

Annexure 4
Independent Review

Schedule – Comments on the Undertaking

1. General

1.1 Enforceability of the Undertaking

It is not clear to us how the access seeker will be able to enforce the Undertaking against Vodafone because:

- currently, the document being considered by the Commission is an Undertaking provided by Vodafone in favour of the Commission. It is not expressly stated to be in favour of the access seeker;
- to apply for access to the Vodafone Roaming Service, an access seeker is required to complete a Deed of Acceptance. By executing the Deed, the access seeker is agreeing to comply with the terms of the Undertaking and acknowledges that Vodafone may enforce the terms of the Undertaking as against the access seeker; and
- there is nothing which expressly states that the access seeker may enforce the terms of the Undertaking as against Vodafone.

1.2 Provision of reciprocal service

The Undertaking appears to be inconsistent with clause 3(1) of Schedule 3A of the *Telecommunications Act 2001* (NZ):

- The Deed of Acceptance includes the following clause:

We [the access seeker] undertake to make available to Vodafone, at any time when we operate a Cellular Mobile Network in New Zealand and at any time requested by Vodafone, a telecommunications service that is the same or substantially similar to the Vodafone Roaming Service on terms that are the same or substantially similar to the terms on which Vodafone makes available the Vodafone Roaming Service under the Undertaking (except that Vodafone would not be regarded as an Excluded Operator).
- Clause 3(1) of Schedule 3A to the *Telecommunications Act* (NZ) relevantly provides that when considering a proposed regulatory change, the Commission may accept an offer from an access provider to supply a service to all access seekers on the terms and conditions of a written undertaking. The undertaking arguably goes beyond that to the extent it seeks to provide for reciprocal supply of services.
- In any event, this clause is ambiguous. For example, the expression "the same or substantially similar" is vague and almost impossible to apply in practice.

1.3 Compliance with standard access principles

Under the *Telecommunications Act 2001* (NZ), the Commission cannot recommend that the Minister accept an undertaking unless the Commission is satisfied that the undertaking complies with, among other things, the Act and the standard access principles set out in clause 5 of Schedule 1 to the *Telecommunications Act 2001* (NZ) and any limits on those standard access principles set out in clause 6 of that Schedule: clause 4 of Schedule 3A to

the *Telecommunications Act 2001* (NZ). The following standard access principles apply to designated access services and specified services:

- *Principle 1:* the access provider must provide the service to the access seeker in a timely manner;
- *Principle 2:* the service must be supplied to a standard that is consistent with international best practice;
- *Principle 3:* the access provider must provide the service on terms and conditions (excluding price) that are consistent with those terms and conditions on which the access provider provides the service to itself;
- *Principle 4:* the access provider must, if requested, provide an access seeker with information about a designated access service or specified service at the same level of detail, and within the same time frame, that the access provider would provide that information had it been requested by one of its own business units.

In our view, Vodafone should bear the onus of establishing that the Undertaking does in fact meet the standard access principles. We are not familiar with the background. However, based on our preliminary review of the publicly available information, it does not appear that Vodafone has provided the Commission with any information to establish that the Undertaking does in fact meet the requisite test. Further, in the light of our comments below regarding the Undertaking, there is a real question as to whether the Undertaking is capable of doing so. For example, in the absence of any service levels, it is unlikely that the Vodafone Roaming Service will be supplied to a standard that is consistent with international best practice. Further, there is no guarantee that the service will be supplied in a timely manner. From the matters discussed below in section 4.1, there is likely to be a substantial delay between an access seeker executing the Deed of Acceptance and commencement of the service.

1.4 Term of the Undertaking

The Undertaking will be effective for 5 years from the date of its registration by the Commission. This appears to be the minimum period under the *Telecommunications Act 2001* (NZ). A 5 year term is unreasonably short for the access seeker: a suitable minimum term in our experience would be between 10 and 15 years, subject to rights of early termination for default.

2. Schedule 1 – Services Description

[Discuss with someone like Garry Sandilands.]

