



COMMERCE COMMISSION

Please refer to:

11128
872737_4

30 July 2009

To all Interested Parties to the MTAS Investigation

Reviews of classification of information under the MTAS Confidentiality Order and request for information about commercial interconnection agreements

Background

As part of the MTAS Schedule 3 investigation, the Commission has received information from interested parties which those parties consider is confidential or commercially sensitive. Protection of confidential information in respect of the MTAS Investigation is governed by the Confidentiality Order issued by the Commission (the **Order**) for the purposes of the investigation. A copy of the Order is available on the Commission's website.

On 21 and 22 July 2009 the Commission wrote to interested parties:

- requesting views on the Commission's proposal that all information provided in response to the fixed-line only companies' responses to the Commission's data questionnaire be classified as Restricted Information (**RI**);
- commencing a review of the classification of information about interconnection agreements and requesting that Telecom, Vodafone and 2degrees provide information about commercial interconnection agreements (**ICAs**); and
- commencing a review of the classification of information provided in response to the Commission's data questionnaire under the Order.

This letter advises the Commission's views on these matters and the actions required from interested parties. Comments received from interested parties on these matters are available on the Commission's website.¹ The Commission has fully considered all comments from interested parties in reaching its views in this letter.

Classification of fixed-line only companies' responses to the Commission's data questionnaire

The Commission received comments from CallPlus, Woosh and Orcon/Kordia, TelstraClear and WorldxChange on this matter.

¹ See

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobiletoMobileTermination/mobiletomobiletermination.aspx>.

The Commission determines under clause 25 of the Order that the appropriate classification of the fixed-line only companies' responses to the Commission's data questionnaire is RI in their entirety. The Commission considers that this will assist in submissions on the competition assessment and cost-benefit assessment in the Commission's draft Report.

The Commission requires the fixed-line only companies that have provided this information to provide RI versions of their responses to the Commission's data questionnaire to all nominated counsel that have signed the Deed of Undertaking **by 5pm on Tuesday 4 August 2009**.

Submissions that directly relate to the fixed-line only companies' responses to the Commission's data questionnaire are due **by 5pm on Tuesday 11 August 2009**. These submissions are limited to issues that are directly related to the fixed-line only companies' responses to the Commission's data questionnaire. Cross-submissions on these submissions are due as part of parties' cross-submissions on the Commission's draft Report **by 5pm on 18 August 2009**.

Review of the classification of information about interconnection agreements under the Order and request for copies of interconnection agreements

The Commission received comments from Telecom, Vodafone and 2degrees, and late comments from CallPlus, Woosh and Orcon/Kordia, on this matter.

The Commission accepts the arguments put forward in comments that the primary focus for its investigation should be on current ICAs. Consequently, the Commission is no longer seeking details of historical ICAs from Vodafone, Telecom and 2degrees.

The Commission's preliminary view is that information about current ICAs is relevant to inform the counterfactual, where there is a material variation between an ICA and the current undertakings submitted by Telecom and Vodafone, and that this information should be classified as RI.

The Commission therefore requires either:

- copies of all current ICAs, either in the form of a template ICA for a company with an aggregate level summary of the material variations between individual ICAs and the template, or in the form of the full ICA; or
- a copy of the current template ICA for a company if there are no material variations between individual ICAs and the template.

The Commission requires that Vodafone, Telecom and 2degrees provide the above requested information about current ICAs **by 5pm on Tuesday 4 August 2009**.

The Commission's preliminary view is that the terms of the Vodafone / 2degrees ICA should be made available as RI, particularly to the extent that there are material variations between that ICA and the current undertakings submitted by Telecom and Vodafone. The Commission considers that making this information available as RI would aid submissions from parties in relation to the assessment of the counterfactual and how ICAs should impact on the counter-factual.

