8 November 2016

BY EMAIL: susan.brown@comcom.govt.nz

Susan Brown
Chief Investigator
Competition Branch
Commerce Commission
WELLINGTON

CONFIDENTIAL

Dear Susan

Vodafone Europe B.V. and SKY Network Television Ltd
SKY Network Television Ltd and Vodafone New Zealand

1. Background and summary

1.1 We act for TVNZ and 2degrees who have each submitted in opposition of the proposed merger.

1.2 [ ]

1.3 [ ]

1.4 [

(a)

(b)]

2. Revenue synergies

2.1 [ ]

2.2 [

(a)

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(b)

(c)

2.3

2.4

2.5

]

2.6 The relevant question is whether the merged entity has the ability and incentive to leverage its market power into telecommunications markets to the detriment of competition, a question which the Commission has correctly answered in the affirmative in its LOUI.

2.7 [

]

(a) Other TSPs: *"the terms that SKY offers to any other party interested in wholesale access to SKY services is priced on an ECPR basis...SKY will continue to offer wholesale access to its pay-TV services at SKY's retail price, less avoided cost..."*[1]

(b) [ ][2]

Triple play bundle discount

2.8 Vodafone's Free MySky is a standard offer of free MySky for all customers that purchase Sky services from Vodafone. Vodafone started offering free MySky in 2009.

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[1] Buddle Findlay letter on behalf of Sky, 9 September 2016.

[2] [ ].

2.9 In addition to its standard Free MySky offer, Vodafone has put more attractive content offers into the market to attract broadband subscribers:

(a) In 2015 Vodafone offered a Free Sky Sport or Sky Movies package to customers who signed up to Vodafone unlimited broadband data and home phone and Sky Basic on a new 12-month term. This offer expired on 31 March 2015.[3]

(b) On 1 July 2016 Vodafone commenced offering Free SKY Sport or Soho for 12 months to customers who signed up to Vodafone unlimited broadband data (over Vodafone's copper, fibre or HFC network) and home phone with Sky Basic both on a new 12 and 24-month contract.[4]

2.10 Both offers included free Sky installation and free My SKY for new SKY customers.

2.11 This indicates that Vodafone had found that its standard $15 discount was not sufficient to attract new customers to its network, which prompted it to offer greater value to attract customers from rival networks.

2.12 Even if the merged entity did commence offering the $15 discount package [ ], it would quickly improve the offering (as Vodafone has done) if it did not generate sufficient uptake. [ ]

2.13 [

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2.17

]

3. The counterfactual

3.1 The Commission does not currently consider the "genuine wholesaler" counterfactual put forward by third parties to be a likely scenario without the merger. The LOUI states, "*we consider that the likely scenario without the merger would be a continuation or*

[3] http://www.vodafone.co.nz/legal/terms-conditions/archive/march-2015/freesky/

[4] http://www.vodafone.co.nz/legal/terms-conditions/freesky/

[5] [ ]

modification to the status quo where....Sky services continue to be available for resale and retransmission to third parties on largely the same terms as currently offered by Sky."

3.2 In our view, a commercial and pragmatic review of the information supplied by the Applicants and third parties, taking into account the dynamic nature and rapid technological changes occurring in the relevant markets, cannot properly lead to the conclusion that a continuation or modification to the status quo is the only likely counterfactual against which to assess the proposed transaction.

3.3 [ ]

3.4 [ ] the Grant Samuel Report which identified "*a variety of hypothetical but plausible outcomes for the long term future of a standalone Sky TV. The range of outcomes is potentially very wide.*"[6]

3.5 The question that the Commission is tasked with answering is not whether SKY's alternative options would be less profitable than a transaction with Vodafone. Rather, the Commission must determine:

(a) what alternative options are in fact likely absent a transaction with Vodafone; and

(b) whether competition is likely to be substantially lessened with the proposed transaction compared with any of those likely alternative options.

3.6 [ ]

3.7 [ ], the Commission must consider objectively what steps SKY would take (i.e. how it could make changes to its current business model) in the face of widely acknowledged pressures. It is inconceivable that the only option is the continuation of a business as usual strategy.

3.8 We submit that applying the proper framework for analysis, the "genuine wholesaler" counterfactual is one of a range of possible likely counterfactuals that the Commission should properly consider as part of its competition assessment of the proposed transaction.[7]

3.9 We agree with the LOUI that the proposed merger would substantially lessen competition in telecommunications markets compared with a status quo counterfactual because:

(a) the merged entity would have substantial market power in premium content;

[6] Independent Adviser's Report and Appraisal Report in relation to the Proposed Acquisition of Vodafone New Zealand Limited, p 105.

[7] The Commission's approach to counterfactual analysis is well known (applying the approach of the Court of Appeal in the Warehouse decision) and is set out in detail in its Merger Guidelines. The Commission is bound to identify all likely counterfactuals and, in practice, uses the most competitive counterfactual scenario to determine whether competition is likely to be substantially lessened with the merger. As the High Court in Woolworths noted, where there is more than one real and substantial without-the-acquisition scenario, it is not a case of choosing the one without-the-acquisition scenario that the Commission thinks has the greatest prospects of occurring.

(b) the merged entity could make buying Sky standalone relatively less attractive leading to customers switching;

(c) the merged entity may have less incentive to enter into reselling agreements; and

(d) one or more rivals could lose or fail to achieve scale so would provide a materially weaker constraint leading to an SLC.

3.10 However, we think it is important that the Commission follows its established approach to counterfactual analysis and assesses the competition effects of the proposed merger against *all likely counterfactuals* of which the "genuine wholesaler" counterfactual is one (and, in our view, the most competitive likely counterfactual).

Yours faithfully

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