

To: Hon Grant Robertson, Minister of Finance

National Interest Assessment Report: Microsoft New Zealand Limited and Microsoft 6399 New Zealand Limited

Purpose

This report seeks your decision about whether the proposed investment is contrary to the national interest of New Zealand under the Overseas Investment Act 2005.

Date	18 August 2020
Briefing number	BRF 21-087
Case number	201900507
Investor	Microsoft New Zealand Limited and Microsoft 6399 New Zealand Limited
Pathway the assessment has arisen under	<input checked="" type="checkbox"/> Mandatory assessment via consent pathway <input type="checkbox"/> Discretionary call-in via consent pathway

Assessment

This report has been prepared by the Overseas Investment Office (OIO), with advice from the Standing Committee for Overseas Investment. We do not consider the proposed investment to be contrary to New Zealand's national interest. We recommend that you seek further advice from officials if you disagree.

	Signature	Date
Charlotte Connell Manager, Applications		

Action required

1. Review the national interest assessment report.
2. Determine if the proposed investment is contrary to the national interest of New Zealand.
3. Complete the **Decision** table below.
4. Return the decision to the Overseas Investment Office by **25 August 2020**. **Note:** The due date is based on the Investor's commercial deadline of 28 August 2020.

OIO contacts

Name	Position	Contact	First contact
Charlotte Connell	Manager, Applications	§ 9(2)(g)(ii)	<input checked="" type="checkbox"/>
Paul Wrigley	Manager, Monitoring and Intelligence	§ 9(2)(g)(ii)	<input type="checkbox"/>

Decision

1. The Overseas Investment Office (OIO) considers that the **s 6(a)** [REDACTED] by Microsoft New Zealand Limited and Microsoft 6399 New Zealand Limited (201900507) **s 6(a)** . **s 9(2)(f)(iv), s 9(2)(g)(i)** [REDACTED]
[REDACTED]
2. I have reviewed the transaction of national interest and have decided:
- a. that the transaction is **not contrary** to New Zealand's national interest and refer the transaction back to the OIO with no further comments. **YES / NO**
- OR**
- b. that further advice from officials is required because the transaction could be contrary to New Zealand's national interest but I wish to consider any risks further and whether I want to ask the OIO (who are the decision-makers under section 24(1)(a) of the Act) to consider imposing conditions to mitigate the risk of harm to New Zealand's national interest **YES / NO**
- OR**
- c. that further advice from officials is required because I am considering whether or not to decline consent to the transaction on the basis that it is contrary to New Zealand's national interest and risk mitigations are unlikely to prevent harm to New Zealand, pursuant to section 20C(1) of the Act. **YES / NO**

Hon Grant Robertson
Minister of Finance

Date:

Summary

1. Microsoft New Zealand Limited (**Microsoft NZ**) and Microsoft 6399 New Zealand Limited (**Microsoft 6399**) (together the **Investor**) seek to acquire s6(a) & 9(2)(b)(ii) interests in s9(2)(b)(ii) land in New Zealand on which it will develop data centres under the Overseas Investment Act 2005 (the **Act**).
2. s 6(a) s 9(2)(f)(iv), s 6(a), s 6(c)
3. The proposed investment is likely to have a positive economic and social impact on New Zealand through delivering hyper-scale computing capability to New Zealand.
4. s 6(a) and the likely positive impacts in New Zealand, we s 9(2)(f)(iv), s 9(2)(g)(i)
5. It is a condition of every consent for a transaction of national interest, that each consent holder must not, in relation to sensitive assets in which the relevant investment is made, act or omit to act with a purpose or an intention of adversely affecting national security or public order (section 25C of the Act).

