

Appendix A

Differences between key elements of the New Zealand, Australian and United Kingdom Telecommunications regulatory regimes

Introduction

Vodafone believes that, in applying the legal framework which governs the Commission's investigation, it is very important for the Commission to have a clear understanding of the ways in which the New Zealand telecommunications regulatory regime differs from the equivalent Australian and United Kingdom regimes. In particular, the primary test for whether to impose regulation is different in each other jurisdiction, and this had a significant impact on the conclusions that were reached.

Our focus is on the recent decisions made by regulators in Australia and the United Kingdom on mobile termination services, as these decisions are referred to most frequently by the Commission in the Issues Paper.

The decision-making frameworks that were required to be applied by the ACCC in Australia and OFCOM and the Competition Commission in the UK in the consideration of aspects of the regulation of mobile termination services were fundamentally different to the framework that must be followed in New Zealand by the Commission.

The key test differs in each case, and in addition to this, the sequence that must be followed in applying the framework is different.

Summary of differences in the primary test

In particular, the decisions made by the ACCC, OFCOM and the Competition Commission about mobile termination services were not made primarily on the basis of promoting competition:

- In Australia, the ACCC was primarily concerned with the promotion of the long-term interests of end-users (LTIE) (and promotion of competition was only one of many factors that merely had to be considered when assessing the promotion of LTIE).
- In the United Kingdom, OFCOM were primarily concerned with whether participants in the relevant market had Significant Market Power (SMP). The services of participants found to have SMP can be regulated.
- Finally, the Competition Commission was solely concerned with the public interest.

In contrast, the Commission is required to consider first whether the regulation of mobile termination services would promote competition. Then, if so, the Commission must consider whether the promotion of competition which would result, would be enough to deliver long-term benefits to end-users.

The Commission is following a different test and a different sequence of application to the other NRAs.

We now discuss the differences more specifically.

Australian regulatory regime

Part XIC of the Trade Practices Act 1974 (the **Australian Act**) establishes a regime for regulated access to carriage services and services which facilitate the supply of carriage services.

Unlike the Act in New Zealand, the Australian Act is relatively prescriptive in its approach to the procedure for declaration. The Australian Act sets out the key test, and also sets out the specific factors that must be taken into account when applying the test.

The ACCC's decision-making framework

In Australia, the mobile termination service of the MNOs has been declared since 1997.. There was no pricing principle applicable to the mobile termination service until 2001. This first pricing principle was based on a retail benchmarking principle where the percentage change in each MNO's mobile terminating rates were benchmarked against each MNO's mobile retail prices. Recent amendments to the Australian Act require the ACCC to publish pricing principles for a declared service as soon as practicable after they publish their decision to declare a service.

The test for declaring, varying or revoking an existing service declaration is set out in section 152AB of the Australian Act. The ACCC must first be satisfied that the proposed declaration, variation or revocation would promote the long-term interest of end-users (**LTIE**) of carriage services, or of services supplied using carriage services.

Section 152AB(2) of the Act provides that, in determining whether a declaration, variation or revocation promotes the LTIE, regard must be had to the extent to which the declaration, variation or revocation is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed (telecommunications) services;
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users; and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied.

In determining the extent to which the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which relevant services are provided is achieved, the ACCC must have regard to:

- whether it is technically feasible for the services to be supplied and charged for, having regard to:
 - the technology that is available or in use;

- whether the costs that would be involved in supplying and charging for the services are reasonable; and
- the effects, or likely effects, that supplying and charging for the services would have on the operation or performance of telecommunications networks;
- the legitimate commercial interests of the supplier, including its ability to exploit economies of scale or scope; and
- incentives for investment in the infrastructure by which the services are supplied.

The ACCC has stated that its approach to an inquiry on possible declaration, variation or revocation enables it to form a view about the likely result of such action on the achievement of each of these objectives.

When it has measured the likely results of such action against the relevant objectives, the ACCC will then make an overall assessment of whether such a declaration, variation or revocation will promote the LTIE, having regard to its impacts on the these objectives.

Conclusions on the ACCC framework

The Australian Act sets out a different test to that which must be applied by the Commission under the New Zealand Act.

The first question for the ACCC is whether the proposed change in a regulated service would promote the LTIE. In considering this, the Australian Act sets out a number of factors that the ACCC must have regard to.

There is a clear sequence of considerations created by the framework. First the ACCC considers LTIE, then it considers the factors specified for LTIE, and then it considers the factors specified for efficiency.