3. Schedule 2 – Pricing

3.1 Set up costs

The Undertaking stipulates that \$0.01 per minute/text message/megabyte of Roaming Traffic will be added to the base rate to compensate Vodafone for set up costs, which will not exceed \$2 million. The set up costs comprise the 'Reasonable and Actual Costs'

incurred by Vodafone in setting up and developing the Roaming Service. The Commission's view is that no such increment should be added to the base rate to recover set up costs and that each party should bear their own set up costs. We believe that the addition of this increment is unreasonable.

In addition, if commercially it is reasonable for set up costs to be recovered, then those costs if they are to be paid by the access seeker should be capable of audit and verification by the access seeker. Those costs should be actual costs, with no profit or overhead.

See also our comments at paragraph 4.6 below.

4. Schedule 3 – Terms and Conditions for Vodafone Roaming Service

4.1 Clause 2 – Conditions

Clause 2 contains a number of conditions precedent. There appears to be a significant delay between an access seeker requesting access to the Vodafone Roaming Service (by executing a Deed of Acceptance) and Vodafone being required to supply that service. This is because:

- following the execution of a Deed of Acceptance, Vodafone and the access seeker are required to first agree on an Implementation Plan and Operational Procedures before Vodafone is required to supply the Vodafone Roaming Service: clause 2.1(a)(i). Clause 2.2 sets out a procedure for dealing with the situation where the parties are unable to agree on an Implementation Plan and Operational Procedures. That process may take up to 145 working days. This does not include the time required to deal with an arbitration in the event that the parties are still not able to reach agreement by the end of that process.
- once an Implementation Plan and Operational Procedures have been agreed upon, there must then be satisfactory completion of all testing that may be reasonably required by either party: clause 2.1(b). The expression 'reasonably required' is not defined and will be difficult to enforce in practice;
- the Services Commencement Date is required to be a reasonable period of time following the execution of the Deed of Acceptance: clause 2.1(a)(i). The undertaking does not specify how 'reasonableness' is to be determined; and
- finally and in any event, it appears that access is not to be provided for at least 6 months from execution of the Deed of Acceptance. This is because of clause 10.2. Clause 10.2 relevantly provides that the access seeker must nominate the initial Exclusion Zones 6 months prior to the Services Commencement Date. An access seeker will likely do so at the time it requests access to the service. This is because an access seeker is precluded from changing the nominated Exclusion Zones prior to the Services Commencement Date.

Before Vodafone will provide the Roaming Service under the Undertaking, the access seeker's network must either:

- have 100 operational cell sites; or
- cover at least 10% of NZ population.

The Commission has accepted this condition. NZC should consider whether this condition will have an effect on its ability to access the Roaming Service.

4.2 Clauses 3 and 4 – Vodafone Roaming Services and Equivalent Quality of Service

(a) General

We have 3 main concerns regarding clauses 3 and 4:

- The Undertaking does not require Vodafone to meet any particular service levels in providing the service.
- Clause 3.3 relevantly confers on Vodafone an entitlement to delay providing roaming over its 3G W-CDMA network, its HSDPA network and any other radio access network to ensure that Vodafone maintains a first mover advantage in relation to the provision of those services. This is inconsistent with the Commission's determination of 3 August 2007.
- Clause 3.12 provides Vodafone with a broad entitlement to use commercially sensitive information it obtains in the course of providing Vodafone Roaming Services to an access seeker.

We deal with the first and second points below. We deal with clause 3.12 in section 4.12 below. We also note in relation to these clauses that:

- Clause 3.14 releases Vodafone from any liability for breaching the Undertaking due to a force majeure event, but it does not give a reciprocal right to the access seeker.
- Clause 3.6 stipulates that Vodafone may, but is not required to, provide roaming over the Vodafone Future RAN and that Vodafone is only obliged to provide a quality of service equivalent to that on Vodafone's normal network and not on the Vodafone Future RAN. This is a technical issue which NZC may wish to consider.

