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Bruce Officer
Telecommunications Branch
Commerce Commission
WELLINGTON

Dear Bruce

Re: Investigation into Mobile Termination Access Services (MTAS)

I refer to Tom Forster's letter to interested parties on 24 February 2009, in which the Commission outlined its revised timetable for the MTAS investigation.

Vodafone appreciates the efforts made by the Commission to provide its preliminary views on the undertakings provided by various parties in this investigation. We believe this will assist parties to decide whether they should provide amended undertakings and what the nature of those undertakings should be.

We note, however, that the Commission has not indicated whether:

- it will be releasing a cost-benefit model to help parties determine whether existing (or potentially amended) undertakings would be likely to provide a better outcome in the long-term interests of end-users than potential regulation;
- whether it will be sharing its views on each party's undertakings with all interested parties; or
- how it intends to deal with many of the complex issues raised in this investigation by the differential undertakings provided by the parties.

Our observations on these issues are set out below.

Background

Vodafone considers that the amendments made in 2006 to the Telecommunications Act 2001 (the Act) establishing the undertakings process were an important step for helping to ensure that the Commission can improve upon regulatory solutions by working with access providers. Appropriately designed undertakings have the potential to generate significant net benefits as compared to more formal regulation via designation of a service because:

- access providers can commit to actions – such as retail pass-through – that are not possible under formal regulation; and

- undertakings can avoid some of the direct and indirect costs of regulation, including the possibility of lengthy drawn out debates on appropriate forms of regulation and the risk of regulatory error.

For this reason, we believe the Commission should make every reasonable effort to facilitate the use of undertakings as an alternative to regulation, and do whatever it can to ensure the undertakings process has the best possible chance of success. We believe it would be helpful if the Commission were to confirm this is its intention.

The current investigation is a particular challenge as there are three access providers for the services subject to the Commission's investigation. It is also unclear from the aforementioned letter from Tom Forster whether the Commission intends to provide its preliminary views on each party's undertaking to all interested parties in this investigation. In this regard, the letter notes that:

The Commission intends to provide preliminary views to parties that have submitted undertakings, on issues that the Commission consider need to be addressed ...

Vodafone believes that all parties that have submitted undertakings would benefit from seeing the Commission's comments on each other's undertakings (subject to appropriate confidentiality constraints). This would ensure all parties can benefit from the Commission's views when determining the appropriate form of any amended undertakings that they might seek to make.

Further, the Commission notes in the aforementioned letter from Tom Forster:

Parties should be aware that the Commission, at this stage, is only planning on allowing parties one opportunity to submit amended undertakings. The Commission encourages parties to use this opportunity to put their best offer forward as an alternative to the regulatory changes being considered.

However, given the divergent nature of parties' undertakings the term 'best offer' is meaningless in the absence of appropriate and specific guidance from the Commission. The fact that the Commission has indicated that it considers this to be the last chance for undertakings places an even greater burden on the Commission in this regard.

The Act states that the purpose of the undertaking process is to provide a mechanism for an access provider to supply a service on a voluntary basis, and on terms and conditions agreed between the access provider and the Commission.¹ The Act clearly contemplates that the undertakings process will involve a degree of discussion in order to arrive at terms which the access provider and the Commission can agree. Without a strong indication of the outcomes the Commission would expect under regulation – and the supporting cost-benefit model to support this position – the parties are left guessing at what outcomes the Commission would expect under regulation. In these circumstances, it is very difficult for any party to develop voluntary options that might create a better net outcome for end-users than regulation, and therefore reach agreement with the Commission on a possible undertaking.

Unless the Commission becomes more involved in discussing the outcomes it thinks would be likely under regulation, and is prepared to release its cost-benefit model, it will be significantly more difficult for parties to put forward amended undertakings that the Commission can recommend to the Minister of Communications in lieu of regulation.

¹ Clause 2, Schedule 3A, Telecommunications Act 2001

Cost-benefit model

To make the undertakings process work effectively, we believe the Commission must release its cost-benefit model **before** parties are given another opportunity to amend their undertakings. This gives the greatest chance for industry participants to develop undertakings that the Commission can agree will generate outcomes better for end-users than could be achieved under regulation.

