

# **Submission**

by



to the

## **Commerce Commission**

on

## **Mobile Termination Access Services**

**28 July 2009**

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**MOBILE TERMINATION ACCESS SERVICES  
SUBMISSION BY BUSINESS NEW ZEALAND<sup>1</sup>  
28 JULY 2009**

**1. INTRODUCTION**

- 1.1 Business New Zealand welcomes the opportunity to comment on the Commerce Commission's (the Commission) *Draft report on whether the Mobile Termination Access Services (incorporating mobile-to-mobile voice termination, fixed-to-mobile voice termination and short-message-service termination) should become Designated or Specified Services* (referred to as the 'draft report').
- 1.2 While we support moves by the Commission to regulate where regulation is clearly warranted, the historical background to the draft report, as well as the draft reports future implications are pivotal to determining the stance we have adopted. Overall, we believe that Ministerial acceptance of the draft report as it stands will have wider negative implications beyond this particular issue as between Government and the private sector.

**2. SUMMARY OF RECOMMENDATIONS**

- 2.1 Business New Zealand makes the following **recommendations** with regard to the draft report, namely that:
- (a) ***The Commerce Commission, in its final report, gives greater weighting to the potentially harmful impact of its recommendations on future Deeds (p.4);***
  - (b) ***The Commerce Commission allows the current Deed to be seen through in its entirety given the relatively small difference in timeframe between the application of the Commission's recommendation and when the Deed ends (p.6);***
  - (c) ***The Commerce Commission gives greater weighting in its final report to the possible negative effects on future investment in all sectors in which it has specific interests (p.7); and***
  - (d) ***The Commerce Commission gives greater weighting to Business New Zealand's expressed caution against the extension of the investigation to MTM and SMS message termination rates in its final report (p.8).***

**3. KEY CONCERNS**

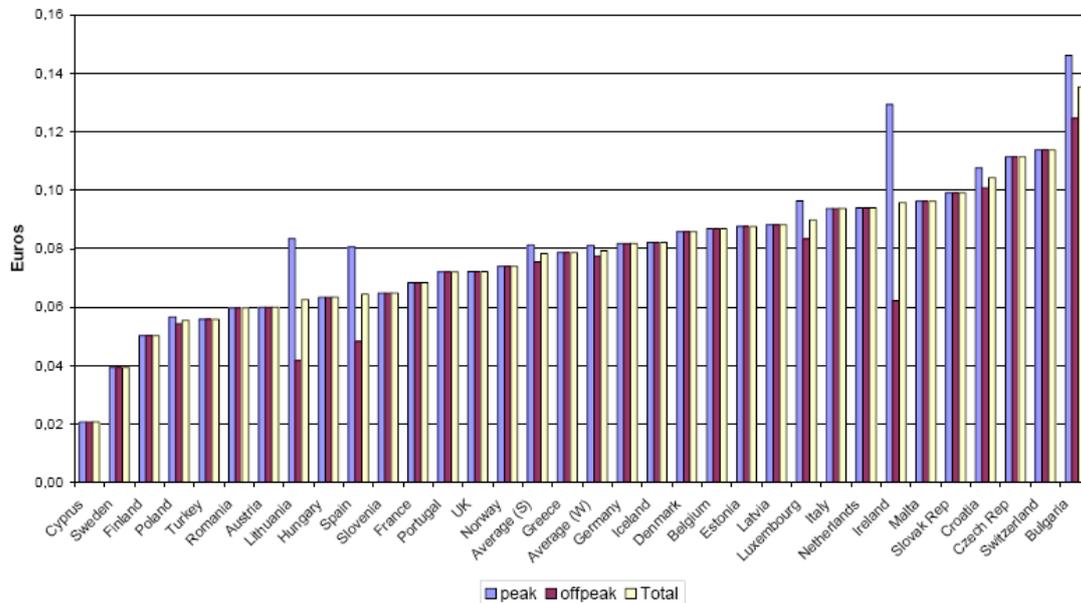
- 3.1 Business New Zealand does not wish to enter into the details of the report on the exact pricing levels for the various termination rates discussed. However, we would like to point out that if New Zealand's prices for Mobile Termination Rates (MTR) are compared with many other countries, such as those in

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<sup>1</sup> Background information on Business New Zealand is attached in the appendix.

