COMMERCE COMMISSION

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cc: Interested Parties to the MTAS Investigation

Comments on undertakings received in relation to the MTAS Investigation

Purpose

This letter provides the Commerce Commission's (**the Commission**) comments for Vodafone, Telecom and NZ Communications (**NZ Comms**) to consider in submitting revised undertakings in relation to the mobile termination access services (**MTAS**).

The Commission in particular draws Vodafone, Telecom and NZ Comms' attention to the Commission's preliminary view that the prices contained in the Vodafone and Telecom undertakings are significantly above the current likely cost of the MTAS. The Commission therefore considers that any revised undertakings will need to include significant reductions in these prices if the Commission is to be in a position to recommend that the Minister accept them.

The Commission considers that acceptable undertakings are a desirable outcome in relation to MTAS and that this matter needs to be resolved on a timely basis. Therefore, the Commission does not intend to allow parties more than one opportunity to submit revised undertakings, and expects to move promptly to recommend either:

a. that some or all of any revised undertakings be accepted, if they do offer sufficient reductions in prices (including the effect of any non price terms) towards the benchmarked levels that the Commission has identified; and/or

b. proposed regulatory changes, if any revised undertakings do not offer sufficient reductions in price (including the effect of any non price terms) towards the benchmarked levels that the Commission has identified.

In determining the process to be followed, the Commission has considered:

a. the potential benefits of receiving acceptable undertakings;

b. the likely timeframes for this investigation and any regulatory processes;

c. the importance that the Commission places on the MTAS market(s) delivering outcomes that are consistent with a workably competitive market (either through suitable undertakings or regulation). The mobile market is a priority for the Commission, which is focusing on reducing barriers to entry and expansion for efficient facilities-based competition in this important market and related markets; and

d. the timeliness of ensuring that an acceptable basis for MTAS is in place, either through undertakings or regulation, with corresponding benefits for improved competition for the long-term benefit of end-users.

Introduction

On 6 November 2008 the Commission commenced an investigation under Schedule 3 of the Telecommunications Act 2001 (**the Act**) into whether or not MTAS (incorporating mobile-to-mobile voice termination (**MTM**), fixed-to-mobile voice termination (**FTM**) and short-message service termination (**SMS**)) should become regulated services under Schedule 1 of the Act (**MTAS Investigation**).

On 12 January 2009, the Commission received five undertakings under Schedule 3A, from:

a. Vodafone – three separate undertakings for the three components of MTAS;

b. Telecom – one undertaking covering all three components of MTAS; and

c. NZ Comms – one undertaking covering MTM, SMS, multi-media-message-services (**MMS**) and video telephony calls.

Submissions were received on the undertakings from Vodafone, Telecom, NZ Comms, TelstraClear, CallPlus, the Telecommunications Users Association of New Zealand (**TUANZ**), and a combined submission from Orcon, Kordia and Woosh.

This letter provides the Commission's comments for Vodafone, Telecom and NZ Comms to consider in submitting revised undertakings, based on the Commission's assessment of the undertakings received and the submissions on those undertakings. The process and timeframe for revised undertakings is detailed below.

The Commission notes that it is currently considering a range of issues in relation to mobile markets, including whether or not to commence an investigation under Schedule 3 of the Act into whether or not mobile roaming should become a designated service under Schedule 1 of the Act (**potential mobile roaming investigation**). Like mobile operators, the Commission takes a holistic view of mobile markets. The Commission will be making a separate announcement about its decision in relation to whether or not to commence the potential mobile roaming investigation.

Comparability of mobile termination rates with international benchmarks

The Commission's preliminary view is that the mobile termination rates (**MTRs**) provided in Vodafone's and Telecom's undertakings are significantly above forward-looking cost-based rates that have been estimated in regulatory cost models in other countries, as reflected in the benchmark information attached at Appendix One.

Based on the Commission's current benchmarks, the Commission's preliminary view is that the current cost-based MTR could be as low as NZ$0.07/min for MTM and FTM, and NZ$0.01/SMS. The Commission expects that any revised undertakings will need to offer significantly reduced initial MTRs at, or close to, the level of the Commission's benchmarks, for the Commission to be able to consider recommending acceptance of the revised undertakings.

The Commission's benchmarks are based on the median of the benchmarked information attached in Appendix One. The Commission has considered the question of comparability of individual cost-based benchmarks with New Zealand, and its preliminary view is that the median benchmark is appropriate.

The Commission also expects that there will be downward pressure on cost-based prices over time, as volumes of MTAS increase and cost-drivers for MTAS decrease, and that the prices offered in the undertakings should reflect this. In this regard, the Commission considers that forward-looking changes in modelled cost-based rates, such as the example of Sweden noted in Appendix One, illustrate the magnitudes of cost changes that may be expected in the future.

While the above cost model based rates are sourced from the most recent information available to the Commission, the Commission notes that it will continue to monitor international developments through the course of the MTAS Investigation, to identify if any adjustments to these benchmarked cost model based rates are appropriate.

On-net / off-net price discrimination

The Commission notes that NZ Comms' undertaking contains clauses preventing discrimination between on-net and off-net pricing, and that Vodafone submitted that NZ Comms' undertaking takes away a significant marketing tool through which mobile network operators can differentiate their product offerings and compete with each other, and may be anti-competitive.[1]

The Commission considers that undertakings may contain terms that prevent discrimination between on-net and off-net pricing, and will consider the likely implications of any such terms in the draft report.

However, the Commission's preliminary view is that, provided MTAS prices are cost-based, non-discrimination provisions are not required to ensure a competitive market in the interests of the long-term benefits of end-users.

Pricing principles

The Commission notes that NZ Comms' undertaking provided for 'bill and keep' (**BAK**) pricing in respect of MTM termination. The Commission's preliminary view is that cost-based pricing is currently more appropriate than BAK in respect of MTAS in New Zealand's current market conditions because cost-based pricing is likely to best promote competition and be consistent with economic efficiency. The Commission is, however, open-minded to the possibility that, in the long-term, it may become appropriate to consider the adoption of BAK in New Zealand, depending on market conditions in New Zealand and overseas developments.

