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Shane Kinley  
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Commerce Commission  
WELLINGTON

By e-mail shane.kinley@comcom.govt.nz

Dear Shane,

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

We refer to the Commission's letter to all Interested Parties to the MTAS Investigation dated 22 July 2009 in which the Commission has requested Vodafone to provide it with various information.

The Commission has requested the following information from Vodafone:

- comments about the Commission's preliminary views on the classification of interconnection agreements under the MTAS Confidentiality Order;
- comments about whether the classification of information provided in response to the Commission's data questionnaire under the MTAS Confidentiality Order as Commission Only Information (COI) should retain COI classification or should be reclassified as Restricted Information (RI); and
- copies of all commercial interconnection agreements that Vodafone is a party to, or has been a party to in the period after 1 January 1998.

Vodafone's responses to the Commission's requests are set out below.

At the outset, however, I feel it is important to note the timing of the Commission's review of classification of information and request for further information (and the timeframes under which it expects a response) is far from ideal. This exercise could have been completed at a much earlier stage in the MTAS process and at a time when Interested Parties were not in the final stages of preparing an important submission and possibly revising undertakings. All the information which the Commission is seeking to review has been in the Commission's possession for some time. The timing of the requests has the effect of diverting resources away from the drafting of our submission at a time that unnecessarily compromises our ability to respond adequately within the Commission's investigation timeframes.

Additionally, if following receipt of comments and information, the Commission makes available further information on Monday 27 July 2009, we believe that parties will not have

sufficient time to meaningfully analyse that information for inclusion in their submissions on the Draft Report. In Vodafone's view, it is therefore unnecessary and unreasonable to impose such a narrow timeframe for Interested Parties' comments and the Commission's review.

We note that in respect of the request that parties provide information about commercial interconnection agreements, this appears to have arisen only as a result of a letter from 2degrees.<sup>1</sup> We elaborate more on this point below. However, we note that this request could have been made much earlier in the process when parties would have had a greater opportunity to properly comment and respond.

#### **Review of classification of information about interconnection agreements under the MTAS Confidentiality Order**

The Commission's preliminary view regarding the classification of interconnection agreements, and in particular the interconnection agreement between Vodafone and 2degrees (**2degrees/VF ICA**), is that the agreements should be classified as RI.

Vodafone considers that interconnection agreements (other than the 2degrees/VF ICA as discussed further below), if disclosed to the Commission, should be classified as COI. Vodafone believes that the publication of its interconnect agreements, even on a restricted basis, would be likely unreasonably to prejudice the commercial position of Vodafone in terms of clause 9 of the MTAS Confidentiality Order. Vodafone notes that, unlike Telecom, Vodafone does not enter into interconnection agreements with other carriers on the terms of a publicly available reference offer. The terms of each of Vodafone's interconnection agreements with its interconnecting partners are therefore particularly sensitive information. As the potential audience of RI includes legal counsel who are likely to be involved in interconnection negotiations with Vodafone, there is a highly significant risk that disclosure on a restricted basis would unreasonably prejudice the commercial position of Vodafone. We are concerned that the information could be indirectly used by a recipient relatively easily to create an improper strategic advantage - even merely sighting the information could be enough to influence an individual's judgement if and when they are involved in negotiating future interconnection agreements.

However, as indicated in previous correspondence to the Commission and as further detailed below, Vodafone considers that the 2degrees/VF ICA has sufficient public interest to be made public. Vodafone believes that the interests in protecting this information do not outweigh the public's interest in knowing the actual rates being charged for mobile-to-mobile termination. We provide further comment on this below. If the 2degrees/VF ICA is not made public, then Vodafone considers that it should be designated as RI.

#### **Review of classification of information provided in response to the Commission's data questionnaire under the MTAS Confidentiality Order**

##### *Reclassifying Vodafone's COI – request from 2degrees*

Vodafone agrees with the Commission's preliminary view that 2degrees has not yet provided detailed enough reasons as to why the information classified by Vodafone (and Telecom) as COI should be reclassified.