Europe (table 1 below<sup>2</sup>), New Zealand's position as of 1 April 2009 would be well within the bottom half. At current exchange rates, the MTR for New Zealand would be approximately €0.069.

**Table 1: European MTR Benchmark Snapshot (as at 1 January 2009)**



3.2 Rather than discuss exact pricing levels, we do have views on two broader aspects of the termination rate issue that we believe the Commission has not given enough weighting to. These are:

1. The timeframe for change
2. Issues relating to certainty and investment.

3.3 Before we examine these two issues, Business New Zealand would first like to take the opportunity to make some points regarding the background to the draft report.

*Background & Accepted Deeds of Agreement*

3.4 The background to the Commission's decision plays an important role in shaping Business New Zealand's overall view on the draft report. It would be fair to say that the draft report is only one part of what is the culmination of a fairly lengthy history, going back to when the schedule 3 investigation into regulation of mobile termination began in May 2004. Throughout the process, Business New Zealand has taken the opportunity to submit at various times concerns we believe have not been fully taken into account by the Commission.

3.5 Despite these concerns throughout the process, we believe the most notable and positive development was the decision by the then Minister of Telecommunications in April 2007 to reject the Commission's recommendation to regulate mobile termination and instead accept deeds of agreement offered by Vodafone and Telecom (known as the 'Deeds').

<sup>2</sup> [http://www.erg.eu.int/doc/publications/erg\\_09\\_23\\_mtr\\_snapshot\\_final\\_090709v1mc.pdf](http://www.erg.eu.int/doc/publications/erg_09_23_mtr_snapshot_final_090709v1mc.pdf)

- 3.6 The Deeds involved a gliding path approach to reducing FTM rates which, given their matching levels, would also be evident with MTM rates. The Deed was to begin on 1 April 2007 and continue through to 31 March 2012, that is, it would be in place for five years.
- 3.7 Business New Zealand strongly supported this outcome. Here was a successful solution by the main players providing a commercial answer to the Government in response to the prospect of blanket regulation. Given our long held views that wherever possible, commercial solutions are always likely to have the best chance of success compared with the imposition of Government led-regulation, the acceptance of the Deeds also meant a high degree of certainty in a market that has experienced a sizeable amount of regulatory interference in recent times.
- 3.8 The five-year Deed meant that both major players in the market had a high degree of certainty around pricing structures for half a decade. In turn, a stronger level of certainty in terms of investment decisions could be guaranteed, which would have flow-on effects to other areas of their business, such as future marketing and technology development/roll-out.
- 3.9 However, despite the acceptance of the Deed giving a degree of termination price certainty in the market through to 1 April 2012, the Commission announced in November 2008 that it was to undertake yet another investigation. This would be whether or not the mobile termination access services (MTAS) should be regulated as designated or specified services.
- 3.10 This investigation was different. It not only included elements of the original Deed that both players had previously thought were off the table until 2012, but also included an extension of the investigation to MTM and SMS termination rates. Essentially, this was the old investigation 'on steroids'.
- 3.11 As paragraph 33 of the draft report points out, the Commission has the right to undertake an investigation into a proposed alteration and recommend to the Minister whether or not the proposed alteration should be made. Business New Zealand fully endorses the independence of the Commission to investigate areas which it believes produce significant market inefficiencies, as the freedom to do so is a cornerstone of its existence. We would always expect such investigations to be conducted in a fair and transparent manner. We are also not averse to decisions being re-examined, especially when circumstances change rapidly and/or new information comes to light.
- 3.12 However, we believe that the Commission should also be conscious of, for want of a better term, 'the bigger picture', and the need to carefully consider the risks of regulatory opportunism. It needs to demonstrate a degree of pragmatism and understanding of issues beyond those prescribed in order to see the future signals and ramifications of both the investigations it decides to undertake, as well as the draft recommendations it makes to the relevant Minister.

