

13 June 2019

**To**  
The Registrar  
Commerce Commission  
PO Box 2351  
Wellington 6140

**Copy to**  
Nick Honey  
David Shaharudin  
Nicola Hulley

**From**  
Anna Parker  
Tony Dellow

**By Email**  
registrar@comcom.govt.nz

Dear Registrar

**Infratil/Vodafone: Infratil submission on Statement of Preliminary Issues**

1. We refer to the Commission's Statement of Preliminary Issues regarding Infratil's application to acquire up to 50% of the shares in Vodafone.
2. This submission is made on behalf of the applicant, Infratil.
3. Infratil's position on the issues raised in the Statement of Preliminary Issues is set out in the clearance application. This submission is therefore limited to an additional issue that the Commission has raised that is not addressed in the clearance application, namely the Commission's statement that it will look at whether it is appropriate to define market(s) for bundled services.
4. In summary:
  - (a) Market definition is only a tool to provide an analytical framework for assessing the effect that an acquisition will have on competition. Infratil does not consider that defining a market (or markets) for bundled services will assist the competition analysis in this case.
  - (b) However, even if the Commission adopted such a market, Vodafone and Trustpower do not offer any bundles for which competitors cannot offer as, or more, competitive alternatives. Vodafone and Trustpower do not control any 'must have' inputs for which there is no viable substitute, and so there is no requirement (cf: the Commission's theory of harm in *Vodafone/Sky*) that rivals will need access to an input controlled by the merged entity in order to viably compete. There is therefore no market for bundled services in which competition would be substantially lessened as a result of the proposed transaction.

## Market definition

5. The Statement of Preliminary Issues states that the Commission will look at whether it is appropriate to define market(s) for the bundled services that telecommunications retailers such as Trustpower and Vodafone offer. It does not specify whether the Commission is planning to look at markets for bundled telecommunications services such as broadband and voice, and/or markets for bundles of telecommunications services and other products or services such as electricity or pay-TV.
6. In relation to fixed voice and broadband bundles, Infratil's clearance application adopts the approach taken by the Commission in other recent clearance decisions. In particular, although many residential consumers purchase their fixed voice and broadband products together as a bundle, the Commission has previously defined separate products markets for fixed voice and fixed broadband but analysed the competitive effects collectively.<sup>1</sup> The Commission's previous approach was based on fixed voice and fixed broadband services being distinct products and consumers being unlikely to substitute one for the other if the price of one increased.<sup>2</sup>
7. Consumers continue to purchase fixed broadband and fixed voice services both separately and as a bundle.<sup>3</sup> As was the case in the Commission's *Vodafone/Telstra Clear* decision in 2012, however, the distinction between a bundled market and separate relevant markets for fixed voice and fixed broadband is not critical to the competition analysis. That is, the proposed transaction would not have the effect of substantially lessening competition in separate markets for fixed broadband and fixed voice, or in a bundled market for broadband/voice, for the reasons set out in the clearance application.
8. In relation to bundles of telecommunications services and other products or services, it is not clear how defining a market for bundled services would aid the competition analysis of the proposed transaction. Market definition is only a tool to provide an analytical framework for assessing the effect that an acquisition will have on competition. As stated in the Commission's Mergers and Acquisitions Guidelines (July 2013), markets should be defined in a way that best isolates the key competition issues, and a market for a bundle of products may be appropriate where this would best illustrate the competitive constraints the merged firm would likely face.
9. In this case, the bundles offered by Vodafone and Trustpower consist of distinct products or services (eg, broadband and electricity in the case of Trustpower, and broadband and pay-TV in the case of Vodafone), which are often purchased by consumers separately rather than as a bundle. If the price of such a bundle increased, consumers could readily switch to purchase the separate components of the bundle, or purchase bundles containing different mixes of products.<sup>4</sup> As outlined

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<sup>1</sup> *Vodafone New Zealand Limited and TelstraClear Limited* [2012] NZCC 33; *Vodafone Europe B.V. and Sky Network Television Limited* [2017] NZCC 1 / *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2.

<sup>2</sup> *Vodafone New Zealand Limited and TelstraClear Limited* [2012] NZCC 33 at [80].

<sup>3</sup> The Commission's Annual Telecommunications Monitoring Report 2018 states that 51% of households are buying a voice and broadband bundle, compared to 40% buying only broadband and the remaining 9% buying only voice.

<sup>4</sup> For example, a consumer might switch from a broadband/mobile package to a broadband/landline package.

in the clearance application, there are no bundles offered by Trustpower or Vodafone for which competitors cannot offer alternatives that are as, or more, attractive.

10. Accordingly, Infratil does not consider that defining markets for bundled services will assist in analysing the effect that the proposed transaction would have on competition.

**No substantial lessening of competition in any market for bundled services**

11. Even if the Commission adopted a market or markets for bundled services, there is no market in which competition would be substantially lessened as a result of the proposed transaction.
12. For there to be an issue relating to bundling, there would need to be a bundle that could be constructed by Vodafone and Trustpower (if they were to merge, which as outlined in the clearance application is not intended) for which competitors could not construct viable competitive alternatives, and would be so attractive to consumers that it would result in consumers switching to the merged entity. As noted above, neither party controls an input that is essential for the construction of their bundles.
13. However, as outlined in the clearance application, bundles based on Vodafone's and Trustpower's product mix can easily be matched, and are matched, by competing providers. The components of the bundles that Vodafone and Trustpower offer are supplied in competitive markets, and competing providers will continue to have the ability to offer the components separately and as bundles.
14. A merged Vodafone and Trustpower would not have a monopoly on any of the inputs required to match those bundles, or have any products that could be bundled that would result in foreclosure of any market. Telecommunications and energy providers are able to offer bundles that are as, or more, competitive than the bundles offered by Vodafone and Trustpower, and this will continue post-acquisition. For example:
  - (a) As outlined in the clearance application, at least three other providers already offer bundles of electricity and broadband like Trustpower, and there are a number of additional electricity retailers in the market who could also purchase access to the broadband network and make arrangements to offer equivalent bundles. The proposed transaction will not have any effect on the ability of competing providers to offer such bundles.
  - (b) Such providers could also enter into arrangements to offer mobile services as MVNOs. For example, Slingshot currently offers broadband, mobile, and electricity plans. The Commission's Mobile Market Study Preliminary Report finds that it appears that non-MNOs have been able to offer, or expect to offer, similar bundles as the MNOs, and also indicates that the majority of consumers do not bundle mobile and broadband in any event.<sup>5</sup> The proposed transaction will not have any effect on the ability of competing providers to bundle mobile services with other services.

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<sup>5</sup> Mobile Market Study Preliminary Report at [3.17]-[3.26].

- (c) Other providers can also offer bundles of telecommunications services and pay-TV, and the proposed transaction will not have any effect on their ability to do so post-acquisition. The largest player in the broadband market (Spark), for example, offers pay-TV services bundled with its fixed-line broadband and mobile services.
15. Therefore, even if Vodafone and Trustpower were to merge, there will continue to be strong competition for the provision of bundles relating to telecommunications services. The merged entity would not have any ability to foreclose competition through bundling.
16. If the Commission nevertheless proposes to analyse the acquisition based on a market or markets for bundled services, Infratil requests that it be further consulted on the Commission's proposed approach.

**Confidentiality**

17. This submission does not contain any confidential information.
18. Please let us know if you have any questions about this submission.

Yours sincerely



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