Vodafone notes that 2degrees could have signed up to the MTAS Confidentiality Order much earlier than it did. We further note that it has sought to review the confidentiality status of information only five working days prior to the date on which submissions on the Draft Report

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<sup>1</sup> Letter from Minter Ellison Rudd Watts to Commerce Commission, dated 15 July 2009

are due. 2degrees was free to execute a Deed of Undertaking, as Vodafone did, in early November 2008. It could have requested that the Commission review the confidentiality status of the information provided in response to the Commission's data questionnaire at a much earlier stage in the MTAS process. As the Commission is aware, this information (and its classification) was provided to the Commission in December 2008 and again in January 2009. 2degrees has, therefore, had considerable opportunity to execute a Deed of Undertaking and to ask the Commission to review the classification of the information.

Vodafone therefore submits that, in considering whether information should retain COI classification or should be reclassified as RI, the Commission should weigh:

- the potential prejudice that would be caused to parties who have supplied the Commission with information on a COI basis, bearing in mind the extent to which such parties' submissions might have benefited had they not been asked to be prepared under urgency and concurrently with the final days of another important submission; against
- the potential prejudice to the submissions of parties who would not receive COI, bearing in mind that such parties will unlikely have sufficient time to meaningfully analyse that information for inclusion in their submissions on the Draft Report in any case.

Moreover, Vodafone does not believe that it is necessary for other parties' professional advisers to have access to this information in order to evaluate and provide a full and informed response to the Commission's Draft Report or in respect of its approach to costs and determination of a factual price for MTAS. As noted by the Commission, this information does not inform the Commission's preliminary view on the determination of a factual price for MTAS and accordingly, Vodafone considers that no party is disadvantaged by this information being classified as COI.

#### *Reclassifying Vodafone's COI – Timing*

Additionally, as stated above, the Commission has had considerable opportunity to review, on its own initiative, the classification of this data at a more appropriate time. The Commission has already completed a review, under clause 24 of the MTAS Investigation Confidentiality Order, of the consistency of protection sought for the information. This review was completed in March 2009. On 30 June 2009, the Commission reached the preliminary view that "there is no *prima facie* evidence to suggest that protection has been requested in respect of information that is not of a confidential or sensitive nature"<sup>2</sup>. While we acknowledge that the Commission has always reserved its rights to review the classification at a later date, if the Commission had any concerns about the classification of the information, we submit that it should have initiated a review well in advance of the submissions on the Draft Report being due.

#### *Reclassifying Vodafone's COI – Vodafone's response*

The Commission's letter invites Vodafone to provide comments about whether the information provided in response to the Commission's data questionnaire that has been classified as COI to date should retain COI classification or should be reclassified as RI. For the reasons set out below in accordance with clause 9 of the MTAS Confidentiality Order, Vodafone considers that the information classified as COI should retain COI classification.

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<sup>2</sup> Commerce Commission's letter to all Interested Parties to the MTAS Investigation dated 30 June 2009.

The categories of information which Vodafone has classified as COI are:

- data disclosing distinctions between on-net and off-net mobile calls and SMS messages;
- data disclosing actual versus billed numbers; and
- data indicating when customers come off contracts.

As stated in Vodafone's letters to the Commission of 19 December 2008 and 20 January 2009, Vodafone believes that the publication of this information, even on a restricted basis, would be likely unreasonably to prejudice the commercial position of Vodafone. Additionally, Vodafone considers that the interests in safeguarding this information in a competitive market outweigh the interests of justice in ensuring that parties are able to prepare and present submissions. We deal with each of these three categories below.