(b) Service levels

The Undertaking does not require Vodafone to meet any particular service levels. For example, the Undertaking does not specify a maximum rate for call drop-outs, a total network availability or performance standards (for example, GPRS performance standards). Further, there are a number of clauses in which Vodafone seeks to minimise its obligations insofar as quality and availability of service is concerned. We make the following comments:

- The Undertaking provides that Vodafone will not discriminate against, and will provide services of an equivalent quality to, the access seeker as it provides to its own subscribers: clause 4.1. However, this obligation is qualified in a number of material respects. For example, the obligation does not apply to the extent that Vodafone exercises any rights under the Undertaking that relate to coverage area, availability and quality of service. In other words, clause 4.1 is subject to the other provisions of the Undertaking. Second, it is qualified by, among other things, clauses

4.3(a)(i) and 4.3(d), both of which are ambiguous and potentially very broad in application. These clauses relevantly provide:

(a) equivalency cannot be achieved in the Vodafone End User Service and the Access Seeker Mobile Service (as it relates to the Vodafone Roaming Service on the Vodafone network):

(i) to the extent that features, functionality and services provided to Vodafone End User are not included in the Vodafone Roaming Service; and

...

(d) any difference in the provision of the Vodafone Roaming Service that is attributable to the differences between the Vodafone Roaming Service and the Vodafone End User Service.

- The Undertaking contains an acknowledgement by the access seeker that Vodafone does not guarantee that the Vodafone Roaming Service will be continuously available or fault-free: clause 3.2. Vodafone will only seek to do so "to the extent reasonably practicable".
- Vodafone has a right to notify the access seeker, from time to time, of its 'acceptable use policy' and the access seeker is required to comply with that policy: clause 11.3(d). The Undertaking does not specify what that acceptable use policy is. Vodafone has a broad discretion as to the terms of any 'acceptable use policy'.
- Vodafone is entitled to suspend or restrict the Vodafone Roaming Service, either in whole or in part, in a number of circumstances: clause 20.1:
 - The Undertaking does not specify the amount of notice Vodafone is required to provide the access seeker of its intention to suspend or restrict the service.
 - The Undertaking does not deal with the duration of any suspension or restriction. While this cannot be dealt with in the Undertaking, the Undertaking should, at the very least, include an obligation on Vodafone to use best endeavours restore the service.
 - The concept of 'restricting' supply is very broad and the agreement does not provide any indication as to what this may entail.
 - The circumstances in which Vodafone may suspend or restrict the service are very broad. We deal with this further below.
- There are limitation of liability clauses which limit substantially the extent to which the access seeker can seek contribution from Vodafone: see clause 22. While the Undertaking confers rights of termination on an access seeker, this does not confer any real protection on an access seeker. This is because an access seeker will not wish to terminate the service for commercial reasons.

(c) 3G roaming

Although Vodafone agrees to provide 3G services to an access seeker as part of the Vodafone Roaming Service, it has only undertaken to do so as follows:

- by August 2008 in the case of 3G W-CDMA;
- by September 2009 in the case of HSDPA; and
- in relation to other radio access network technologies, 3 years after the date on which Vodafone launches that service commercially: clause 3.3.

The Commission considered in its 3 August 2007 report that Vodafone has an incentive to invest in 3G technology because of competition at the retail level with Telecom New Zealand. In addition, the Commission noted that Vodafone's 3G network has increased capacity and not all of that capacity is being utilised. Both of these matters indicate that it is unnecessary for Vodafone to include any clause in the Undertaking which seeks to delay the provision of 3G roaming services to an access seeker. Further, to the extent that this clause seeks to provide Vodafone with a first mover advantage, it is inconsistent with the objective of promoting competition in telecommunications markets for the long term benefit of end-users of telecommunications services. Given Vodafone's dominance in the mobile market, any delay in the provision of 3G roaming services is likely to entrench Vodafone's dominance in that market.