As discussed further in Appendix Two, the Commission's preliminary view is that the pricing principle used for MTAS should cover mobile termination of any voice services irrespective of where the service is originated, including FTM, MTM, internationally originated or VOIP originated calls, so long as they are handed over from a New Zealand Access Seeker to a New Zealand Access Provider, for termination on the Access Providers' mobile network.

Other pricing structure related comments

The Commission's preliminary view is that the appropriate length of time that regulation or an undertaking should set prices for needs to reflect a balance between providing certainty

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[1] Vodafone, *Submission to the Commerce Commission: Telecommunications Act 2001: Submission on the Schedule 3A Undertakings provided on 12 January 2009*, 13 February 2009, page 45, para 138 and page 46, para 142

and recognising that the mobile telephony markets are subject to rapid technological change. The Commission's preliminary view is that that this time period is less than five years and is likely to be around three years.

The Commission notes that both Vodafone's and Telecom's undertakings contain glide paths. The Commission's preliminary view is that there is no justification either for the glide paths contained in Vodafone's and Telecom's undertakings, or for further glide paths of MTRs towards cost to be included in the factual of regulation for the draft Report. The Commission reiterates its preliminary view, noted above, that there should be rapid movement to cost based MTRs, and looking forward the Commission expects prices will continue to move down as cost based rates continue to decline.

The Commission notes that, in the regulated rates for the countries that the Commission has included in its benchmarks in Appendix One, there is a mix between the regulated rates being based on "second + second" pricing, "minute + second" pricing and the regulated rate being silent on the basis of pricing, although the majority of the benchmarked countries use "second + second" pricing.

The Commission's preliminary view is that there would need to be a strong economic basis for the factual of regulation for the draft Report to apply "minute + second" pricing, and that this has not clearly been demonstrated to the Commission.

While the Commission considers it is appropriate that the parties submitting undertakings be free to choose the pricing structure for their undertakings, the Commission's preliminary view is that it will apply an uplift to any "minute + second" prices provided in revised undertakings in the draft Report to ensure that it is comparing like with like prices.

The Commission notes that asymmetric prices (i.e., different prices for MTAS on different mobile networks) are not currently provided in the undertakings.

The Commission's preliminary view is that it has not been provided any justification for asymmetric pricing in either undertakings or the factual of regulation for the draft Report.

Scope of the undertakings

The Commission received several submissions on the scope of the services contained in the undertakings. In particular, it was argued that particular services (such as MMS) or particular terms (such as pass-through obligations) were beyond the scope of any proposed regulatory change, and that as a result the Commission is required to reject any undertakings containing such terms.

The Commission notes that the Act does not expressly restrict the scope of the undertakings, and considers that the undertakings regime is designed to provide flexibility to access providers in submitting undertakings.

For this reason the Commission's preliminary view is that the scope of the undertakings are not limited to the scope of proposed regulation. The Commission notes, however, that the particular terms of any undertaking will be carefully assessed against the factual of regulatory change as part of the Commission's welfare analysis (both quantitative and qualitative) in the draft Report with all price and non price terms assessed.

Secondary issues

Attached as Appendix Two are the Commission's preliminary views on secondary issues, including further comments regarding pricing structure, the scope of undertakings and the process for the submission of revised undertakings.

Process for submission of revised undertakings

The Commission wishes to stress that the process for this investigation set out in the Act must be followed in its entirety. The Commission is not able under the Act to suspend or cancel the investigation, or to proceed to recommend that the Minister accept any undertakings prior to completing the full process set out in the Act.

The Commission is required under clause 16(3) of Schedule 3A of the Act to give Vodafone, Telecom and NZ Comms "… a reasonable opportunity to amend [their undertakings] in light of any submissions received by the Commission under this clause."

The Commission considers that four weeks is a reasonable opportunity for Vodafone, Telecom and NZ Comms to submit amended undertakings. The Commission invites these parties to provide written revised undertakings, should they choose to do so, by 5pm on Wednesday 22 April 2009. Submissions should be forwarded to Shane Kinley at shane.kinley@comcom.govt.nz.

As noted above, the Commission does not intend to allow parties more than one opportunity to submit revised undertakings. The Commission reiterates that it encourages parties to use this opportunity to put their best offer forward as an alternative to the proposed regulatory changes being considered.

The Commission invites Vodafone, Telecom and NZ Comms to clearly identify, when submitting any revised undertakings, where they have made changes, or decided not to make changes in response to a matter raised in this letter, to those undertakings, and the reasons for those changes or decisions to not make changes.

The Commission does not expect that this will require substantial supporting submissions or the provision of supporting material. If previous submissions are cited in support of any point, the Commission invites Vodafone, Telecom and NZ Comms to provide specific references.

If the Commission considers that some or all of the undertakings should be recommended for acceptance, then a workshop may be held to resolve any issues of comparability of terms, as further addressed in Appendix Two.

The Commission does not intend to release its cost benefit model at this point, and this matter is further addressed in Appendix Two.

Revised timeline for MTAS investigation

After the receipt of amended undertakings (if any), the Commission will proceed to issue a draft Report in accordance with clause 2 of Schedule 3 to the Act. The draft Report will indicate the Commission's preliminary views to recommend that some or all of any revised undertakings be accepted, and/or to recommend proposed regulatory changes, as discussed above.

An updated timeline reflecting the process that the Commission intends to follow for the submission of revised undertakings is available, along with a copy of this letter, on the Commission's website.[2] The Commission will continue to regularly review and update the timeframes for the investigation, as it progresses.

[2]http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobiletoMobileTermination/mobiletomobiletermination.aspx.

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

Yours sincerely

Paula Rebstock
Chair

Appendix One: Commission benchmarking information and comments on benchmarking information provided by Vodafone and Telecom

The following table and associated comments provides the source information used in the Commission's benchmarking, and features of the regulated rates from the countries that have been used in the Commission's benchmarking.