The ACCC were working under an LTIE test – not a “promotion of competition” test. The ACCC must only have regard to the extent to which the proposed declaration or revocation will promote competition, promote the efficient use of, or investment in, infrastructure, and/or promote any-to-any connectivity. That is, if the proposed declaration or revocation does not promote competition, although it is more difficult for the ACCC to justify the proposed declaration, the ACCC may still decide that the proposed declaration will promote the LTIE. Importantly, the legislation does not preclude the ACCC from declaring the service if it does not promote competition.

This is clearly different to the NZ legislation where the threshold for imposing regulation is higher. There is a significant difference between an assessment of whether competition will be promoted compared to an assessment of whether the declaration is in the long-term interests of end-users having regard to the extent to which competition, economic efficiency and any-to-any connectivity are promoted.

United Kingdom new regulatory framework

The most recent development in the regulation of mobile termination services in the United Kingdom (**UK**) was the completion this year of the market review of the markets for mobile termination services, undertaken by OFCOM.

OFCOM has a new statutory criteria to work within when making regulatory decisions, which has been implemented in the form of the Communications Act 2003 (the **UK Act**), and which is the UK response to the new regulatory framework which has been introduced in the European Community (**EC**).

OFCOM's statutory framework

The new framework in the UK requires National Regulatory Authorities (**NRA**s) such as OFCOM to carry out reviews of competition in certain communications markets, in order to ensure that regulation remains appropriate in the light of changing market conditions.

Broadly speaking, where a market participant is found to have Significant Market Power (**SMP**), then an assessment of the appropriate regulatory obligations, and potentially regulation, follow. Where competition exists, the NRA may withdraw regulation. The market review has three parts:

- definition of the relevant market or markets;
- an assessment of competition in each market, in particular whether any participants have SMP in a given market; and
- an assessment of the appropriate regulatory obligations which should be imposed where there has been a finding of SMP.

Conclusions on the OFCOM framework

The UK Act sets out a different test to that which must be applied by the Commission under the New Zealand Act.

The first question for OFCOM was whether a participant had SMP in the relevant wholesale market. This involved an assessment of competition. Having found that a participant had SMP, then OFCOM was able to consider imposing regulatory obligations. The key hurdle for OFCOM is the assessment of competition.

OFCOM therefore needed in this case to identify a participant with SMP in order to impose regulation. It did not have to go on and consider whether regulation would promote competition, as the Commission is required to do.

There is a clear sequence of decisions created by the UK Act. The first decision is whether a participant has SMP. If it is, then the next decision considers the appropriate remedy for the limited competition.

OFCOM were working under an assessment of competition test – not a “promotion of competition” test. There are significant differences between an assessment of whether competition will be promoted (in the future, by regulation), and an assessment of whether competition is limited or not (at this point in time).

Reference made to the Competition Commission

Finally, we examine the framework for the decision made by the Competition Commission in 2003 in relation to a dispute between certain UK MNOs and OFTEL, over the decision of OFTEL to modify their telecommunications licence provisions. The modification had been proposed following OFTEL's investigations into mobile termination services, and was part of its intervention in regulating termination rates. The modification involved a form of price cap on the rates.

Again, we intend to explain to the Commission how the Competition Commission's decision was made on the basis of a different legal framework, and not on the basis of the promotion of competition.

The Director-General of Telecommunications (the **DGT**) in the UK has the ability to refer a dispute over a proposal to modify the licence terms of the mobile operators operating in the UK to the Competition Commission. The Competition Commission conducts inquiries into mergers, markets and the regulation of the major regulated industries, undertaken in response to a reference made to it by another authority.

The DGT made a reference to the Competition Commission in January 2002, asking two questions. These were first whether the mobile termination services offered in the UK operated, or may have been expected to operate, against the public interest. Second, the DGT asked whether the effects adverse to the public interest could be remedied or prevented by a licence modification.

Conclusions on the Competition Commission framework

The framework under which the Competition Commission was working was different to the New Zealand framework.

The Competition Commission had a far narrower scope. The test was a consideration of the effect on the public interest.

Again there was a clear sequence of decisions to be made. The first question was whether the mobile termination services at the time operated, or may have been expected to operate, against the public interest. If so, then the next question was whether a licence modification could remedy or prevent the problem.

The Competition Commission were working under a public interest test – not a “promotion of competition” test. There are significant differences between an assessment of whether competition will be promoted, and an assessment of whether certain services operated against the public interest.