*Data disclosing distinctions between on-net and off-net mobile calls and SMS messages*

Vodafone believes that volume, duration, revenue and price data in relation to on-net and off-net mobile calls and SMS messages is critically sensitive information. Vodafone has only been able to collect such data from its experience in the market over many years. It is valuable and proprietary intellectual property that Vodafone uses to make judgements about its customers' usage and, therefore, how to construct its retail pricing propositions. If this data was provided to our competitors, even on a restricted basis, Vodafone would be materially disadvantaged because it would lose the competitive advantage of this intellectual property.

Further, Vodafone believes that there would be no probative value in the parties having access to this information. The information cannot be verified by the parties because it is based on data only available internally to Vodafone. Vodafone does not see the value that other parties could add to the Commission's thinking from having access to the information. Vodafone believes that other parties would not have anything of substance to offer in terms of verification or criticism in addition to that which the Commission would already be capable of performing.

*Data disclosing actual versus billed minutes*

Vodafone also believes that the relationship between actual minutes and billed minutes of voice calls is critically sensitive information. This information is a core component of the Vodafone interconnection business model and, therefore, Vodafone considers this information to be in the nature of a trade secret. Vodafone has only been able to collect such valuable data from its experience in the market over many years.

Vodafone believes that publication of such data, even on a restricted basis, would materially disadvantage Vodafone's commercial position in interconnection negotiations with other parties, as such data would provide those other parties with an insight into the Vodafone interconnection business model.

As the potential audience of Restricted Information includes legal counsel who are likely to be involved in interconnection negotiations with Vodafone, there is a highly significant risk that disclosure on a restricted basis would unreasonably prejudice the commercial position of Vodafone.

*Data indicating when customers come off contracts*

This information is also critically sensitive to Vodafone and any disclosure, even on a restricted basis, would unreasonably prejudice Vodafone's commercial position. If this data was provided to our competitors, even on a restricted basis, Vodafone would be materially disadvantaged because it would lose the competitive advantage of this confidential customer information. This information could enable a competitor to achieve an artificial competitive or strategic advantage over Vodafone which it would not, without this information, be able to achieve.

We are not suggesting that the Nominated Counsel or any other person who has signed a Deed of Undertaking will disclose the information or use it for an unauthorised purpose. Vodafone is cognisant of the binding commitments on these persons. However, we are concerned that the information could be indirectly used by a recipient. Individuals may be working on other matters in addition to the MTAS investigation, and even having seen the information could be enough to influence such an individual's judgement when they are planning or making other decisions.

Again, Vodafone believes that there would be no probative value in the parties having access to this information. The information cannot be verified by the parties because it is based on data only available internally to Vodafone. Vodafone does not see the value that other parties could add to the Commission's thinking from having access to the information. Vodafone believes that other parties would not have anything of substance to offer in terms of verification or criticism in addition to that which the Commission would already be capable of performing.

**Request that interested parties provide information about any commercial interconnection agreements**

The Commission requests that Vodafone provide it with copies of all commercial interconnection agreements that it is a party to, or has been a party to in the period after 1 January 1998 (**requested interconnection agreements**) by 5pm on Friday 24 July 2009.

*Timeframe and Confidentiality*

Vodafone is unable to comply with this request in the timeframe required. Vodafone estimates it is likely to have dozens of contractual documents which could fall into this category, including various heads of agreement, amendment letter agreements, renewal letter agreements, extension letter agreements and side letter agreements. Many of the personnel who will be involved in compiling this information will also be involved in the submission (and possible revised undertakings) and cross-submission. Compiling copies of the requested interconnection agreements will take a substantial amount of time and Vodafone expects that it could take up to four weeks to be able to provide the Commission with these documents.

In addition, some of the requested interconnection agreements may contain confidentiality provisions which require Vodafone to obtain the other party's consent prior to disclosure to the Commission or third parties. Without reviewing all the requested interconnection agreements, it is not possible to know which, and how many, agreements this applies to. In cases where a third party's consent is required, we do not know whether such consent will be forthcoming, and so this may impact on the classification which Vodafone proposes for each agreement.