The Commission notes that there is a distinction drawn in the following information between glide paths provided for in regulated rates, and revisions to cost-based MTRs that include rates set over multiple years. Information in relation to the latter includes confirmed future pricing movements, i.e., price movements due to occur in out years, but does not attempt to anticipate potential pricing movements that are not certain to occur. Further comment is provided on downward trends in regulated and prevailing MTRs in European countries below.

Table 1: Information used in the Commission's benchmarking

	MTR Home Currency (year of modelled rate)	FX rate[3]	MTR NZD	Benchmark - Telecom[4]	Min+Sec or Sec+Sec	Glide-path	Asymmetry	Adjustments
Australia	AU$0.058 (2008)	0.8883	0.0653	n/a	Not stated	Not proposed for 2009 - 2011.	No	No
Denmark	kr 0.54 (2009)	4.5984	0.1174	0.1671	sec+sec	Yes	Yes	No
France	€0.029 (2008)	0.5516	0.0526	n/a	sec+sec	Yes, concludes at the end of 2010	Yes	No
Israel	NIS 0.161 (2008)	2.4190	0.0666	n/a	sec+sec	No	No	Inflation, externality surcharge excluded 0.011ILS
Malaysia	MYR 0.0873 (2008)	1.6695	0.0523	n/a	Not stated	No	No	No
Netherlands	€0.056 (2008)	0.5387	0.1040	0.1841	min+sec	Yes, concluding in 2009	Yes	No
Norway	NOK 0.48 (2008)	5.0299	0.0954	0.1645	sec+sec	Yes, concluding in July 2010	Yes	No

[3] FX rates are calculated by taking an evenly weighted average of the 10 year (15/01/99 – 14/01/09) average exchange rate, sourced from www.oanda.com, and the IMF PPP (2007) rate, sourced from http://www.imf.org/external/pubs/ft/weo/2008/02/weodata/weoselco.aspx?g=2001&sg=All+countries, using the variable "Implied PPP conversion rate".

[4] Telecom, *Schedule 3 Investigation into Regulation of Mobile Termination Access Services – Submission on the Schedule 3A Undertakings Received by the Commission*, page 9.

Sweden	kr 0.3675 (2008)	5.2937	0.0694	0.0892	sec+sec	No	No	No
UK	£0.0492 (2009)	0.3811	0.1290	0.1509	min+sec	Yes, concluding in 2010/2011	Yes	Inflation adjusted for 3 yrs inflation at average of 3% (£0.0042)
		Median	**0.0694**					

Note: The benchmarking provided by Vodafone has not been used for comparison to the Commissions benchmarked rates due to Vodafone providing their benchmarks in graphical form. This prevents the Commission for referencing the benchmarks with the accuracy desired. Vodafone's benchmarks are derived from the same source as Telecom and a visual comparison of the benchmarking conducted by Vodafone and Telecom indicates little difference.

Comments on above information:

Australia

Information source: http://www.accc.gov.au/content/item.phtml?itemId=848997&nodeId=601d147209271ed9279beeab48505bf0&fn=Draft%20MTAS%20Pricing%20Principles%20Determination%202009%E2%80%932011.pdf.

Australia engaged WIK Consult to conduct cost modelling for mobile termination. WIK used a TSLRIC+ model to estimate a cost of AU$0.058/min[5] for call termination for an operator with 31% market share in their 2008 update of their model. However, the indicative rate provided for by the Australian Competition & Consumer Commission (**ACCC**) of AU$0.09/min is significantly above the cost modelled rate. [6]

Denmark

Information source: http://www.itst.dk/samtrafikregulering/filarkiv-samtrafik-og-brugerregulering/telepriser-pa-engrosniveau/lraic/lraic-processer/lraic-mobil/endelig-model-og-prisafgorelser/20080619%20Prisafgorelse%20Hi3G.pdf.

Denmark engaged Analysys to conduct cost modelling for mobile termination. Analysys used a LRAIC model to estimate a cost of DKK0.54/min for call termination for the highest cost operator in the Danish market in 2009. The reference provided is in Danish, however,

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[5] ACCC, *Draft MTAS Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011*, November 2008, Table 4, page 14. Source: http://www.accc.gov.au/content/item.phtml?itemId=848997&nodeId=601d147209271ed9279beeab48505bf0&fn=Draft%20MTAS%20Pricing%20Principles%20Determination%202009%E2%80%932011.pdf.

[6] The ACCC also ran a scenario, using the updated 2008 WIK Consult model with an increased WACC rate and minutes of use, which resulted in a cost of AU$0.059. Because the increased data was estimated, the Commission did not use the rates derived because the results are less robust, however, the difference between the two rates is minimal and that the benchmarking result would remain changed regardless of the rate used.

correspondence with the Danish regulator has confirmed the rate of DKK 0.54/min.[7] Termination rates are regulated in Denmark using an asymmetric glide path with termination rates at between DKK 0.54 - 0.74/min that expires after 31 December 2009.

France

Information source: http://www.arcep.fr/uploads/tx_gspublication/consult-projdec-tammetro-231008.pdf

The French regulator (ARCEP) engaged Analysys to conduct cost modelling for mobile termination. Analysys used a LRIC model to estimate a cost of 2.4-2.9€c/min for call termination for the highest cost operator in the French market in 2008. The reference provided is in French, however, correspondence with the ARCEP has confirmed the rate of 2.4-2.9€c/min[8]. ARCEP regulate rates using an asymmetric glide path that finishes at the end of 2010 with termination rates at between 3c€-4c€/min. France regulate SMS rates at 3€c/SMS. This is a regulated rate and not a cost modelled rate. The Commission notes that the cost based voice termination rate is lower than the regulated SMS rate.

