

# **Commerce Commission**

## **Schedule 3 Investigation into Mobile Termination Access Services**

### **Submission on the Undertakings**

13<sup>th</sup> February 2009

Submission by



Public version

## **Schedule 3 Investigation into Regulation of Mobile Termination Access Services**

### **Submission on the Undertakings**

#### **Introduction:**

CallPlus views high mobile termination rates are the most critical issue in the telecommunications market at this time and welcomes the opportunity to respond to the proposed Undertakings.

CallPlus has read and endorses the joint submission made by Kordia, Orcon & Woosh which makes many of the same points as this submission.

Our comments are primarily focussed on Telecom & Vodafone's fixed to mobile undertaking. We have not commented on the SMS or MTM undertaking (other than where it is inextricably linked to the fixed line market as substitutable services) nor have we performed an extensive legal review of the overly complex undertakings.

CallPlus has already commented by way of submissions (5<sup>th</sup> September 2008) on the failings of the current situation and the drivers for the need for regulation. The proposed undertakings, far from addressing the issues at hand, take us backwards and offer no obvious benefit to consumers:

- In a dynamic global & domestic telecommunications market the proposed undertakings lock in high termination rates for '5 more years'
- Where it suits them operators have chosen to interpret the existing undertakings in the narrowest possible sense (and not necessarily in line with the government's understanding) and 'ring fence' the impact of the undertaking by differentiating services based on geography, technology and originating network. The proposed undertakings further compound the problem with new 'exclusions' including VoIP and wholesale transit traffic.
- The proposed undertakings are overly complex and if successful in widening the scope of an investigation could lead to delays or provide opportunities for 'gaming' due to the complexity.

The cost of calling mobiles represents a significant 'share of wallet' in terms of consumer & businesses expenditure on telecommunications – rates have been held artificially high by the current undertakings.

Fixed line competitors will continue to experience predatory pricing in the fixed line calling, access and broadband market as a result of cross subsidy from mobile operators who are able to charge artificially high mobile termination rates. Ultimately the level of competition across the fixed and mobile telecommunications markets could decrease with the dominant fixed and mobile network operators being the ultimate winners.

Given the groundwork on mobile termination done by the commission over a number of years CallPlus supports the commission moving quickly to regulate mobile termination rates with a single Second + Second termination rate with no artificial differentiation by origination – neither by geography, technology or network of origination.

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## **Specific comments**

### **1. Locking in high termination rates is undesirable in a rapidly changing world**

In a dynamic industry where fixed to mobile convergence is accelerating and the issue of mobile termination rates is coming under increasing scrutiny from regulators around the world the current undertakings lock in rates for 5 more years.

The proposed undertakings would effectively lock in high mobile termination rates for a further 2 years, until 2014.

This is not in the long term best interest of consumers, in fact the reverse is true. It will ensure that he continues to pay excessive rates for any calls that terminate on a mobile network until 2014.

### **2. The 'Maximum' rate is in reality the 'Actual' rate charged**

Both Telecom and Vodafone's current undertakings are very explicit that the rate in the undertaking is the 'Maximum rate'.

The new undertakings do not propose that the rates be a 'maximum rate' and continue where the maximum rate under the existing undertakings leave off in 2012. The conclusion is therefore that in reality it is the intention to continue to charge at the 'maximum rate' under the existing undertakings.

### **3. Undertakings continue to 'limit' the application of lower termination rates**

Both parties state that they have met the commitments in their undertakings however this is overly simplistic. CallPlus continues to experience operators choosing to interpret their undertakings in the narrowest sense and not necessarily aligned with the Ministers understanding. This artificially 'ring-fences' services from the undertaking and prevents a 'level playing field' for competition.

In CallPlus' submission on the 5<sup>th</sup> September 2008 on Mobile Termination we outlined the fact that we had issues with Telecom still charging 24 cents per minute, rather than 16c, for:

- Internationally Originated Calls to Mobile
- Calls from Mobile to toll free numbers (the reverse of calling party pays)

In neither case is there any cost based justification and the very significant impact on competitors business extends well beyond mobile calling - impacting on the viability to build network domestically and being able to cost effectively terminate outbound capacity for the reasons outlined in our previous submission.

CallPlus notes that the proposed undertakings do not address the issue and in fact make the situation worse: -

- Both operators are now trying to exclude international originated calls from the undertaking effectively giving them a monopoly on the wholesale international market with serious implications for domestic competitors.
- Telecom has introduced a further limitation (page 50 clause 8.1) to the services it proposes to cover in the undertaking. Telecom excludes VoIP calls from the definition thereby placing calls from a VoIP service to a mobile outside the undertaking.

This would create a significant barrier to competition for operators such as CallPlus who have operated VoIP services for a number of years. This would allow Telecom to surcharge for any provider who provides a VoIP service – as opposed to PSTN. It also places Telecoms NGN outside the undertaking.

- Vodafone define a FTM call (page 8 of the undertaking) as one that “...originates from an Access Seekers End user”. However the definition of an Access seekers end user (page 1 of terms & conditions) precludes one carrier sending traffic to a carrier (transit carrier) who then terminates to Vodafone – even domestically.

This is commonplace in the industry, domestically and globally, and exclusion of wholesale traffic would be anti-competitive.