3.13 Therefore, Business New Zealand remains perplexed as to the Commission's decision to formally begin an investigation (or re-investigation in certain respects) into MTAS only 19 months after a commercial solution for five years was agreed upon between Telecom and Vodafone, together with the Government.

3.14 That the Commission has reopened and expanded upon the issue of termination rates within such a short timeframe after the signing of an historic first Deed raises key concerns that Business New Zealand believes need to be considered.

#### **4. BUSINESS NEW ZEALAND'S KEY CONCERNS**

##### *Potential Damage to Existing & Future Deeds between Government & Private Sector*

4.1 The original Deed was essentially a first in terms of the Minister formally accepting a commercial rather than a regulatory undertaking. Now, the future of such Deeds has become murky for a variety of reasons, raising questions such as:

- If the decision of the Minister is to reject the Commission's recommendations for the current investigation, how much certainty is there that the revised Deed will remain in place without another Commission investigation?
- With the possibility of another investigation by the Commission hanging over the heads of both Vodafone and Telecom, will they still put their best foot forward when providing a revised Deed, keeping in mind that a re-investigation may provide further room for another commercial response?
- If the Minister accepts the Commission's recommendations, to what extent will this change the major players future undertakings in respect to investigations of other issues?

4.2 The questions posed above are certainly not exhaustive, but highlight the potential uncertainty with not only the Deed in question, but with the potential for other future Deeds as discussed in greater depth below. Overall, as a first step, these types of questions should be given more weighting by the Commission, and certainly taken into account in the context of the current investigation.

***Recommendation: That the Commerce Commission in its final report gives greater weighting to the potentially harmful impact of its recommendations on future Deeds.***

4.3 The questions highlighted above raise another issue Business New Zealand finds puzzling – namely the date at which the recommendations of the Commission are intended to commence as opposed to when the signed Deed will finish.

##### *Timeframe for Change*

- 4.4 Under the proposed timeline as summarised in paragraph xxxii of the Draft Report, *the regulated price for the MTAS would be available from early 2011...with the Commission finalising the price and non-price terms through its Standard Terms Determination process sometime in 2010.* By comparison, the original Deed will end on 31 March 2012.
- 4.5 In other words, if the Minister accepts the Commission's recommendations, the Deed will be broken going into the 2010 and 2011 years during which the Deed is supposed to run. From Business New Zealand's point of view, this possibility raises a question that we believe, if addressed and given more weighting by the Commission, would go a long way towards dealing with some of our major concerns. Namely, *why wouldn't the Commission intend from the outset for its recommendations to start from 1 April 2012 onwards so that the signed Deed is kept 'as is', and is allowed to run its full time period?* If the Commission chose to do this there would undoubtedly still be differences of opinion regarding the termination of pricing paths. However, both major players would have certainty that their five year Deed would go through uncontested, and pricing decisions post the Deed could be worked through.
- 4.6 Therefore, what would happen if the Commission decided to launch an investigation for termination rates beyond the post Deed time period? Given the timeframe taken to launch an investigation, along with receiving feedback and possible undertakings, we would expect the Commission to start an investigation (if required) 1-2 years before the date of implementation. If we look at the context of current timeframes, an investigation by the Commission to look solely at termination prices from 1 April 2012 onwards would start with initial notification at the end of 2009, with two years for an investigation, undertaking, final decision by the Minister and finalising price and non-price terms.
- 4.7 However, this has obviously not been the case with an investigation cutting in before the Deed is allowed to formally end. In its current format, the draft report outlines its assessment framework, based on the factual (the Commission considers the costs and benefits of regulation) compared with the counterfactual (based on the undertakings received from Telecom and Vodafone and the commercial agreement negotiated with 2 degrees). While the Commission readily views its recommendations as an alternative option to undertakings by the market players, we would not want the Commission to believe it is essentially the opposing player in a game where winner takes all. We would expect the Commission to see past any issues of difference to ensure that commercial solutions, where appropriate, are encouraged and given the best chance of success. This applies not only to the current investigation, but also, looking ahead, to other sectors that the Commission takes an interest in.
- 4.8 Paragraph xv of the draft report notes that *'the Commission's preliminary view is that above-cost MTRs are likely to limit the extent to which an entrant will be able to compete with existing retail on-net prices in New Zealand'*, and in paragraph xix comes to the conclusion that *'the supply of the MTAS at prices*