Path to national interest assessment

6. The Investor sought consent¹ to acquire s6(a) and 9(2)(b)(ii) interests in s9(2)(b)(ii) land in New Zealand on which it will develop data centres.² The decision is delegated to the Overseas Investment Office (**OIO**) as it relates to significant business assets³ with the total consideration for the acquisition exceeding \$100 million. While the Applicant is acquiring s6(a) and 9(2)(b)(ii) interests in land, none of this land is considered 'sensitive land' under the Overseas Investment Act 2005, and therefore consent to acquire sensitive land under section 12(a) of the Act is not required.
7. On 18 August 2020 the OIO decided that the investor test was satisfied for this Application (Attachment 1). The next step is for you to consider whether the application is contrary to New Zealand's national interest. Attached is the Proposed Consent Decision setting out the proposed special and standard conditions to provide context for how the investment would ordinarily be managed under the overseas investment regime (Attachment 2).
8. The investment requires a mandatory national interest assessment as the business is or includes a Strategically Important Business (**SIB**)⁴. Microsoft NZ is on the critical direct suppliers list s6(a) and 9(2)(b)(ii)
9. Land Information New Zealand (**LINZ**) and other agencies are interested in the establishment of the data centre. To ensure that any perception of a conflict of interest is managed, we have a small team within the OIO working on the consent application and a separate small team on the national interest assessment ensuring information about the Application is not shared with other LINZ staff. The LINZ Executive Leadership Team have no decision making power over this Application.

¹ Section 13(1)(c) of the Act

² Data centres are centralised locations where cloud computing and networking equipment is concentrated for the purpose of storing and processing large amounts of data.

³ Designation and Delegation Letter, 17 October 2018, Table A, Row A.

⁴ Sections 13(1)(c) and 20A(1)(e) of the Act

10. This report was prepared by the OIO, with advice from the Standing Committee for Overseas Investment, a cross-government agency group of advisors. The Standing Committee met and discussed this transaction on s 9(2)(ba)

Context for the investment

The Investment

11. The Investor intends to develop data centres in New Zealand, which it submits will support New Zealand's digital ecosystem. The Investor submits the majority of information and technology companies build their solutions on top of cloud platforms, with many choosing to use hyper-scale cloud platforms⁵ (such as the Investor's) due to a combination of price, scalability, improved security and advanced technological capabilities (such as artificial intelligence and machine learning).
12. Data centres are centralised locations where cloud computing and networking equipment is concentrated for the purpose of storing and processing large amounts of data. In order to meet data residency law requirements⁶ the Microsoft group delivers hyper-scale cloud services from approximately 60 so-called 'regions' and intends to add a region in New Zealand enabling its New Zealand customers to store and process data in New Zealand.
13. Microsoft group is one of the three main hyper-scale cloud services providers⁷ via Microsoft Azure which is an established cloud computing service for building, testing, deploying and managing applications and services through data centres it manages.
14. To enable its proposed investment the Investor intends to acquire the interests in land in Auckland detailed in the table below:

s6(a) and 9(2)(b)(ii)

⁵ In computing, hyper-scale is the ability of an architecture to scale appropriately as increased demand is added to the system.

⁶ Data residency law requires data about a nations' citizens or residents be collected, processed, and/or stored inside the country, often before being transferred internationally, and usually transferred only after meeting local privacy or data protection laws, such as giving the user notice of how the information will be used and obtaining their consent.

⁷ The others being Google Cloud Platform and Amazon AWS

⁸ s9(2)(b)(ii)

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15. [REDACTED] s6(a) and 9(2)(b)(ii) [REDACTED]. Data centres will be developed on [REDACTED] s6(a) and 9(2)(b)(ii) [REDACTED] these facilities including data halls, storage capacity and some office space and storage areas.
16. The Investor will [REDACTED] s6(a) and 9(2)(b)(ii) [REDACTED] which will be on land [REDACTED] s6(a) and 9(2)(b)(ii) [REDACTED] also provides data services to the government.
17. Subdivisions will be required to create the [REDACTED] s6(a) and 9(2)(b)(ii) [REDACTED] interests in [REDACTED] s6(a) and 9(2)(b)(ii) [REDACTED], and once subdivided they are likely to be held by Microsoft 6399. [REDACTED] s6(a) and 9(2)(b)(ii) [REDACTED].

