised to [ ]. In the counterfactual, the TowerCo that owns 2degrees' assets may (depending on the terms of any MISA it has with 2degrees) be freer to compete than Connexa.

64. We invite submissions on the above.

[36] Commerce Commission interview with 2degrees (2 February 2023), Commerce Commission interview with Spark (8 February 2023). [ ]

Reducing competition to entry for new entrants in downstream telecommunications markets

65. Telecommunications markets are currently characterised by high levels of innovation and expansion. All MNOs in New Zealand continue to make significant investments in their networks to improve their offerings,[37] and other jurisdictions have found that other network types could become more common in the next ten years.[38]

66. We are continuing to consider whether new entry – whether as an MNO or non-MNO – may require access to a national network of passive infrastructure. With the Proposed Acquisition, Connexa will have a larger network of sites to offer any new entrant, and we are considering whether the Proposed Acquisition may result in conditions of entry to downstream telecommunications markets becoming materially less competitive compared with the counterfactual.

67. We invite submissions on the above.

Coordinated effects in passive infrastructure services markets

68. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all, or some, of its remaining rivals to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase across a market. Unlike unilateral effects, which can arise from the merged entity acting on its own, coordinated effects require some or all the firms in the market to be acting in a coordinated way.

69. We are continuing to assess whether the Proposed Acquisition could substantially lessen competition in passive infrastructure services markets by allowing TowerCos to coordinate their behaviour.

70. Connexa submits that there is no risk of coordination between TowerCos or in any passive infrastructure services markets. It submits that a number of factors mean that coordination is unlikely to occur or not be sustainable, and the Proposed Acquisition would not make coordination more likely.[39]

71. We are continuing to consider whether passive infrastructure services markets are vulnerable to coordination, and whether the Proposed Acquisition would be likely to change conditions in passive infrastructure markets to make coordination more likely, more complete or more sustainable.

72. The MISAs in place between Connexa and Spark, and anticipated to be in place between Connexa and 2degrees include non-discrimination clauses [ ].

73. We are continuing to consider whether these service agreements would enable Connexa to coordinate more easily with FortySouth, in the factual, compared to the counterfactual.

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37 Commerce Commission, Mobile Market Study – Findings (26 September 2019) at [3.70]-[3.73].

38 Ofcom, Discussion paper on Ofcom's future approach to mobile markets (9 February 2022) at [5.41]-[5.46].

39 The Application at [270]-[271].

74. Finally on this point, we are continuing to consider whether non-discrimination clauses included in MISAs may [ ].

75. We invite submissions on the above.

Vertical effects in downstream telecommunications markets

76. A merger or acquisition between parties who operate in related markets can result in a substantial lessening of competition due to vertical effects. This can occur where a merger or acquisition gives the merged entity (or a related entity) a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively (which we refer to as 'foreclosing rivals').

77. In this case, the Proposed Acquisition raises a potential concern of vertical effects on 2degrees. Spark – which is a rival of 2degrees in downstream telecommunications markets – has two directors on Connexa's Board and a minority shareholding in Connexa.[40] Spark also owns Entelar, which Connexa uses as a contractor to build and maintain passive infrastructure. Pursuant to an OSA, Connexa [ ]. With the Proposed Acquisition, 2degrees would rely on Connexa for most of its passive infrastructure needs while, without the Proposed Acquisition, most of 2degrees' passive infrastructure would be managed by a third TowerCo with no connection to Spark.

78. We are continuing to assess whether Spark would have the ability and incentive to influence Connexa to harm 2degrees – by raising its costs, reducing the quality of services provided by Connexa, delaying site builds or by any other means.

Submissions and information received

79. Connexa essentially submits that Spark would have no ability or incentive to affect how Connexa would serve 2degrees.[41]

80. As regards ability, Connexa submits that, in its view, Spark would be unable to dilute or override Connexa's commercial objectives and foreclose other MNOs' competitive access to passive infrastructure services. In other words, Spark would not be able to prevent it from serving 2degrees effectively and without discrimination because:

    80.1 [ ];

[40] We note that any influence that Spark may have on Connexa specifically through its shareholding would diminish with the Proposed Acquisition, since Spark's shareholding would fall from 30% to 17%.

[41] The Application at [10.1], [162]-[173] and [190.4], Connexa response to the Commission's RFI (8 February 2013), Commerce Commission interview with Connexa (17 February 2023) and Connexa response to the Commission's questions (28 February 2013).

80.2 [

]; and

80.3 [

].

81. As regards incentive, Connexa submits that, even if Spark could exert any influence over Connexa, it would not be commercially rational for Spark to do so. In more detail, Connexa submits that:

81.1 [

]; and

81.2 [

].