4.3 Clauses 5 to 8 – Chargeable Calls and Price Review

We make the following comments regarding these clauses:

- Clauses 5.2 and 7A.2 indicate that Vodafone will charge on a 'minute plus second basis'. We understand that Vodafone's intention is that where a call lasts for less than a minute, it will charge access seekers for the entire minute. For calls that exceed a minute, the additional time will be billed on a per second basis. There are other clauses which appear to be inconsistent with that intention: see for example, clauses 5.3 and 7A.3. If that is the intention and the effect, we think it is unreasonable. Any access price should reflect the costs of providing the service. To bill on this basis, is inconsistent with that objective.
- Under the Undertaking, Vodafone is free to round calls, for the purpose of billing the access seeker, in the same manner as it rounds calls for its own subscribers: see for example clauses 5.2, 7.2 and 7A.2; see also the definition of the term 'Duration'. We think that such an approach is unreasonable. First, this approach does not provide access seekers with any certainty regarding the basis on which it will be charged. Vodafone is free to alter its position in its discretion. Further, what happens in the event Vodafone decides to adopt a different position in relation to some of its subscribers? Clause 7.2 for example relevantly provides that the terms relating to the rounding of each use of the Vodafone network for a Roaming Data Session, will be matched with the retail terms upon which Vodafone **generally** provides 2G and 3G GPRS mobile data origination services to its subscribers. It is not clear what the expression "generally" means in this context. Second, any

access price should reflect the costs of providing the service. It is not clear that this will occur in circumstances where Vodafone is free to round calls as it wishes.

- Under clause 7.2, Vodafone will charge access seekers on a per MB basis and will round to the nearest 1MB the access seeker's total Chargeable Data Session. We think this is unreasonable.
- The Undertaking sets out a number of examples dealing with the manner in which Vodafone will charge for the Vodafone Roaming Service: see clause 26 for example. We think the Undertaking should seek to deal comprehensively with the types of scenarios that may prevail and specify precisely the manner in which the access seeker will be charged for the service. This includes specifying in detail who pays or retains the mobile termination charge.
- Clause 8 contains a price review clause. Clause 8.2 requires Vodafone and the access seeker to "take into account any relevant changes in the market pricing for mobile telecommunications services in New Zealand since the Services Commencement Date". This clause is ambiguous and, in any event, it is not clear why that information is relevant to the access price for the Vodafone Roaming Service.
- The Undertaking does not contain any clauses which require Vodafone to supply detailed billing information to the access seeker.
- Charges apply on a 'per leg basis' which suggests that the access seeker could be charged twice for one call, text, or data session.

4.4 Clause 9 – Access Fee

Clause 9 requires the payment of an 'Access Fee' by the access seeker, in advance, for each calendar quarter. Any usage charges incurred by the access seeker in that calendar year, are applied against the Access Fee. This clause raises the following issues:

- It is not clear why this clause is needed, particularly given that under clause 23, Vodafone may require the access seeker to provide security.
- Under clause 9.4, the Access Fee is non-refundable including where the access seeker's total usage charges for the relevant quarter are less than the amount of the Access Fee. In addition, any shortfall does not roll over into subsequent quarters. This clause appears to be onerous, particularly given that an access seeker's total usage charges may fall from quarter to quarter as the access seeker continues to expand its network.
- Clause 9.5 provides Vodafone with a right to terminate the Vodafone Roaming Service if the usage of the service is sufficiently low to render the Access Fee payable in any four consecutive quarters the same as the Minimum Access Fee. The Minimum Access Fee is \$60,000. This does not appear to be a significant amount and may, therefore, not be a major issue for access seekers in the initial stages of their network roll-out. However, as the access seeker begins rolling out its network, thereby reducing the total usage charge payable to Vodafone, this may confer on Vodafone a right to terminate the service. This is unreasonable.

4.5 Clause 10 – Exclusion Zones

This clause deals with the areas in which Vodafone is not required to supply the Vodafone Roaming Service to access seekers. In particular, it relevantly provides that Vodafone is not required to supply the service in what are referred to as 'Exclusion Zones'. An access seeker must notify Vodafone of the initial Exclusion Zones 6 months prior to the Services Commencement Date and cannot change those areas prior to that date. As the access seeker rolls out its network, additional areas may become Exclusion Zones.