Pre-consultation undertaken by the Investor

18. [REDACTED] s9(2)(g)(i) and 9(2)(ba) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] s 9(2)(ba), s 9(2)(g)(i) [REDACTED]
[REDACTED]
[REDACTED]
19. [REDACTED] s 9(2)(ba), s 9(2)(g)(i) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

National interest assessment

20. This section sets out our assessment of whether the proposed transaction would likely be contrary to New Zealand's national interest as set out in s20C(1) of the Act.
21. Foreign direct investment generally improves economic wellbeing in New Zealand. Treasury advised that foreign direct investment is one of the Government's wellbeing indicators. It is particularly important for New Zealand businesses which are currently capital constrained due to the economic downturn caused by the COVID-19 pandemic. Treasury notes that a key part of the Government's economic plan is to create deeper pools of capital available to New Zealand businesses, to invest in infrastructure and grow New Zealand's productive assets.
22. The national interest, and what would be contrary to it, is not defined in the Act. Instead the Act grants the Minister responsible broad discretion to decide on a case-by-case basis whether a prospective investment could be contrary to the national interest.
23. In undertaking the national interest assessment, we have been informed by the following:¹¹
- the *Foreign Investment Policy and National Interest Guidance (Guidance Note)* which sets out factors generally considered when determining whether an investment is contrary to New Zealand's national interest

⁹ Or by a third party [REDACTED] s6(a) and 9(2)(b)(ii) [REDACTED].

¹⁰ <https://www.linz.govt.nz/overseas-investment/applying-for-consent-purchase-new-zealand-assets/preparing-your-application-oio/national-interest-assessment>

¹¹ As set out in the Supplementary Ministerial Directive letter dated 8 June 2020

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- Consultation and input from relevant partner agencies.¹²

24. The Guidance Note sets out five general factors to be considered when determining whether an investment is contrary to New Zealand’s national interest. We consider three to be relevant for the proposed transaction.

National security

The Government considers the extent to which investments pose risks to New Zealand’s national security, public order, or international relations.

25. s 6(a) [redacted]
26. This investment has been automatically subject to the national interest test because the assets being acquired are used in the operation of a critical direct supplier’s business. s 6(a) [redacted]
27. Microsoft is already a critical supplier to New Zealand Government agencies s 6(a) [redacted]
28. In addition s 6(a), s 6(c), s 9(2)(f)(iv), s 9(2)(g)(i) [redacted]
29. s 6(a) [redacted]

Economic and social impact and alignment with New Zealand’s values and interests

The Government considers an investment’s likely impact on the New Zealand economy and on New Zealand society and the extent to which an investment supports broader Government priorities and policy settings and New Zealand’s values.

30. We consider the investment is likely to have **positive** economic and social impacts. We consider there is s 9(2)(f)(iv) of the investment being contrary to New Zealand’s values and interests. The analysis for these two factors has been consolidated one section due to the significant overlap between them.

¹² Such as those agencies listed in section 126 of the Act.

s 6(a) [redacted]

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- 31. The investment will provide new information and communication technology (ICT) infrastructure that can help grow New Zealand’s productive assets and improve the ICT services available to New Zealander businesses and end users of these services in New Zealand. The investment is expected **§ 9(2)(f)(iv)** both with the domestic provider market and through attracting other, international hyper-scale providers to deliver similar capabilities in New Zealand.
- 32. The creation of a data centre in New Zealand will likely generate more market activity from businesses not just in the technology sector but those that can now accelerate their adoption of leading-edge technology. These positive impacts would likely extend to both domestic and export driven markets.
- 33. **§ 9(2)(f)(iv)**
- 34. The investment **§ 6(a)**, **§ 9(2)(f)(iv)**, which is expected to enable safe consumption of cloud services by public agencies. This is expected to offer **§ 9(2)(f)(iv)** and delivery of services to the New Zealand public.
- 35. The investment should reduce companies’ overall costs using cloud-based technology. This may reduce barriers to market entry for New Zealand organisations that require computer power, storage, or connectivity to grow their businesses.