82. Spark and Entelar told us that [

].[42]

83. In broad agreement with the above, 2degrees told us that [

].[43]

Our current assessment

84. We continue to assess Spark's potential ability and incentive to affect the passive infrastructure services that Connexa would provide to 2degrees with the Proposed Acquisition and, thereby, how Spark may influence 2degrees' competitive

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42 Commerce Commission interview with Spark (8 February 2023) and Commerce Commission interview with Entelar (24 February 2023).

43 Commerce Commission interview with 2degrees (2 February 2023).

effectiveness in downstream telecommunications markets into the future. This is because, with the Proposed Acquisition, 2degrees would enter into a long term supply arrangement with Connexa.

85. While we note the protections afforded by 2degrees' MISA and by OTTP's incentives to operate Connexa in a non-discriminatory way, we continue to assess whether there is any potential for Spark to affect 2degrees, in particular via Entelar, in ways that governance arrangements could not fully prevent. We also note that Connexa's governance arrangements are set out in commercial agreements between Spark and OTPP that are not subject to clearance and that could be changed without the Commission's oversight if the Proposed Acquisition takes place.

86. One potential concern arises from the fact that Entelar has [ ]. We are assessing whether Connexa could, in fact, [ ] to the detriment of 2degrees.

87. For example, if Spark could influence [ ], it may be able to delay 2degrees' roll out of 5G and undermine 2degrees' competitive effectiveness at a critical time. We continue to assess the likelihood of such an outcome and the protections that 2degrees may have against it. In particular, we continue to assess [ ].

88. We invite submissions on the above.

Issues that do not currently raise concerns

89. Currently, we have no concerns that the Proposed Acquisition is likely to:

   89.1 give rise to coordinated effects in downstream telecommunications markets; or

   89.2 harm competition in the supply of services by contractors relating to physically building and maintaining of infrastructure.

Coordinated effects in downstream telecommunications markets

90. We consider that the Proposed Acquisition is unlikely to give rise to coordinated effects in downstream telecommunications markets.

91. We acknowledge that there is the potential for information exchange via Connexa due to Spark's ownership interest in Connexa and its ownership of Entelar and/or non-discrimination clauses in MISAs. With the Proposed Acquisition, there is the potential for Spark and 2degrees to learn information about each other's businesses (and plans for growth and investment) via Connexa. However, we consider that any such information exchange is unlikely to materially facilitate coordination between MNOs in downstream telecommunications markets.

92. Connexa submits that the Proposed Acquisition would not increase the potential for coordination between MNOs. In summary at a high level, it submits that:[44]

    92.1 even if non-discrimination clauses did provide Spark or 2degrees [ ], it would not enhance the conditions for coordination in any meaningful way; and

    92.2 downstream telecommunications markets are not conducive to coordination.

93. We invite submissions on the above.

Harm to competition between contractors in building and maintaining infrastructure

94. We consider that the Proposed Acquisition is unlikely to harm competition between contractors involved in physically building and maintaining infrastructure.

95. Connexa submits that the Proposed Acquisition would not result in any aggregation in relation to the supply of contracting services for building infrastructure.[45]

96. Pursuant to an OSA between Connexa and Entelar, [ ] with the Proposed Acquisition. The OSA could lead to Entelar [ ] and mean that, with the Proposed Acquisition, competitors to [ ]. However, we consider that this would be unlikely to substantially lessen competition in any markets for the supply of services by contractors relating to the physical building and maintaining of infrastructure. There are several contractors of similar scale to Entelar. These and other contractors would still have the opportunity to compete for the business of other parties, including customers that seek contractors to build or maintain passive infrastructure for purposes other than mobile telecommunications.

97. We invite submissions on the above.

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[44] The Application at [10.6] and [267]-[268], Connexa response to the Commission's RFI (8 February 2013) and Connexa response to the Commission's questions (28 February 2013).

[45] The Application at [109].

Next steps

98. We are currently scheduled to decide whether or not to give clearance to the Proposed Acquisition by 19 May 2023. However, this date may change as our investigation progresses.[46] In particular, if we need to test and consider the issues identified above further, the decision date may extend.

99. As part of our investigation, we are identifying and contacting parties that we consider will be able to help us assess the issues identified above.

Making a submission

100. We are continuing to undertake inquiries and seek information from industry participants about the impact of the Proposed Acquisition. We welcome any further evidence and other relevant information and documents that the parties or any other interested parties are able to provide regarding the issues identified in this SoI.

101. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Connexa/2degrees" 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 April 2023**.

102. 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 be likely to unreasonably prejudice the commercial position of the supplier or subject of the information.

46 The Commission maintains a clearance register on our website at https://comcom.govt.nz/case-register/case-register-entries/verifone-new-zealand-smartpay-holdings-limited where we update any changes to our deadlines and provide relevant documents.