*that substantially exceed cost still represents a barrier to efficient entry and expansion in the retail market in which FTM calls are supplied'.*

- 4.9 Since the heart of the issue is competition, an investigation at a later stage would also provide more time to ascertain how the third player in the market (2degrees, which formally begins in August) actually performs with current settings. If it shows after the first year that the introduction of the third player to the mobile market has led to a relatively sizeable decrease in market share for the incumbent players, as well as competitive pressures in the market further reducing end prices for consumers, the Commission may come to different conclusions as to the extent of regulation required in the market.
- 4.10 Also, an investigation looking at 1 April 2012 onwards provides the incumbent players with an idea of cost structures into the future. Although both Telecom and Vodafone had established a glide path for rates out to 2012, both companies subsequently submitted revised undertakings to the Commission so that the glide path continues out to 31 March 2014. Given the established Deeds, it is not surprising that both offered the same price rates up to 31 March 2012 but with an additional glide path reduction for FTM, as well as additional areas for investigation, such as MTM and SMS rates. The glide paths beyond the initial Deed may be able to be extended further, and at a lower rate as more information comes to hand.
- 4.11 Furthermore, if the Commission is concerned about the long-term implications of a higher cost MTAS, given the rapid movement of offshore developments, would not waiting another 1+ years for a re-investigation mean more information would be available to ascertain the direction of MTAS here in New Zealand? In turn, this might help the Commission provide a better and more robust case for discussion with incumbent players.
- 4.12 Overall, one could argue that if the Commission had simply waited around 12 to 15 months to initiate this investigation it would have focus on a post Deed termination environment and there would be information available on whether the third major player was successfully entering the market. There would also be more information on developments offshore, and a better guide to what the current players can offer as a further glide path beyond the timeframe of the current Deed. Therefore, we recommend that the Commerce Commission allows the current Deed to be seen through in its entirety given the relatively small difference in timeframe between the application of the Commission's recommendation and when the Deed ends.

***Recommendation: That the Commerce Commission allows the current Deed to be seen through in its entirety given the relatively small difference in timeframe between the application of the Commission's recommendation and when the Deed ends.***

- 4.13 Business New Zealand accepts that coming to a conclusion in regard to an agreeable price between the Commission and the incumbent players on aspects of the MTAS will most probably remain an issue beyond 31 March 2012. However, if the Commission accepts our recommendation above, there will be an acknowledgement that for the time being, the Deed entered into

and agreed by the Minister is held in permanence. This then brings us to another concern, namely what are the potential costs of not seeing the Deed through in its entirety?

