

28th Oct 2009

Commerce Commission
44-52, the Terrace
WELLINGTON

By email: telco@comcom.govt.nz

Consultation on the Non-Discrimination & EOI Obligations with respect to the Telecom Wholesale Loyalty offer

CallPlus thanks the Commerce Commission for the opportunity to submit on the Commissions preliminary view regarding the undertaking requirements with respect to non-discrimination & EOI obligations and the Telecom Wholesale Loyalty offer.

Loyalty Offer

CallPlus agrees with the Commissions view with respect to the Loyalty offers. Simply making an offer to all Service Providers does not mean that the offer is therefore non-discriminatory – one has to assess the particular case on its merits.

In CallPlus' view the loyalty offers unfairly discriminated between recipients of the service in that certain recipients, who had invested in their own infrastructure, were effectively precluded from benefiting from the offers (unless they left the equipment they had only just deployed empty) due to the way in which it was constructed.

Future Offers

However in agreeing with the Commission, in this instance, we do have concerns if the outcome is that Telecom Wholesale are simply unable to make any offers to its Wholesale customers. This could produce an undesirable outcome which could be detrimental to the ability of Telecom's wholesale customers to compete with competitors building their own infrastructure or wholesaling from another party.

The Commission makes the point (para 111) that policy setting between UCLL & UBA is not neutral. However it is usually the case that smaller players compete at a wholesale level in order to build a customer base and 'move up the ladder of investment' to the next step of making investments in their own network components. These operators seek a degree of flexibility from their wholesale provider, and often depend on it, to encourage them to invest, compete in the market and take risks.

Unfortunately commercial offers are inherently a 'double edged sword' – they can be used to lock in dominant market positions & stifle competitor investment. However they are an integral part of a competitive market and the many of them do not have wide ranging market impacts, encourage investments, increase competition and risk taking and benefit consumers.

For example:

CallPlus may decide that they won't invest in LLU, choosing instead to focus resources & investment into EUBA as an alternative delivery mechanism which they believe will best service their customers & prospective customers needs, differentiate their service and make them more competitive in the market. A good example is our ability to deploy our inhouse-developed voice service 'iTalk' (www.italk.co.nz) which offers a vast array of features such as 'follow me' and call recording, which are not available to consumers over the traditional Pots service.

CallPlus may be prepared to increase their investment in the service, take on additional risks and increase its sales & marketing effort, or take on the risk of a CPE volume commitments with a supplier on the basis they have been able to get a better commercial deal from Telecom Wholesale. Similarly we may require additional resources from Telecom Wholesale in order to ramp the service at the required rate.

This increased investment by CallPlus may attract increased levels of business to Telecom Wholesale who may be prepared to agree to incentives (short or long term), they may however want a term commitment in return for the offer in order to cover their investment. CallPlus may also seek an assured maximum price over an extended period.

Just because an LLU operator is unlikely to accept a similar offer, as they are pursuing a different strategy, should not automatically make this discriminatory. In the absence of any other factors or extraneous terms & conditions CallPlus' view is that this type of offer would be reasonable. This is how an effective, competitive market operates.

- Is it open to abuse? Yes
- Can it lead to improved competition and consumer benefits? Yes

To assess this situation the Commission would need to consider multiple factors to form a 'holistic view' of the underlying intent behind the offer and whether it is in the interest of competition & consumers. For example this may be more likely to be considered discriminatory if: -

- The offer was only available in a certain region where a new LLU builder has just been established.
- The offer favored Telecoms own retail arm above other providers.
- The offer was likely to have substantial impact on the market

There is a danger that we find the 'lowest common denominator' position whereby the regulated price is turned from a maximum price charged by Telecom Wholesale to a minimum price. This is not necessarily in the best interest of competition or consumers.

As the Commission notes (at para 80) "whether an offer has been made on non-discriminatory terms must be determined case by case".



CallPlus supports this and recommends that consideration be given to some form of process which can provide an independent 'preliminary' opinion in a timely manner on the merits of each case. This could be a function of the IOG to ensure some timely guidance, the Commission should not need to get involved unless the offer has a significant impact on the market.

Telecom would need to accept the risk that competitors have the right to challenge this through the Commission however in practice we would anticipate that guidelines on what is and is not acceptable would quickly become apparent and the Commission only needing to be involved in the more substantive cases with the potential to have significant impact on the market.

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Yours faithfully,

A handwritten signature in black ink, appearing to read 'G. Walmsley', with a large, sweeping flourish at the end.

Graham Walmsley
General Manager – Wholesale & Regulatory