This clause raises the following concerns:

- A location area becomes an Exclusion Zone when an access seeker builds or acquires a part of its network in the coverage area of that location area: clause 10.1. It is not clear whether the access seeker's network needs to be built and operational in a location area before that area becomes an Exclusion Zone. It appears from clause 10.5 that that is the intention. However, clause 10.1 should be clarified to make this clear.
- It is not clear from clause 10 whether the access seeker's network only has to be built in part of a location area before the entire location area becomes an Exclusion Zone. If it is technically feasible for Vodafone to supply the Vodafone Roaming Services in part of a location area, then we think that it should do so. If Vodafone is not required to provide services in an entire location area, then an access seeker will have no choice but to build its network in that area.
- Clauses 10.3 and 10.4 provide Vodafone with a broad discretion to alter the areas which constitute location areas. This is particularly detrimental if the effect of clause 10.1 is as described in the preceding paragraph of this advice.
- The Undertaking does not expressly provide the access seeker with a right to request that the Vodafone Roaming Service be supplied in an area which, while previously notified to be an Exclusion Zone, does not in fact become an Exclusion Zone.
- As mentioned, an access seeker is required to identify the Exclusion Zones 6 months prior to the Services Commencement Date and cannot change those zones within that period. In addition, if an access seeker wishes to extend its network, it is required to notify Vodafone six months in advance. These clauses are onerous and require the access seeker to disclose commercially sensitive information substantially in advance.
- An area will become an Exclusion Zone once the access seeker builds, or acquires, part of its mobile network in that area. This effectively excludes 'black spot' or 'in coverage' roaming from the Roaming Services.

4.6 Clause 11 – Access Seeker's Responsibilities

The access seeker is required to reimburse Vodafone for all 'Reasonable and Actual Costs' that Vodafone incurs in providing the Vodafone Roaming Service: clause 11.1. These costs are additional to the set up costs set out in clause 10 of Schedule 2 and are referred

to in the Undertaking as the Access Seeker Specific Costs. We think this clause is unreasonable for the following reasons:

- It does not provide the access seeker with any control over, such as a right to consent to, any costs before the work is completed.
- The only obligation imposed on Vodafone is to establish that the costs were incurred, not that those costs were reasonable or were reasonably incurred. This is because of the definition of the term 'Reasonable and Actual Costs'. The auditor's role, as set out in clause 11.2, is to confirm the amount of the access seeker specific costs.
- The Undertaking states that these Access Seeker Specific Costs include the 'reasonable and actual costs' of the VLR capacity upgrade referred to in clause 27.6. We would like to discuss with you the VLR capacity Vodafone has allocated as set out in clause 27.7. These appear to us to be relatively low. This is particularly given that they are based on 'current inbound international roaming traffic', which by its nature is likely to be substantially below the likely traffic for domestic roaming services.

There are a number of other aspects of clause 11 which are disadvantageous for an access seeker:

- an access seeker is required to comply with all reasonable instructions issued by Vodafone from time to time that are directly related to, and necessary for, the provision of the Vodafone Roaming Service: clause 11.3(a);
- it confers on Vodafone a right to notify an 'acceptable use policy' from time to time, and imposes an obligation on the access seeker to comply: clause 11.3(d). The Undertaking does not otherwise deal with an acceptable use policy. The effect appears to be that Vodafone has a broad discretion as to the terms of any such 'acceptable use policy' it wishes to adopt;
- clause 11 contains two broad indemnities in favour of the Vodafone Group: clauses 11.5 and 11.8. The first indemnity, in particular, appears to be broader than that which is necessary to protect Vodafone's interests. It indemnifies Vodafone in respect of any act or omission by an access seeker customer in connection with the access seeker's mobile services; and
- 'Reasonable and Actual Costs' are defined as including time expended by Vodafone employees at the rate applied by Vodafone. It is not clear what this rate is or how Vodafone intends to calculate it.

4.7 Clause 12 – Marketing

Clause 12.2(a) relevantly provides that an access seeker must not, and must ensure that its resellers do not, use any brand in the sale, marketing and advertising of the access seeker's mobile services that Vodafone in good faith considers is likely to bring the Vodafone brand into disrepute. It is not clear to us why this clause is necessary. First, there are other clauses in the Undertaking which limit the extent to which consumers will draw any connection between Vodafone and the access seeker by reason of the roaming

arrangements. Second, this clause simply confers on Vodafone a right of veto on the access seeker's marketing initiatives and is therefore unreasonable.