Israel

Information source: http://www.moc.gov.il/new/documents/about/analisis_m.pdf

The Israeli regulator engaged Analysys to conduct cost modelling for mobile termination. Analysys used a LRIC model to estimate a cost of 0.159NIS/min (real 2003 NIS) for call termination for a new entrant on the GSM network in 2008. The rates were set using a multiyear glide path, based on the cost model that concluded in 2008. Regulation does not allow for asymmetry.

Adjustments have been made, to the cost based rate of 0.159NIS/min (real 2003 NIS). Firstly the referenced document states that the cost modelled rate includes an externality charge of 1.1 agorot/min[9]. The Commission considers that externality charges are not cost based. As a result the Commission has removed 1.1 agorot/min from the estimated rate. Secondly, the quoted rates are in real 2003 NIS, an adjustment has been made to the figure. The Israeli inflation index quoted on the Israeli central bank website has increased by a total of 8.2%. The cost estimate has been adjusted accordingly.

In the Israeli cost model SMS is calculated to have a cost based termination rate of 0.021 NIS (real 2003 NIS). When adjusted for inflation this comes to 0.022 NIS. Converted into NZD using the same method of calculation as used for voice termination rates results in cost based termination rate of $0.0073/SMS.

Malaysia

Information source:http://www.skmm.gov.my/registers/cma/report/pdf/PIReportAccessPricing-MCMC-Final.pdf

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[7] The Danish regulator has referenced relevant information to the first full paragraph on page 16.
[8] ARCEP has referenced relevant information to page 52, paragraph 7.
[9] Analysys, *Report for the Israel Ministry of Communications - Response to issues raised concerning the Analysys cost model*, 15 December 2004, Page 101.

The Malay regulator engaged NERA to conduct cost modelling for mobile termination. NERA used a LRIC model to estimate a cost of 8.23sen/min for local calls, 9.13sen/min for national calls and 28.34sen/min for national calls using the submarine cable[10]. The rates were set using a multiyear glide path, based on the cost model that concluded in 2008. Regulation does not allow for asymmetry. The Commission has used an average of the local call and national call costs. The Commission decided to not consider including the rate for national calls using the submarine cable because of the distance from mainland Malaysia is 950km compared to the Cook Straight which is around 23km at its narrowest point, creating significant cost differentials.

SMS is calculated to be have a cost based termination rate of 0.27 Sen/SMS. Converted into NDZ using the same method as voice termination rates are calculated the cost based termination rate is $0.0012/SMS.

Netherlands

Information source: http://www.opta.nl/nl/actueel/alle-publicaties/publicatie/?id=2318

The Dutch regulator (OPTA) engaged Analysys to conduct cost modelling for mobile termination. Analysys used a LRIC model to estimate a cost of 5.6€c/min[11]. The rates were set using a multiyear glide path, based on the cost model that concluded in 2010. The reference provided is in Dutch, correspondence with OPTA has confirmed the rate of 5.6€c/min. OPTA regulate rates using an asymmetric glide path that finishes at 1 July 2010 with termination rates at between 7c€-8.1c€/min.

Norway

Information source: http://www.npt.no/iKnowBase/Content/108168/Draft_decisions-Market16-public.pdf

The Norwegian regulator (NPT) engaged Analysys to conduct cost modelling for mobile termination. NPT state in paragraph 124 that there is nothing to suggest that the LRIC model estimate would differ from the efficient price for the two largest operators. The efficient model price is estimated to be NOK 0.45 (2005 NOK) in 2010. Footnote 27 gives an inflation adjusted price of NOK 0.48 for August 2008. The rates are regulated using an asymmetric multiyear glide path, based on the cost model that concludes on 1 July 2010, with termination rates between NOK 0.45 – 0.75.

Sweden

Information source: http://www.pts.se/upload/Ovrigt/Tele/Bransch/Kalkylarbete%20mobiln%E4t/prisrekommendation-fran-1-juli-2008.pdf

[10] Malaysian Communications and Multimedia Commission, *A Report on a Public Inquiry – Access Pricing, 30 November 2005*, Page 92.
[11] Page 134, paragraph 644.

The Swedish regulator (PTS) engaged Analysys to conduct cost modelling for mobile termination. PTS produce a graphical representation of the cost modelled rates for the highest and lowest cost operators (SEK 0.428, SEK 0.307). The Commission has taken the mean price of the two bounds for this benchmarking exercise, SEK 0.3675.

The Commission notes the rates are cost modelled rates for each year, rather than a regulated glide path to the cost based rate. PTS' cost modelling for the time period 2008 – 2013 are published in a graph[12] with the highest and lowest cost operators providing the upper and lower bounds. Between 2008-2011, the Swedish modelled rates fall by 20% and 44% (upper and lower bounds).

UK

Information source: http://www.competition-commission.org.uk/appeals/communications_act/mobile_phones_determination.pdf.

The UK Commerce Commission (UKCC) recently published their decision on an appeal regarding the MTR rates set by Ofcom, the British Telecommunications regulator. The UKCC made adjustments to the LRIC modelling done by Analysys on behalf of Ofcom. The UKCC set rates for 2009/2010 at between 4.4-5.5 pence/min in 2006/07 prices[13]. The upper bound of that range being set for the exclusively 3G network H3G. This rate was not used in the benchmarking exercise. The rate of 4.5p/min has been used and has been inflation adjusted at an average inflation rate for the previous 3 years of 3%. This gives a rate of 4.92p/min. The rates are regulated using an asymmetric multiyear glide path, based on the cost model that concludes in 2010/2011, with termination rates between 4 – 4.4p/min

Benchmarked SMS termination rates

SMS termination rates have also been estimated by WIK-Consult, in a report[14] prepared for the Commerce Commission, where the estimated cost of termination was 0.063€c/SMS for a small densely populated country and 0.025€c/SMS for large sparsely populated country. Converted back to NZD using the 10yr Euro average the termination rates are 0.123c/SMS and 0.0489c/SMS.

Information on benchmarks provided by Vodafone and Telecom in their comments on undertakings

Both Vodafone and Telecom present benchmarking information in their comments on undertakings. The majority of their data is sourced from the ERG MTR snapshot from 1 July 2008.