*Undoing the Deed = Undoing Certainty & Investment?*

- 4.14 In paragraph 4.5 above, we asked what we believe to be a fundamental question in terms of the future implications for certainty and investment, namely *why wouldn't the Commission intend from the outset for its recommendations to start from 1 April 2012 onwards so that the signed Deed is kept 'as is', and is allowed to run its full time period?*
- 4.15 While Business New Zealand strongly believes in competition across any industry or sector, this should not come at the expense of creating a significant level of uncertainty in the market. In particular, we would be averse to any negative flow-on effects involving investment because of uncertainty issues.
- 4.16 It would be fair to say that the Information & Communications Technology (ICT) industry is one that involves fast change relative to other sectors, and one in which the players are quick to develop innovative products and services for customers. However, continued regulatory intervention to 'correct' perceived instances of market failure may end up stifling, rather than assisting, the industry as a whole.
- 4.17 In relation to the above, the Government has recently announced its 'plan' for the future, including six main policy drivers, involving:
- Regulatory reform
  - Investment in infrastructure
  - Better public services
  - Education and skills
  - Innovation and business assistance
  - A world-class tax system

Business New Zealand applauds these drivers, as each will have a fundamental impact on the future of New Zealand's economic growth. However, we believe the driver of 'investment in infrastructure' could become an early casualty with the stance the Commission is currently taking. If New Zealand is to concentrate on lifting both its productivity and productive capacity, signals from the Commission that cause uncertainty will undoubtedly provide future roadblocks for investment.

- 4.18 While there is a degree of certainty in respect to Government investment in the ICT sector via the \$1.5b broadband investment fund, any action that removes certainty for the private sector in an industry where ongoing investment is paramount to keep pace with world trends, will send a wrong signal to the major players who have already allocated substantial amounts for re-investment.

- 4.19 Regulating a wealth transfer from mobile infrastructure networks to entrants would do nothing to enhance prospects for new investment in Broadband. In addition to the uncertainty created regarding regulation of new networks, there is the matter of ability of investors to invest if significant regulatory costs have been imposed. There is also the potential impact on productivity as mobile broadband has already been shown to be a key enabler of productivity growth in the modern economy.
- 4.20 Also, if we were to accept the prices outlined by the Commission, the absence of a glide path in terms of the reduction in prices means it is very difficult to smooth the impact to allow the incumbent players to alter revenue streams and minimise the risk of adverse consequences for consumers. Offshore, a transition period is typically introduced.
- 4.21 Worse still could be the associated impacts on other industries in which the Commission has interests. For the Government essentially to ignore a signed Deed will send a signal that will certainly give pause for thought if there are future Deeds in other industries. Therefore, we believe the Commission needs to put greater weighting in its final report on the impact on not only future investment in the ICT sector, but also on other sectors that in which the Commission has specific interests in.

***Recommendation: That the Commerce Commission gives greater weighting in its final report to the possible negative effects on future investment in all sectors in which it has specific interests.***

## **5. THE EXTENSION OF THE INVESTIGATION**

- 5.1 As we stated earlier in our submission, Business New Zealand does not wish to provide views on the exact level at which termination rates for MTAS should be set. Views on this matter must involve a significant level of expertise in the area, rigorous analysis when comparing countries with similar factors, and the development of a robust and comprehensive economic model to ascertain recommended levels.
- 5.2 However, we would like to point out that the extension of the investigation to include MTM and SMS messages has occurred despite concerns previously expressed to the Commission. In our submission on the issues paper on whether there should be a formal schedule 3 investigation into mobile to mobile termination charges (2008), we urged caution that the strict objective of investigating mobile termination should not morph into a wide-ranging review into various matters that competitors might want to examine for whatever purpose.
- 5.3 In response to this current report, Business New Zealand wishes to repeat the view expressed. The further extension of regulation will undoubtedly create broader flow-on effects not only with the sector in question, but with other sectors with a critical infrastructure element attached. Simply put, extending an investigation can also extend the level of uncertainty and unwillingness to invest for the private sector as a whole.

***Recommendation: That the Commerce Commission gives greater weighting to Business New Zealand's expressed caution against the extension of the investigation to MTM and SMS message termination rates in its final report.***

## **APPENDIX**

### **6. Background Information on Business New Zealand**

- 6.1 Business New Zealand is New Zealand's largest business advocacy organisation.
- 6.2 Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 70 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.
- 6.3 In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.