Further, under clause 12, Vodafone is only required to provide the Vodafone Roaming Service without the Vodafone brand if it is "technically and economically practicable": clause 12.1. This clause provides Vodafone with a broad discretion as to whether it supplies the service with or without its brand. We think that an access seeker should be involved in any decision as to whether the service is provided with the Vodafone brand.

4.8 Clause 13 – Excluded Operators

This clause raises the following concerns:

- Vodafone has a right to terminate the service if any member of the Access Seeker Group acquires services that are equivalent or similar to the Vodafone Roaming Service from any other person: clause 13.1:
 - To the extent that it seeks to render the arrangement exclusive, it has an anti-competitive effect. For example, it prevents the access seeker from acquiring roaming services from a third person, including, for example, for the purpose of providing roaming in the Exclusion Zones.
 - The clause is ambiguous. While the Undertaking defines the expression 'Access Seeker Group', the definition is very broad. Further, the Undertaking does not define the circumstances in which a person will be considered to be a 'member' of the Access Seeker Group.
 - The Undertaking does not provide any guidance as to the circumstances in which an access seeker will be held to be acquiring "equivalent or similar services". While there is a definition in clause 13.1, it is inclusive and seeks to expand the ordinary meaning of the expression.
- Vodafone has a right to terminate the service if an Excluded Operator owns, or has an ownership interest in, or operates any part of the Access Seeker Mobile Network: clause 13.1(b). The expression 'ownership interest' is not defined. Arguably, a very small interest in the agreement triggers the clause.
- Earlier versions of the Undertaking excluded Telecom from being able to access the Roaming Service. The Commission's view is that the Undertaking should not exclude Telecom in order to promote competition in the mobile telecommunications market. The Undertaking does not identify Telecom as an Excluded Operator, but does exclude from accessing the Roaming Service, any entity that, or any entity that is a member of a group of companies individually or collectively that, holds a share of at least 20% in New Zealand's retail mobile market. This will not effect NZC as NZC does not have such a great share in the New Zealand market and the definition of 'Excluded Operator' is such that NZC would not become an Excluded Operator if it were to gain such a market share after having already accessed the Roaming Service under the Undertaking.

4.9 Clauses 14 and 15 – Provision of Services to Access Seeker End Users and Wholesale

Clause 14 deals with the access seeker's arrangements with subscribers, while clause 15 deals with the access seeker's arrangements at the wholesale level. The effect of clauses 14.1 and 14.3, when read with the definition of Access Seeker End Users, is that the Vodafone Roaming Services will not be provided to an access seeker where the service is being used by an in-bound international roaming customer. Clause 15.6 expressly prohibits the access seeker from entering into any agreement, arrangement or understanding with a telecommunications service provider outside of New Zealand that would allow that telecommunications service providers' customers to use the Vodafone Roaming Service.

Two comments may be made about these provisions. First, the Commission's view, as set out in its 3 August 2007 report, was that the Undertaking should not prevent access seekers from providing the roaming service to in-bound international roaming customers. Second, the restriction raises concerns under the Australian *Trade Practices Act 1974* (Cth) and therefore, possibly, New Zealand legislation. In particular:

- under the Australian *Trade Practices Act 1974* (Cth) it is possible that clause 14.3 is illegal, comprising an exclusionary provision. An exclusionary provision is a provision in an agreement between competitors which has the purpose of preventing, restricting or limiting the supply of services to particular persons by one of the parties to the agreement. In this case, the provision seeks to prevent, restrict or limit the supply of international roaming services by NZC to international telecommunications service providers.
- The Australian *Trade Practices Act 1974* (Cth) prohibits parties entering into agreements which have the purpose or the likely effect of substantially lessening competition in a market. It is arguable that there is a market in New Zealand for the provision of international roaming services to telecommunications service providers based outside New Zealand. The purpose and effect of the provision is to substantially lessen competition in that market.