The Commission intends to make a final decision under clause 25 of the Order on what information about ICAs will be treated as RI **by Friday 7 August 2009** and will then set a

timetable for the provision of any reclassified information, and submissions and cross-submissions on that reclassified information. These submissions will be limited to the assessment of the counterfactual and how ICAs should impact on the counter-factual.

Review of the classification of integrated operators responses to the Commission's data questionnaire under the Order

The Commission received comments from Telecom, Vodafone and 2degrees on this matter.

The Commission considers that the information provided by Vodafone and Telecom in response to the Commission's data questionnaire as COI should be reclassified as RI. Access to and use of RI is governed by clause 11 of the Order, which limits the use of RI to those parties that have signed the Deed of Undertaking under Schedule 1 of the Order (the **Deed of Undertaking**) and for the purposes of the MTAS Investigation.

The information provided by parties is at an aggregate level. The Commission does not consider that there is a significant risk that aggregated information could be used to target specific customer groups in the manner suggested by Vodafone and Telecom. The Commission considers that this information being classified as RI will assist in submissions on the competition assessment, the cross-checks based on on-net prices and the cost-benefit assessment in the Commission's draft Report.

The Commission, therefore, determines under clause 25 of the Order that the data in Vodafone and Telecom's responses to the Commission's data questionnaire that is currently classified as COI, should be reclassified as RI in its entirety.

The Commission requires Vodafone and Telecom to provide revised RI versions of their responses to the Commission's data questionnaire, reflecting the above reclassification, to all nominated counsel that have signed the Deed of Undertaking by **5pm on Tuesday 4 August 2009**.

Submissions that directly relate to the information provided by Vodafone and Telecom in response to the Commission's data questionnaire are due by **5pm on Tuesday 11 August 2009**. These submissions are limited to issues that are directly related to the information provided by Vodafone and Telecom in response to the Commission's data questionnaire. Cross-submissions on these submissions are due as part of parties cross-submissions on the Commission's draft Report by **5pm on 18 August 2009**.

Access to, and use and disclosure of, Information provided under the Deed of Undertaking

Vodafone and Telecom both commented that they were concerned that classification as RI did not provide sufficient protection, due to the possibility that information could be used "indirectly", notwithstanding the restrictions in the Order, for commercial purposes, as a party could not "unlearn" the information once they had reviewed it.

The Commission considers that the Order provides sufficient protections against this matter. Clause 11 of the Order sets out the protections that are provided to RI. Clause 7 of the Deed of Undertaking that all parties are required to sign before being entitled to access RI includes an acknowledgement that:

"... a failure to comply with clause 11 of the Order is a criminal offence under s 100(4) of the Commerce Act."

In addition, nominated counsel are required, pursuant to clause 6 of the Order, to hold a current certificate to practise as a barrister and solicitor of the High Court of New Zealand. This means that all nominated counsel have professional obligations to ensure the non-disclosure of sensitive information, and to avoid conflicts of interest in respect of sensitive information. These are significant protections, in addition to the express obligations set out in the Order.

The Commission considers that these obligations are sufficient to provide protection to the information that it has determined be classified as RI under the Order.

Parties are, however, reminded that RI must only be provided to persons that have signed the Deed of Undertaking, and may only be used for the purposes of this investigation.

Other agreements

2degrees, CallPlus, Woosh and Kordia, and Linktel commented that the Commission should also have regard to, and facilitate the release as RI of, the terms of retail agreements and calling-card agreements.

The Commission considers that these matters are not required to inform its assessment in the MTAS Investigation, for the reasons set out in its letter of 22 July 2009. While these matters may serve as cross-checks on the Commission's benchmarking, the Commission does not consider that the actual details of these matters would materially affect its conclusions about the appropriateness of those benchmarks in determining the factual for this investigation.

Should you have any queries in relation to this matter, please contact Shane Kinley on (04) 924 3686 or by email at shane.kinley@comcom.govt.nz.

Yours sincerely



Anita Mazzoleni
Commissioner