The Commission notes that these rates are the prevailing market rates, rather than the cost based rates the Commission has used in benchmarking.

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[12] Source : http://www.pts.se/upload/Ovrigt/Tele/Bransch/Kalkylarbete%20mobiln%E4t/prisrekommendation-fran-1-juli-2008.pdf.

[13] United Kingdom Competition Commission, *Reference under section 193 of the Communications Act 2003: Hutchison 3G UK Limited v Office of Communications - Case 1083/3/3/07 and British Telecommunications plc v Office of Communications - Case 1085/3/3/07: Mobile phone wholesale voice termination charges – Determination*, 16 January 2009, Page 373.

[14] WIK Consult, *Final Report: Study for the Commerce Commission of New Zealand - Cost Driver Sensitivity Analyses with Mobile Cost Models*, 22 December 2008.

As indicated in the table at the beginning of this appendix, there is a sizable difference between the benchmarked rates used by Telecom and Vodafone and the cost based rates. There is also significant pressure for prevailing termination rates to fall, with a notable example being the Bulgarian MTRs. The European Commission has asked the Bulgarian regulator to reduce their MTR from 15.09€c/min to 7.6€c/min in 2010. The downward pressure on wholesale MTRs is point is illustrated by the reductions in MTRs in recent years as reported by the ERG in their time series information.

Table 2: Information excluded from the Commission's benchmarking

	MTR Home Currency	FX rate[15]	MTR NZD	Benchmark - Telecom[16]
Austria	€ 0.057	0.5329	0.1073	0.1177
Belgium	€ 0.072	0.5396	0.1334	0.1702
Bulgaria	€ 0.1509[17]	0.4668	0.3232	n/a
Germany	€ 0.0792	0.5341	0.1483	0.1602
Greece	€ 0.0495	0.4833	0.1024	0.1966
Iceland	kr 7.49	56.5067	0.1326	n/a
Italy	€ 0.045	0.5331	0.0844	0.2107
Portugal	€ 0.065	0.4837	0.1344	n/a
South Korea	KRW 31.80	570.1208	0.0558	n/a
Spain	€ 0.070	0.5066	0.1382	n/a
		Median	**0.1330**	

Note: The benchmarking provided by Vodafone has not been used for comparison to the Commissions benchmarked rates due to Vodafone providing their benchmarks in graphical form. This prevents the Commission for referencing the benchmarks with the accuracy desired. Vodafone's benchmarks are derived from the same source as Telecom and a visual comparison of the benchmarking conducted by Vodafone and Telecom indicates little difference.

The Commission's reasons for excluding these countries are as follows:

- Austria – Regulatory decisions regarding MTRs in Austria are not legally binding due to ongoing legal issues.

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[15] See footnote 3 for basis of FX rate calculation.

[16] See footnote 4.

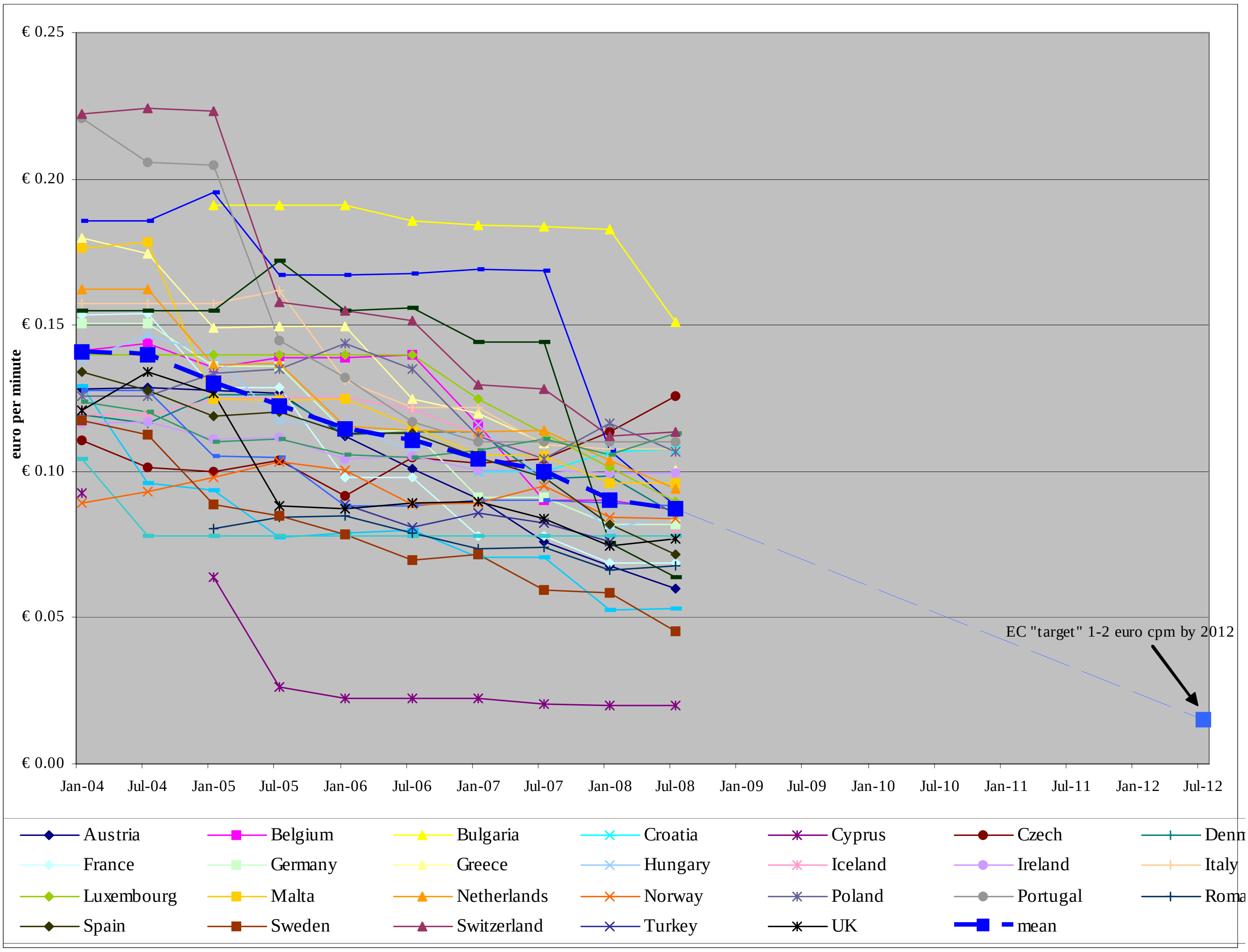
[17] Source: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/166&format=HTML&aged=0&language=EN&guiLanguage=en.