4.10 Clause 16 – Numbering

In this clause, Vodafone appears to dictate to the access seeker how the access seeker must manage its numbering arrangements. In its 3 August 2007 report, the Commission expressed the view that the issue of numbering is an issue for the New Zealand Number Administrator and that, where an access seeker is in compliance with the Number Allocation Rules and had the capability of accessing Vodafone's network(s), that access seeker should not be restricted from using the Roaming Services. It is unclear therefore whether the Commission would accept the Undertaking with such a numbering provision. Although we are not familiar with the role of the New Zealand Number Administrator and the Number Allocation Rules, based on the Commission's finding this clause appears to be unreasonable.

4.11 Clause 17 – Payments

Under the Undertaking, the access seeker is required to notify Vodafone of a dispute, no later than 60 days after the date of issue of an invoice: clause 17.8. It is not clear whether, if an access seeker fails to do so, it is taken to have waived its rights to subsequently notify Vodafone of a dispute. The position should be clarified in the access seeker's favour.

The Undertaking does not contain any clauses which require Vodafone to supply the access seeker with all relevant information in order for it to assess the invoiced amount.

4.12 Clause 19 – Confidential Information

This clause purports to restrict the use of Vodafone's and the access seeker's confidential information. The Undertaking does not, however, specify what types of information may constitute confidential information. Nor does it specify in any detail what protocols or procedures should be put in place to protect that confidential information, or at the very least, particular information which the access seeker is required to supply Vodafone. We think that this is particularly problematic in the context of this Undertaking for the following reasons:

- The Undertaking requires an access seeker to provide Vodafone with commercially sensitive information. For example, an access seeker is required to provide Vodafone, at the time it signs a Deed of Acceptance, with forecast data for the first 24 months of supply of the service: clause 27.1. The data is required to include volumes for each of the categories of traffic on a time of day and geographic basis and the maximum number of subscribers at any point of time during the forecast period. The access seeker must update this information at the commencement of each calendar quarter. By reason of clause 27.4, this may require an access seeker to disclose its strategic plan to Vodafone.
- Vodafone will also obtain commercially sensitive information by reason of its providing the Vodafone Roaming Service to an access seeker. This will include, for example, the following information: the extent to which the access seeker's subscribers use the roaming service; its subscriber's demand patterns (for example, the extent to which they use video calling facilities or mobile broadband services), and geographic usage.
- The Undertaking envisages that Vodafone may request further information relating to forecasting in the Operational Procedures: clause 27.7.
- The Undertaking contains a clause which allows Vodafone to use information it obtains from the access seeker. It is not clear how that clause will operate, in practice, with clause 19:
 - Clause 3.12 relevantly provides that the access seeker acknowledges that the Undertaking is not intended to limit or restrict how or when Vodafone rolls out or deploys any telecommunications network or system or how or when Vodafone markets or prices any of its services, including, without limitation:

...by virtue of the fact that Vodafone may become aware, through the operation of this Undertaking, of details regarding the Access Seeker

Mobile Services or any services of the Access Seeker (or a member of the Access Seeker Group or an Access Seeker reseller) and when those services are intended to be launched.

- While clause 3.12 is expressly stated not to relieve Vodafone of its obligations under clause 19 (see clause 3.13), it is not entirely clear how the two provisions interrelate.
- In addition, there will be practical issues associated with enforcing clause 19, particularly given the operation of clauses 3.12 and 3.13.

The obligations set out under clause 27 are very onerous and it is not immediately obvious to us that it is necessary for Vodafone to have detailed forecasting information for a 24 month period for its network planning purposes.

In our opinion, forecast information should be a purely operational matter the relevance of which is confined to clauses in the Operational Procedures, rather than it being elevated to a major contractual issue in the Undertaking.