These highlight the inadequacies of the undertakings as static documents with no means of resolving disputes on their interpretation and implementation. A regulated service is required with the ability to review as the market changes and resolve issues as they inevitably occur.

#### **4. True cost of termination are masked**

As outlined in our previous submission (sections 4 & 5) the real termination rate is in fact significantly higher due to the basis charging at minute + second rates.

- ‘Minute + Second’ charges adds a significant additional cost (as detailed in point 4.2 of the previous submission) above and beyond the undertaking rates. Whilst consumer retail pricing is ‘minute plus second’ transit agreements with overseas carriers are not. This effectively creates a barrier to competitors being able to participate in the international market for wholesale termination. Both undertakings propose ‘minute plus second’ billing.

It should also be noted that our previous submission noted that this produces the perverse outcome that it does not encourage effective network operation – a mobile operator is effectively rewarded for calls that drop out, calls where the called party is out of coverage and the call goes to voicemail or calls where call quality is poor and a customer hangs up. In the case of mobile networks this represents a significant percentage of calls.

- Telecom continues to place a 0.5c per call surcharge on ‘non code access’ customers calling a mobile. Telecom claims this is to recover the cost of a database lookup however with number portability in place this charge is an anachronism which should be removed. Telecoms undertaking does not address this.

## **5. Overly complex undertakings used as a means to delay and as a 'Trojan Horse' to establish General Terms**

CallPlus is concerned that the proposed undertakings are in the form of complete interconnect agreements with wide ranging non-price terms. This is in contrast to the existing undertakings. The call types in question are only one of a number of call types and other services covered by carriers interconnect agreements.

Interconnections are bilateral and vary from carrier to carrier. Whilst we have not done a detailed legal review of the undertakings provided, a non-trivial task, we are concerned that the undertaking is being used as a 'Trojan horse' to establish general non-price terms with wider application.

There are a number of terms which would differ significantly from our current arrangement, it would be unlikely we would agree to and are well outside what we would expect the scope of an investigation into mobile termination.

We are also concerned that the overly complex nature of the undertakings and the wide ranging terms will cause delay to long overdue regulation. It is in the incumbents best interest to defer and delay through tactics such as this and requesting a 'full cost benefit analysis'. In terms of fixed-to-mobile and mobile-to-mobile termination rates these issues have been under consideration for 4 or more years. Provided there is clarity on which services are covered then this is essentially a pricing issue - which should not be caught up in a wide ranging investigation as this is not in the best interest of consumers.

## **6. Cost Based approach**

CallPlus support the cost based approach proposed by the commission - 'fixed to mobile' convergence means that integrated fixed & mobile providers can bundle and cross subsidise if mobile termination rates are held 'artificially' high. The commission has already noted that bundling, calling circles and on-net pricing are becoming increasingly prevalent in the market. In CallPlus' experience this has become the 'norm' particularly following Vodafone's purchase of iHug. By adopting a cost based approach to termination rates and aligning MTM & FTM rates the commission can create a level playing field for competition in the fixed line market.

## **7. Mobile-to-Mobile and Fixed to mobile need to remain aligned**

CallPlus is pleased to see that both Telecom & Vodafone propose to offer the same rates for both Mobile & Fixed originated traffic. However we are concerned that either party could voluntarily drop rates on one or the other and drive substitution between the fixed and mobile calling markets. We would prefer to see a single rate established with no opportunity for differentiation.

Furthermore we see no justification for charging a different rate for Mobile originated calls to toll free number to the Mobile termination rate. The toll free service is simply a service where the 'caller party pays' principle is reversed. There should be no wholesale surcharge, let alone a 50% increased cost currently applied by Telecom. This simply gives Telecom an unfair advantage when competing in the toll free market.

## **8. Bill and Keep**

NZ Communications proposes a 'Bill & Keep' regime for certain MTAS traffic - primarily mobile-to-mobile originating on each other's network. Whilst CallPlus agrees that Mobile termination rates should be nearer to zero, rather than the

artificially high rates in the current undertakings, we are concerned by the approach proposed by NZ Communications.

There is a high degree of substitutability between the fixed and mobile markets, there are more mobiles than people and every house has a phone. In the event that Mobile-to-mobile termination rates become out of line with Fixed-to-Mobile rates (and particularly where only mobile network operators have bill & keep) this could create a huge substitution of calling away from fixed to mobile calls. A mobile network operator who is also a fixed line operators would have a huge competitive advantage over 'fixed line only' competitors through bundling, on-net calling and other means of cross subsidisation.

CallPlus strongly recommends that a single mobile termination rate is set regardless of origination.

### **9. Reduced wholesale prices do lead to reduced retail prices where there is competition**

Vodafone's proposal (section 3.2 of their undertaking) for an auditable pass through mechanism to ensure access seekers pass on the benefit to consumers is overly heavy handed, administratively complex and is 'a solution looking for a problem'.

The cost of calls to mobiles is 'top of mind' for customers when deciding on a service provider. The Fixed to mobile calling market is competitive. The issue that needs to be addressed is that a cosy duopoly can maintain retail prices artificially high through high wholesale rates. A mechanism such as that suggested by Vodafone is unnecessary both for Vodafone themselves and other providers, noting that Telecoms undertaking does not have an equivalent.