- Belgium – MTR modelling was conducted using top-down cost modelling.
- Bulgaria – Unable to procure information directly from the regulator.
- Germany – MTR modelling was conducted using top-down cost modelling.
- Greece – Unable to procure information directly from the regulator.
- Iceland – MTR is derived from benchmarking.
- Italy – Unable to procure cost based information directly from the regulator.
- Portugal – MTR is derived from the ERG benchmark.
- South Korea – Previous data is out of date and the Commission was unable to procure updated information from the regulator.
- Spain – The cost modelled rate is confidential.

Information on trends in regulated and prevailing rates in Europe

The Commission notes that there have been significant reductions in regulated and prevailing MTRs in recent years as reported by the European Regulators Group (**ERG**).

The following graph shows the reductions in the MTRs reported by the ERG[18] over the period from 2004-2008. The Commission has added a projection of the downward trend forward to the European Commission's "target" MTR for 2012.



[18] ERG/IRG MTR Snapshots (January 2004 to July 2008).

Appendix Two: Commission preliminary view on secondary issues

The parties that have submitted undertakings should note, in relation to the Commission's views on secondary issues set out below that the Commission has:

a. focused on high-level issues that have arisen in relation to non-price terms contained in the undertakings, based on submissions received as well as other substantive issues identified by the Commission; and

b. assumed interested parties are in the best position to understand the commercial implications of many of the non-price terms contained in the undertakings, and hence interested parties are in the best position to raise any issues relating to non-price terms that would normally be commercially negotiated.

Where any party considers that changes are appropriate in their revised undertakings in response to other issues raised in submissions, the Commission would appreciate those changes being clearly identified, with reference to the submission that they have been changed in response to, and any relevant comments on the reasons for the change.

Issue description	Reference to undertakings and / or submissions	Commission's preliminary view
Release of cost-benefit model	In a letter of 10 March 2009 Vodafone stated that "we believe the Commission must release its cost-benefit model ***before*** parties are given another opportunity to amend their undertakings."[19]	While the Commission does not currently have a fully populated draft cost-benefit model available, the Commission will release its draft cost-benefit model as part of the draft Report. The Commission does not consider that the release of a fully populated draft cost-benefit model is required for Telecom, Vodafone and NZ Comms to be able to submit revised undertakings, as sufficient feedback has been provided elsewhere in these comments to enable the parties to submit revised undertakings. However, the Commission notes the following: a. as part of its previous Schedule 3 investigation, the Commission used a model to examine the possible impact of mobile termination regulation on the downstream markets. The Commission's previous model is publicly available; b. in the current Schedule 3 investigation, the Commission intends to follow a standard approach to assessing the possible impact of regulation, involving a counterfactual scenario that gives appropriate weight to the undertakings, and a

[19] Vodafone letter, *Re: Investigation into Mobile Termination Access Services (MTAS)*, 10 March 2009, p 3, available at: http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobiletoMobileTermination/mobiletomobiletermination.aspx.

Issue description	Reference to undertakings and / or submissions	Commission's preliminary view
		factual scenario in which the MTAS is regulated; c. in considering the possible impact of regulating MTAS, the Commission will consider the likely implications of regulation for the relevant downstream markets, including the retail markets in which FTM, MTM and SMS services are supplied, as these are the markets in which MTAS regulation may promote competition for the long-term benefit of end-users; d. as noted below, the assessment of the counter-factual of the undertakings will consider all price and non-price features, including terms that cannot be part of the factual of regulation such as a requirement or commitment to pass-through reduced termination rates to end-users in full; and e. this will include an assessment of the efficiency consequences of regulation, as required under Section 18 of the Act.
Regulation of retail pricing	Vodafone's undertaking contains terms which require pass-through of reduced FTM termination charges to end-users.[20] Vodafone state that it cannot support Telecom's undertaking as it does not allow for the pass-through of reduced FTM termination rates to end-users.[21] NZ Comms' undertaking contains clauses preventing discrimination between on-net and off-net pricing.[22] Telecom submitted that the regulation of retail pricing is beyond the scope of the	The Commission considers that there is nothing in the Act to suggest that undertakings are limited to terms that are able to be included in a proposed regulation. Rather, clause 2 of Schedule 3A provides that the undertakings regime is intended to encourage undertakings that act as an alternative to regulation. The Commission considers that there is significant value in an access provider being able to offer terms in an undertaking that would not be available if the Commission were to recommend regulation. Furthermore, the Commission considers that this accords with the purpose of Schedule 3A of the Act. The Commission's preliminary view is that undertakings are able to contain conditions that purport to affect the retail price of mobile services, including terms that require pass-through of reduced termination rates to end-users. However, the Commission's primary concern is the promotion of competition at the wholesale

[20] Vodafone, *Draft Undertaking to the Commerce Commission under Schedule 3A in respect of the Vodafone FTM Call Termination Service*, 12 January 2009, pages 10-11, clauses 3.2 and 3.4.
[21] Vodafone, *Submission to the Commerce Commission: Telecommunications Act 2001: Submission on the Schedule 3A Undertakings provided on 12 January 2009*, 13 February 2009, page 12.
[22] NZ Comms, *Undertaking to the Commerce Commission under Schedule 3A in respect of mobile termination access services*, 22 December 2008, pages 7 and 9, clauses 4.3(c) and 5.3(c).