4.13 Clause 20 – Suspension

Vodafone is entitled to suspend or restrict the Vodafone Roaming Service, either in whole or in part, in a number of circumstances: clause 20.1. The clause is unreasonable for the following reasons:

- The clause does not specify the amount of notice Vodafone is required to provide the access seeker of its intention to suspend or restrict the service.
- The clause does not specify the duration for which such suspension or restriction may take place. Nor does it impose an obligation on Vodafone to use best endeavours to restore the service.
- The concept of 'restricting' supply is very broad and the agreement does not provide any indication as to what this may entail.
- Finally, the circumstances in which Vodafone may suspend or restrict the service are very broad:
 - Vodafone may do so if it is entitled to terminate the provision of the service. In other words, in lieu of terminating the provision of the service, Vodafone may, in its discretion, suspend or restrict the service for an undefined period.
 - Vodafone may suspend or restrict the service in the event of an Outage. The term Outage is broadly defined as follows:

the failure by Vodafone to provide, in whole or in part, the Vodafone Roaming Service to the Access Seeker in accordance with this Undertaking due to any technical or operational matter, **or any other circumstances which, in Vodafone's reasonable opinion, makes it necessary** to interrupt supply of the Vodafone Roaming Service. (emphasis added).

(It appears that notifications for planned outages are intended to be dealt with in the Operational Procedures: see clause 29.1(b)).

- Vodafone may suspend the service where it reasonably requires the suspension or restriction of the Vodafone Roaming Service for 'any other reason'.

4.14 Clause 21 – Termination

Clause 21 sets out the circumstances in which the provision of the service may be terminated. Having regard to the fact that an access seeker is unlikely to wish to terminate any agreement with Vodafone for the roaming service, our view of this clause is as follows:

- The amounts specified in clauses 21.1(b) and 21.1(c)(iii) appear to us to be low.
- The effect of clause 21.1(d) is that an access seeker will be forced to pay any invoiced amount to Vodafone, whether or not that amount is genuinely disputed by the access seeker. This clause also gives Vodafone (and the access seeker, although it is more likely that Vodafone will have the opportunity to exercise this right) the right to terminate the Roaming Service where the access seeker (or Vodafone) has failed to pay any amount due and payable under the Undertaking within 10 business days after relevant due date. This timeframe appears to us to be very short.
- Vodafone may terminate the service if there is a change of control of the access seeker and control passes to an Excluded Operator: clause 21.2(a). In addition, the Undertaking may be terminated if there is a change of control of an Excluded Operator and control passes to any member of the Access Seeker Group. The term 'control' is not defined in the Undertaking. Nor is the expression 'member of the Access Seeker Group'.

Finally, the access seeker does not have a right to terminate in the event it no longer wishes to acquire the Vodafone Roaming Service.

4.15 Clause 22 – Compensation and Liability

The Undertaking limits substantially the extent to which Vodafone is liable to the access seeker for any breach of the Undertaking:

- Vodafone is only liable to pay the access seeker's 'net direct costs': clause 22.2. The expression 'net direct costs' is defined to exclude any loss of revenue, business or profits by the access seeker or any liability incurred by the access seeker to any subscriber or reseller or third party: clause 22.3. The access seeker, on the other hand, is liable for any breach of the Undertaking.
- The access seeker must notify Vodafone of its claim for compensation within 120 days after the service is first affected or the property is damaged: clause 22.4. Vodafone, on the other hand, is only required to notify the access seeker of its claim for compensation within 120 days after Vodafone incurs the relevant loss or damage, or pays the relevant expenses or costs.
- Liability is capped at \$2 million for any event or series of related events and shall not exceed a total of \$4 million in respect of any events or series of events in any 12 month period: clause 22.8.

4.16 Clause 23 – Security

Clause 23 deals with the provision of security by an access seeker. It relevantly confers on Vodafone a broad discretion to require an access seeker to provide credit support and to determine the amount of that credit support. Without any checks on the exercise of this power, there is a risk that it could be used in a manner that discourages an access seeker from continuing to seek access.

5. Schedule 4 – Technical Specifications

Page 72 of the Undertaking stipulates that although call continuity (ie seamless service where a call starts on Vodafone's network and then moves into the coverage of the access seeker's network but remains on Vodafone's network) is provided, call handover (ie seamless service where a call starts on the access seeker's network and then moves into the coverage of Vodafone's network) is not provided unless the parties enter into a separate commercial agreement. We believe that, in line with international best practice, Vodafone should provide call handover, at least at the access seeker's request, under the Undertaking.