During previous investigations into whether to recommend regulation of mobile termination services and national roaming services, the Commission constructed cost-benefit models to assess the implications of potential regulation. These models were important for the ultimate outcomes of these investigations. Indeed, cost-benefit models are important for demonstrating the value of any regulatory intervention.

Vodafone notes that the Commission has made detailed information requests of the parties in this investigation, and expects that this information has been with the Commission since January of this year. Vodafone expects the Commission is seeking to use this information to populate some form of model to assess the costs and benefits of different types of regulation and undertakings made by the parties. Given the Commission has been considering welfare issues associated with this investigation since at least September last year (when it received submissions from interested parties on a number of detailed questions relevant to its factual/counter-factual analysis), and has had the data requested of parties since early this year, we expect the Commission should be in a position to shortly release its cost-benefit model (even if in preliminary form) to interested parties in this investigation.

Releasing the cost benefit model will enable parties to understand the outcomes – however preliminary – that the Commission expects will occur under regulation, and to explore whether alternative arrangements can be developed using the undertaking mechanism to deliver outcomes that will better promote competition for the long-term benefit of end-users. Conversely, releasing the cost-benefit model after parties have had their last chance to submit amended undertakings seems to deprive the industry of finding ways to work with the Commission to develop undertakings that could – on its own analysis – deliver better outcomes for consumers than are possible under formal regulation.

We do not see the release of the cost-benefit model in any way delaying the investigation. If the Commission is able to release its model at the same time (or earlier) as it releases its preliminary views on parties' initial undertakings, parties should have sufficient time to utilise the model to develop revised undertakings within the 4 week period currently envisaged by the Commission for providing revised undertakings after it releases its preliminary views.

Other process issues

It is not clear whether the Commission intends to provide guidance on many of the legal and technical implications of the undertakings when it provides its preliminary views on the parties' undertakings. In particular, we believe it is important that before parties are offered the opportunity to provide final amended undertakings, the Commission ought to give consideration to, and provided detailed guidance on, a range of issues raised by parties in their submissions, including whether:

- the Commission believes it is possible for it to recommend the Minister accept undertakings from only some, but not all, access providers;
- it is appropriate for undertakings to contain "reciprocity" provisions;
- the Commission believes it is possible for it to recommend the acceptance of an undertaking from one (or more) party, but still recommend regulation of the service at the same time;

- the Commission believes it is possible for it to recommend the acceptance of different undertakings from different parties, but for the same service.

There would be merit in the Commission providing guidance on these issues prior to parties being given a final opportunity to amend their undertakings in this investigation. It would be a wasted opportunity if the Commission provided views on these issues only after it had purported to close the opportunity for parties to provide amended undertakings in this investigation.

Conclusion

It would be a great shame if the Commission implemented the undertakings process contained in the Act as simply a hoop that has to be jumped through on the way to regulation, rather than using it as an opportunity to generate solutions for the industry that could deliver better and faster outcomes for consumers than are possible under regulation.

We are of the view that parties will be prevented from submitting their best offers in the absence of some very clear guidance from the Commission. This includes its cost benefit model.

Vodafone is committed to trying to find solutions that are superior to regulation for access providers, access seekers and end-users and we would like to work closely with the Commission to achieve this. To this end, Vodafone would be happy to participate in a workshop with other parties to discuss these options prior to the Commission releasing its preliminary views and cost benefit model later this month. Alternatively, such a workshop could be conducted shortly after the Commission releases its preliminary views to the parties.

We do not think a workshop would necessarily extend the timeframes the Commission has previously indicated for this investigation. However, given that accepting undertakings would provide outcomes for end users sooner than the regulatory alternative, it should not be a concern if the Commission required slightly more time to prepare its preliminary views and cost-benefit model. In any case, we think there is sufficient time for all of this to be achieved in advance of the Commission releasing its draft report for this investigation in June of this year.

Should you have any queries in relation to this matter, please feel free to contact me on 021 882 429.

Yours sincerely



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