Issue description	Reference to undertakings and / or submissions	Commission's preliminary view
	Commission's jurisdiction and the policy of the Act, which is to regulate wholesale services.[23]	level. The Commission would expect increased competition to benefit end-users by leading to lower retail prices. Given Vodafone's arguments in favour of pass-through provisions, the Commission invites Vodafone to indicate why it has only included pass-through for FTM, but not MTM and SMS.
Services covered by undertaking	Telecom[24] and Vodafone[25] have commented on the range of services included in other parties' Undertakings, including submitting that they include services which are outside the current MTAS investigation. By contrast, CallPlus[26] have questioned why Telecom exclude VoIP calls to a mobile service from their undertaking.	The Commission note, as discussed in the body of this letter, that the scope of an undertaking does not need to match the scope of the investigation. However, for the draft report the undertakings will be assessed against the factual of potential regulation, which will be based on the scope of the investigation, with additional elements in the undertakings assessed against the factual of commercial offerings. The Commission's preliminary view is that it has not been provided any justification for the differential treatment of mobile termination of any voice services, including internationally originated or VOIP originated calls, that are handed over from a New Zealand Access Seeker to a New Zealand Access Provider, for termination on the Access Providers mobile network.
FTM not covered in NZ Comms undertaking	Vodafone[27], TelstraClear[28] and Telecom[29] all submitted on issues relating to NZ Comms undertaking not dealing with FTM termination, including comments that this	The Commission's preliminary view is that NZ Comms has not provided any justification to not include FTM termination within the scope of their undertaking.

[23] Telecom, *Submission on the Schedule 3A undertakings received by the Commission*, 13 February 2009, p 13, para 45.
[24] See note 23, page 26, paras 103-106.
[25] See note 21, page 23, para 42.
[26] CallPlus, *Commerce Commission: Schedule 3 Investigation into Mobile Termination Access Services - Submission on the Undertakings*, 13 February 2009, page 4.
[27] See note 21, page 26, para 51, pages 35-36, paras 91-95, and pages 41-42, paras 120-123).
[28] TelstraClear, *Schedule 3 investigation into regulation of mobile termination - Submission on undertakings received from Telecom, Vodafone and New Zealand Communications*, 13 February 2009, page 10, para 46.
[29] See note 23, page 15, para 53.

Issue description	Reference to undertakings and / or submissions	Commission's preliminary view
	raises risks of arbitrage.	
Wholesale providers	TelstraClear note that the NZ Comms' undertaking does not cover wholesale providers.[30]	The Commission's preliminary view is that NZ Comms has not provided any justification to not include wholesale customers within the scope of their undertaking.
Interface with Roaming calls	NZ Comms note that Vodafone's undertakings exclude "any mobile number allocated or ported to the Access Seeker that is used on the Vodafone Network in accordance with an agreement between the parties" (clause 1.7.2) and raise concerns about the impact of this clause in relation to NZ Comms' customers roaming on Vodafone's network .[31]	The Commission invites Vodafone to consider how this clause would interface with any confidential commercial roaming agreements, and to indicate to the Commission how they envisage this clause operating, in light of NZ Comms' comments.
Statement of Government economic policy	The Commission is required under section 19A of the Act to "… have regard to any economic policies of the Government that are transmitted, in writing, to the Commission by the Minister." A statement of Government economic policy in relation to international commitments in the telecommunications domain, was transmitted to the Commission by Hon. Steven Joyce, Minister for Communications and Information Technology, on 5 February 2009, and is available on the Commission's website.[32]	The Commission draws the attention of Telecom, Vodafone and NZ Comms to the Annex on Telecommunications in the General Agreement on Trade in Services ("**GATS**"), which requires New Zealand, as a Member to GATS, to ensure that access to and use of public telecommunications transport networks and services are provided to other Member states on reasonable and non-discriminatory terms and conditions.[33] The Commission's preliminary view is that similar termination services and charges should be available to internationally originated traffic from GATS Member states as domestically originated traffic. The Commission invites Telecom, Vodafone and NZ Comms to consider whether any changes are required to their undertakings in relation to the statement of Government economic policy in relation to international commitments in the telecommunications domain, as noted in the

[30] See note 28, page 11, paras 51-56.
[31] NZ Comms, *Commerce Commission: Mobile Termination Access Services – Undertakings: Submission from NZ Communications Limited*, 13 February 2009, pages 11-12, paras 2.16-2.17.
[32] http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/Overview.aspx.
[33] See General Agreement on Trade in Services, Annex on Telecommunications, cl 5(a).

Issue description	Reference to undertakings and / or submissions	Commission's preliminary view
		body of this letter.
Compatibility with Act, particularly section 18, 19A and the Access Principles set out in Schedule 1 of the Act	NZ Comms state Vodafone and Telecom undertakings do not address the statutory test.[34] Vodafone consider that NZ Comms' undertaking does not meet the purpose contained in section 18 of the Act, and that BAK and a prohibition on price discrimination at retail level for on-net / off-net calls in particular do not meet the purpose in section 18.[35] Telecom comment that the NZ Comms' undertaking does not comply with the standard access principles and the limits on the standard access principles under the Act.[36]	The Commission notes that it is required, in assessing whether to recommend that the undertakings be accepted or regulation be recommended, to make the decision that best gives, or is likely to best give, effect to the purpose set out in section 18.[37] The Commission's draft report will address in detail this assessment. The Commission notes that it must not make a recommendation to the Minister to accept an undertaking unless it is satisfied that the undertaking complies with the standard access principles and the limits on those principles.[38] The Commission considers that reference to the standard access principles and the limits on the standard access principles under the Act in an undertaking is not sufficient to meet the above requirement for to Commission to make a recommendation to the Minister to accept an undertaking. The Commission therefore invites Telecom, Vodafone and NZ Comms to provide any further comments in relation to how their undertakings meet this requirement. The Commission also invites NZ Comms to consider incorporating the standard access principles and the limits on the standard access principles under the Act into their undertaking, or to provide an explanation of how their undertaking is compliant without explicit incorporation of these matters.
Availability of undertaking to other access seekers	The NZ Comms' undertaking takes the form of amendments to current commercial agreements with Telecom[39] and Vodafone[40],	The Commission considers that as the NZ Comms' undertaking is essentially an offer to supply Telecom and Vodafone only, it cannot be construed as an offer to supply all access seekers, and therefore is not capable of acceptance by the Commission.