Summary of analysis

- 36. In light of advice from partner agencies, and our analysis, we consider that while this investment involves a critical direct supplier (requiring a mandatory national interest assessment), it poses a **§ 6(a)**
- 37. Notably, this investment has been identified as posing a **§ 6(a)** for New Zealand and is likely to have a **positive** economic and social impact through providing **§ 6(a)** **§ 9(2)(f)(iv)**
- 38. Given existing **§ 9(2)(f)(iv)** For completeness, we note that the attached Proposed Consent Decision sets out conditions showing how the investment would ordinarily be managed under the overseas investment regime.

Recommendation and next steps

39. We recommend the following decision be made.

Decision	Conditions	Rationale
§ 9(2)(f)(iv)	§ 9(2)(f)(iv)	The proposed transaction will advance technology capacity in New Zealand poses a § 6(a) § 9(2)(f)(iv)

40. Please complete the decision section on page 1 and we will notify the decision-maker.

Attachments

1. Letter from Louise Hornabrook (Overseas Investment Office): **National interest assessment under the Overseas Investment Act 2005** (18 August 2020)
2. Proposed Consent Decision for Microsoft Application (201900507)

Attachment 1: Letter from Overseas Investment Office

OVERSEAS INVESTMENT OFFICE



Case ref. 201900507

18 August 2020

Hon Grant Robertson
Minister of Finance
EXECUTIVE WING

cc Vanessa Horne, Group Manager (Overseas Investment), vhorne@linz.govt.nz

Dear Minister

National interest assessment under the Overseas Investment Act 2005

I seek your decision about whether the following investment is contrary to New Zealand's national interests.

Microsoft New Zealand Limited and Microsoft 6399 New Zealand Limited seek consent under the Overseas Investment Act 2005 (**the Act**) to acquire various **s6(a) and 9(2)(b)(ii)** interests in **s9(2)(b)(ii)** non-sensitive land in Auckland, New Zealand.

This investment requires a national interest assessment because it is an acquisition, by an overseas person, of property used in carrying on business in New Zealand where the total value of consideration exceeds \$100 million, and the property is being acquired from a business that is a strategically important business being a business involved in telecommunications infrastructure or services (section 20A(1)(e) of the Act).

I have made an assessment that the four elements of the investor test have been met, namely that:

- the individuals with control have business experience and acumen relevant to the overseas investment;
- the relevant overseas person has demonstrated financial commitment to the overseas investment;
- all the individuals with control of the relevant overseas person are of good character; and
- each individual with control of the relevant overseas person is not an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009.

As this decision relates to an investment in significant business assets, it is delegated to the regulator pursuant to the Designation and Delegation Letter of 17 October 2018. Before I can determine whether to grant or decline the application, I need your decision about whether the investment is contrary to the New Zealand's national interest (sections 16(1)(g) and 20C of the Act). To aid your consideration of the national interest assessment, I attach the Proposed Consent Decision that outlines the special and standard conditions that would apply if consent is granted.

The Overseas Investment Office has or will provide you with a separate report addressing the national interest assessment.

Yours sincerely

Louise Hornabrook
Manager, Applications
Overseas Investment Office

Encl.

Attachment 2 – Proposed Consent Decision for Application

Consent for Overseas Person to Acquire Significant New Zealand Business Assets

Read this consent carefully - you must comply with all the conditions. If you do not, you may be subject to fines or other penalties.