Although many of Vodafone's various recent interconnection agreements have generally followed a standard template, they do differ to varying degrees. Even providing the

summarised data of the agreements would require Vodafone to spend substantial time reviewing and extracting the relevant services, pricing and term details to satisfy the Commission's request.

*Relevance and use of interconnection agreements*

Vodafone notes that the Commission has not relied in its Draft Report on the additional commercial interconnection agreements it is now seeking. We note that they appear to have been raised only recently as a result of a request from 2degrees. Vodafone does not consider that these agreements are material in informing the Commission's counterfactual or that they can assist in the investigation. The data contained in historical interconnection agreements dating back to 1998 are not relevant to the question of whether MTAS should become regulated in 2009. It would appear to us that the request for collection and disclosure of this information is a defence response by 2degrees to its sensitivity about feeling pressure to disclose the highly favourable terms and conditions of its existing ICA with Vodafone. While such defensiveness may be understandable given it would demonstrate that 2degrees is not set to pay mobile termination rates to Vodafone in line with its public comments about New Zealand having the second highest termination rates in the world, such defensiveness does not suddenly make agreements dating back to 1998 relevant to whether regulation should occur in the period after 2009.

We therefore believe the Commission should reconsider whether the interconnection agreements (particularly those dating back to 1998) are material in informing the Commission's counterfactual and how they can assist in the investigation. In the event that the Commission reaches a view that the interconnection agreements are required for this investigation, we request the Commission to explain in detail why.

If the Commission intends to use details of other interconnection agreements to inform the counterfactual, we expect this information would be included in the Commission's cost-benefit analysis. If the Commission is intending to revise its cost-benefit model, Vodafone would like confirmation that the Commission intends to allow interested parties to have an opportunity to analyse the Commission's adjusted cost-benefit model.

As we have stated previously, Vodafone considers that the 2degrees/VF ICA is unique in terms of its relevance to the MTAS investigation and informing the counterfactual. The Commission has asserted that there are significant barriers to entry<sup>3</sup> and has considered other important issues such as the ability of a new entrant to compete, the appropriate price of mobile termination rates, and whether [ ] VNZCOI is appropriate. We believe the 2degrees/VF ICA is highly relevant to the Commission's assessment of these factors. As stated in Vodafone's letter to the Commission of 29 June 2009, the price terms contained in the 2degrees/VF ICA are important to the Commission's consideration of the rates likely to apply for mobile termination in the absence of regulation and the public's perception of the actual rates that are currently being charged for mobile-to-mobile termination for new entrants such as 2degrees. However, Vodafone does not consider that the same is true of interconnection agreements with other parties – especially when those agreements relate to periods of more than a decade ago.

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<sup>3</sup> See, for example, Commerce Commission's Draft Report, paragraph xxii of Executive Summary.


### Summary

Vodafone has set out above its responses in relation to the Commission's preliminary views on the classification of interconnection agreements (including the 2degrees/VF ICA) and of Vodafone's data already provided to the Commission (including the data classified by Vodafone as COI).

Vodafone believes that the Commission's request, that parties provide copies of all commercial interconnection agreements that they are a party to since 1 January 1998, is significant. It will require a substantial amount of resource, by personnel who will also be involved in the submission and cross-submission stages. More importantly, we do not think that such agreements are necessary for, or materially relevant to, the MTAS investigation. Until now, the Commission has not considered them to be relevant, and the issue has only arisen at a very late stage apparently as a result of a request by one party. Given all of this, Vodafone believes that the Commission should instigate a separate round of submissions on this point. That could enable all parties to have a proper and meaningful opportunity to comment on the matter.

Please feel free to contact me in relation to this letter if any discussion would be helpful. In this regard, I can be contacted by telephone on 021 882 429 or via email at [richard.york@vodafone.com](mailto:richard.york@vodafone.com).

Yours sincerely,



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