[34] See note 31, page 3.
[35] See note 21, page 23, para 44, pages 26-33, paras 53-84, and page 43, para 131.
[36] See note 23, page 30, para 126.
[37] Section 19 of the Act.
[38] Clause 4(b) of Schedule 3A of the Act.
[39] See note 23, page 16, para 60.
[40] See note 21, page 60, paras 203-206.

Issue description	Reference to undertakings and / or submissions	Commission's preliminary view
	for reasons outlined by NZ Comms.[41] Telecom and Vodafone consider that this does not meet the requirements of the Act.	The Commission invites NZ Comms to ensure their undertaking is capable of acceptance by all access seekers, including Telecom and Vodafone.
Ability for NZ Comms' undertaking to be accepted independently	NZ Comms' undertaking is contingent on both Telecom and Vodafone accepting it's terms, and would not be effective if either party does not agree to the variations to provide bill-and-keep payments (NZ Comms' undertaking, clause D, p4, clauses 3.1 and 3.2, p5-6).	The Commission considers that an offer that is conditional for one party on another party also accepting the offer is not appropriate or certain enough to be accepted as being compliant with clause 3(1) of Schedule 3A of the Act. The Commission invites NZ Comms to ensure their undertaking is capable of independent acceptance by Telecom and Vodafone (and other Access Seekers).
Compatibility of undertakings	TUANZ consider that the draft undertakings are incompatible with each other to a degree that could only be resolved by a complete withdrawal and resubmission of radically different undertaking by NZ Comms, or radically revised undertakings by Vodafone and Telecom.[42] Vodafone have proposed that the Commission hold a workshop on reconciling undertakings and facilitate negotiations over reconciling undertakings. Vodafone have suggested an optimal outcome could be reaching a consistent set of undertakings.[43]	The Commission notes that the undertakings, if all were recommended to be accepted, would arguably raise issues of compatibility. The Commission further notes that differences in undertakings could be justified by the different circumstances or commercial approaches of the parties. The Commission invites the Vodafone, Telecom and NZ Comms to address these issues of potential incompatibility within their revised undertakings. If the Commission considers that any revised undertakings are substantively capable of being recommended for acceptance by the Minister, but that there are issues of potential incompatibility, then the Commission will consider further how to resolve any such issues of incompatibility and may undertake a further consultation process on issues of compatibility.
Lack of certainty in Vodafone undertaking	Telecom consider that the Vodafone Undertakings are not sufficiently certain because, while the Access Seeker must	The Commission invites Vodafone to provide a process to accept the terms of the reciprocal service.

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[41] See note 31, page 12, paras 2.19-2.20.
[42] Telecommunications Users Association of NZ Inc, *Commerce Commission Schedule 3 Investigation into Regulation of Mobile Termination Services, Submission from Telecommunications Users Association of NZ Inc (TUANZ)*, 5 February 2009, page 1.
[43] See note 21, page 14, para 9 and pages 16-18, paras 14-21.

Issue description	Reference to undertakings and / or submissions	Commission's preliminary view
over reciprocity of terms	provide reciprocal services on request from Vodafone, the precise terms on which the Access Seeker's reciprocal service must be provided are not set out. Nor is there any express provision requiring Vodafone to be bound by the reciprocal terms.[44]	
Telecom's undertaking is not fully reciprocal	NZ Comms question why Telecom's charges are not fully reciprocal re reasonable establishment fees and other reasonable additional charges, which Telecom may charge an Access Seeker but an Access Seeker may not charge Telecom.[45] Telecom's undertaking contains 3 additional charges that an Access Seeker must pay Telecom, which Telecom does not reciprocally have to pay an Access Seeker, being: • Reasonable establishment or modification charges to accommodate the initial provision of services to an Access Seeker (Schedule 4, clause 3.1(b), pg 52); • Installation charges for interconnect links (Schedule 4, clause 3.1(g), pg 53); and • Reasonable charges for any additional work not covered by the pricing schedule (Schedule 4, clause 3.1(i), pg 53).	The Commission invites Telecom to provide reciprocal terms in these areas or reasons for terms not being reciprocal.
Three independent undertakings provided by	Telecom note that although the same terms and conditions (Schedule 3) relate to all of the	The Commission notes that there are risks associated with the submission of multiple undertakings, but the form of undertakings is ultimately a choice for the party submitting

[44] See note 23, pages 15-16, para 57, and pages 26-27, paras 107-111.
[45] See note 31, page 10, paras 2.10-2.11.

Issue description	Reference to undertakings and / or submissions	Commission's preliminary view
Vodafone	Vodafone Undertakings, they do so independently for each Undertaking and that, for example, there are no cross-default provisions. This gives rise to the possibility of the supplier of services being exposed to gaming (for example, by an Access Seeker (or Vodafone) limiting consequences by failing to pay under one Undertaking (or one set of reciprocal terms) while the others continue).[46]	them. The Commission, however, invites Vodafone to address cross-default provisions within their undertakings.
Handover point impact on price	NZ Comms suggest that clause 4.2 of Schedule 4 of Telecom's undertaking means that where an Access Seeker does not connect to all of Telecom's 24 major LICAs, then Telecom will pay an Access Seeker 3.5c less per minute.[47]	The Commission invites Telecom to explain the intent and impact of this clause, and the rationale for this deduction.

[46] See note 23, pages 27-18, para 113 – 114.
[47] See note 31, pages 9-10, paras 2.8-2.9.