

Statement of Preliminary Issues

Vodafone / TelstraClear

27 July 2012

Introduction

1. On 13 July 2012, the Commerce Commission (the Commission) received an application from Vodafone New Zealand Limited (Vodafone) seeking clearance to acquire up to 100% of the equity in TelstraClear Limited (TelstraClear) from Telstra Corporation (Telstra). The public version of the application can be accessed on the Commission's website at:

<http://www.comcom.govt.nz/clearances-register/detail/760>
2. This Statement of Preliminary Issues outlines the key competition issues that the Commission currently considers will be important in deciding whether or not to give clearance. The issues highlighted in this statement are based on the information available at the time of publication, and may change as the Commission's assessment of the application for clearance progresses. Therefore, the issues highlighted in this Statement of Preliminary Issues are in no way binding on the Commission.
3. The Commission invites interested parties to comment on the likely competitive effects of the proposed merger. The Commission requests that parties who wish to make a submission do so by **13 August 2012**.

The transaction

4. Under the terms of the proposed acquisition, Vodafone would acquire 100% of the equity in TelstraClear by way of a share sale agreement. Vodafone would acquire some but not all of TelstraClear's spectrum assets as part of the proposed acquisition. TelstraClear's parent, Telstra Corporation would dispose of the balance of spectrum not acquired by Vodafone at its discretion. For further details of the spectrum transfer arrangements, and the pre and post acquisition spectrum entitlements please refer to paragraphs **18** to **20** of Vodafone's application for clearance.

Relevant parties

The acquirer – Vodafone New Zealand Limited (Vodafone)

5. Vodafone is a telecommunications operator in New Zealand. Vodafone has a nationwide network servicing mobile retail customers; it also wholesales mobile services to other providers. In addition, Vodafone offers a range of fixed line services to residential and business customers.

The target – TelstraClear New Zealand Limited

6. TelstraClear offers a range of fixed line services to residential and business customers throughout New Zealand. In addition to its fixed line products,

TelstraClear also offers cable TV, mobile phone services (through a wholesale agreement with Vodafone) and data backhaul services.

Analytical framework

7. In the context of an application for clearance, the Commission must consider whether or not an acquisition substantially lessens competition in any market. Therefore, an important step in the Commission's analytical framework is to determine the relevant market or markets. To do this, the Commission identifies the areas of where the businesses of the acquirer and the target overlap. The Commission then considers the relevant products and geographic regions that may be close substitutes from both a customer's and a supplier's point of view.
8. The Commission uses forward looking analysis to assess the degree of any potential lessening of competition in the relevant market or markets arising from a proposed acquisition. Therefore, the next step is to establish the two hypothetical future scenarios, namely:
 - with the acquisition; and
 - without the acquisition.
9. The impact of the acquisition is then viewed as the difference in competition between those two scenarios.
10. The Commission analyses the extent of competition in each relevant market for both the with and without scenarios in terms of the following:
 - 10.1 Existing competition – the degree to which existing competitors compete and their ability to expand their operations in the event that the combined entity raises prices.
 - 10.2 Potential competition – the ability of businesses to enter the market on sufficient scale in order to provide competitive constraint.
 - 10.3 The countervailing market power of buyers – the potential for a business to be sufficiently constrained by purchaser's ability to exert an influence on price, quality and/or terms of supply.
 - 10.4 Coordinated behaviour – whether the acquisition would enhance the ability of market participants to collude either tacitly or explicitly.
11. A comparison of the extent of competition in the relevant markets both with and without the acquisition enables the Commission to assess the degree by which the proposed acquisition might lessen competition. If the lessening is substantial, the Commission may not give clearance to the proposed acquisition.

Preliminary issues

12. Of the factors outlined in the previous section, the Commission currently considers its focus in respect of the proposed acquisition will be on the following areas.

Market definition

13. In its application, Vodafone submitted that the acquisition will result in overlap between it and TelstraClear in the following areas:
- 13.1 Vodafone's and TelstraClear's fixed line infrastructure – that is the exchanges where both Vodafone and TelstraClear have unbundled the same exchanges or where there is overlap between a Vodafone unbundled exchange and TelstraClear's hybrid fibre coaxial (HFC) network;
 - 13.2 Vodafone's and TelstraClear's retail fixed voice and broadband services to consumers and businesses;
 - 13.3 retail mobile services; and
 - 13.4 wireless spectrum holdings.
14. Vodafone considers that there is no overlap with TelstraClear in relation to backbone transmission or international connectivity. The Commission will test whether there is overlap between Vodafone and TelstraClear in these areas.
15. The Commission will also consider whether there are additional areas of overlap between the two. The Commission will also identify any other markets in which competition concerns may arise. The Commission will consider whether there are:
- 15.1 separate relevant markets for the provision of fixed line calling and broadband services to residential, SME¹ and large commercial customers;
 - 15.2 separate relevant geographic markets for metropolitan and non-urban areas; and
 - 15.3 separate relevant markets for bundles of products given that telecommunication providers offer bundles of different services (for example combinations of fixed line calling, broadband and mobile and video).

Existing competition

16. Vodafone has submitted that it currently has limited ability to provide fixed-line voice and broadband services to large, complex business customers. As such, Vodafone submitted that it primarily competes with TelstraClear in the provision of fixed-line voice and broadband services to residential and smaller business customers.

¹ Small to medium enterprises.

17. The Commission will consider the closeness of the competition between Vodafone and TelstraClear at present, and the degree of competitive constraint other providers in the market would provide on the merged entity.
18. The Commission will consider whether in the absence of the acquisition, Vodafone would be likely to enter the large commercial segment in the near future, and whether any competitive constraint from this would be lost as a result of the proposed acquisition.
19. The Commission will also consider the strength of existing competition in the relevant wholesale access markets, including any impact this has on downstream retail markets.

Potential competition

20. The Commission will consider the constraint that potential entry would place on the merged entity in the relevant markets. Included in this will be consideration of the impact of ultra-fast-broadband and the impact of any confirmed regulatory change in the sector.

Next steps

21. In line with the Commission's Merger and Acquisitions Clearance Process Guidelines (available on the Commission's website at www.comcom.govt.nz), the Commission has established a draft timeframe for consideration of the issues and Vodafone's application for clearance. An extension of time was agreed to by Vodafone such that the Commission should make its final decision by 7 September 2012. However, this timeframe could change. To keep abreast of changes in relation to timing and to find relevant documents, visit the public Clearance Register on the Commission's website at:

<http://www.comcom.govt.nz/clearances-register/>

22. As part of its investigation, the Commission will identify the parties it believes will provide the best information to help it assess the preliminary issues identified above. The Commission will be contacting those parties over the next few weeks.
23. The Commission also invites submissions from any other parties that consider they have information relevant to the Commission's consideration of this matter. If you wish to make a submission, please send it to the Registrar, at registrar@comcom.govt.nz with the reference Vodafone / TelstraClear in the subject line of your email, or The Registrar, PO Box 2351, Wellington 6140 by 4pm **13 August 2012**. Please clearly identify any confidential information contained in the submission and provide contact details.