Consent

Decision date: [date]

The following people have been given the following **consent**:

Case	201900507
Consent holder/s	Microsoft New Zealand Limited Microsoft 6399 New Zealand Limited We will also refer to each Consent holder and the Consent holders together as you .
Consent	You may acquire the Assets subject to the Conditions set out below.
Assets	Property in New Zealand used in carrying on business in New Zealand where the total value of the consideration provided exceeds \$100 million, being

s6(a) and 9(2)(b)(ii)

	s6(a) and 9(2)(b)(ii)
Timeframe	You have until 31 August 2021 to enter into all agreements necessary to acquire the Assets.

Conditions

Your Consent is subject to the conditions set out below. These apply to all overseas people who are given consent to acquire significant business assets, including you.

You must comply with them all. Be aware that if you do not comply with the conditions you may be subject to fines or other penalties.

In the Consent and the Conditions, we refer to the Overseas Investment Office as **OIO, us or we**.

Details	Required date
Standard condition 1: acquire the Assets	
<p>The agreements by which you are completing the acquisition of the Assets:</p> <ol style="list-style-type: none"> 1. must be entered into by the Consent holder by the date stated in the Consent. If they are not, your Consent will lapse and you must not acquire the Assets, and 2. must use the acquisition, ownership and control structure you described in your application. <p>Note, only you – the named Consent holder – may acquire the Assets, not your subsidiary, trust or other entity.</p>	As stated in the Consent
Standard condition 2: tell us when you acquire the Assets	
You must tell us in writing when you have acquired each of the Assets.	As soon as you can, and no later than two months after settlement

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<p>Include details of:</p> <ol style="list-style-type: none"> 1. the date you acquired the Assets (settlement), 2. consideration paid (plus GST if any), 3. the structure by which the acquisition was made and who acquired the Assets, and 4. copies of any transfer documents and settlement statements. 	
Standard condition 3: automatic condition for transaction of national interest	
<p>You must not, in relation to the Assets, act or omit to act with a purpose or an intention of adversely affecting national security or public order.</p>	<p>At all times.</p>
Standard condition 4: remain of good character	
<p>You and the Individuals Who Control You:</p> <ol style="list-style-type: none"> 1. must continue to be of good character, and 2. must not become an individual of the kind referred to in section 15 or section 16 of the Immigration Act 2009. These sections describe convicted or deported people who are not eligible for visa or entry permission to enter or be in New Zealand and people who are considered likely to commit an offence or to be a threat or risk to security, public order or the public interest. <p>The Individuals Who Control You are individuals who:</p> <ol style="list-style-type: none"> (a) are members of your governing body (b) directly or indirectly, own or control 25% or more of you or of a person who itself owns or controls 25% or more of you, and (c) are members of the governing body of the people referred to in paragraph (b) above. To avoid doubt, this includes the members of your governing body. 	<p>At all times</p>

Standard condition 5: tell us about changes that affect you, the people who control you, or people you control

You must tell us in writing if any of the following events happens to any of the Consent holders:

Within 20 working days after the change

1. You, any Individual Who Controls You, or any person in which you or any Individual Who Controls You hold (or at the time of the offence held) a 25% or more ownership or control interest commits an offence or contravenes the law anywhere in the world. This applies whether or not you or they were convicted of the offence. In particular, please tell us about offences or contraventions that you are charged with or sued over and any investigation by enforcement or regulatory agencies or professional standard bodies.
2. An Individual Who Controls You ceases to be of good character; commits an offence or contravenes the law (whether they were convicted or not); becomes aware of any other matter that reflects adversely on their fitness to have the Assets; or becomes an individual of the kind referred to in [section 15](#) or [16](#) of the Immigration Act 2009 (see standard condition 3).
3. You cease to be an overseas person or dispose of all or any part of the Assets.
4. You, any Individual Who Controls You, or any person in which you or any Individual Who Controls You, hold (or at the time of the event held) a 25% or more ownership or control interest:
 - (a) becomes bankrupt or insolvent
 - (b) has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, or
 - (c) becomes subject to any form of external administration.