



Sky TV / Vodafone merger clearance

[PUBLIC]

“mobile continue to be drivers for sports. In the U.K. and Ireland for example, Ooyala has found that more than 45% of sports viewing occurs on smartphones and tablets.”

- Ooyala, 'State of the Broadcast Industry 2016 – OTT Moves to Center Stage'

Cross-Submission | Commerce Commission

23 November 2016

SPARK CROSS-SUBMISSION ON SKY AND VODAFONE SUBMISSIONS

1. Spark welcomes the opportunity to comment on the submissions of the merging parties and other interested parties to the Commerce Commission's Letter of Unresolved Issues (LOUI) in relation to the proposed Sky / Vodafone NZ merger (**the Merger**).

EXECUTIVE SUMMARY

2. Spark has seen nothing in Sky's or Vodafone's submissions on the LOUI, nor NERA's report, that change its view that the Merger is likely to substantially lessen competition in the New Zealand pay TV, broadband and mobile markets.
3. Pay TV and telecommunications markets are rapidly converging. This is a global trend and is just as relevant in New Zealand as it is in the United States, Britain or Australia. And this convergence is opening up exciting new options and forms of competition that will benefit end-users. Bundles of Pay TV and telecommunications services will be the dominant driver of competition in the future. It is well established that premium sports rights are the "battering ram" of Pay TV, and so we expect it will be the "battering ram" of Pay TV/telecommunications bundles. Again, this will be a global truth – it will be just as true in New Zealand as it will be in the United States, Britain or Australia.
4. What is different about New Zealand though – different to the United States, to Britain, to Australia - is that one organisation holds every single premium sports right, and we have no legislative or regulatory access framework that controls what it does with those rights. Whereas in the US, Britain and Australia competitive Pay TV/telecommunications bundles will evolve using competing combinations of premium sports rights from multiple Pay TV providers and telecommunications services from multiple broadband and mobile network operators, in New Zealand every single one of those Pay TV/telecommunications bundles will have one thing in common: if they want to include access to premium sports, they will have to get that premium sports from Sky.
5. That is true in the factual or the counterfactual: Sky holds the rights to those premium sports for the next 5 years at least, and it is clear from submissions that all submitters expect it to continue to hold those rights for even longer.
6. But in the factual, the Merger combines Sky's monopoly with an established broadband network and customer base, and an established mobile network and customer base. In that scenario, telecommunications operators wanting to deliver compelling Pay TV/telecommunications bundles will be reliant on the merged entity providing us with wholesale access to its premium sports content on terms that enable us to compete with it; to economically replicate the bundles it will offer.
7. It is clear to us that the merged entity will have strong incentives not to provide that access. It is clear to us that the merged entity will have both the ability and incentive to use its monopoly sports position in conjunction with its broadband and mobile networks to foreclose competition in a way that simply would not be possible in any sensible counterfactual. Analysis from Castalia, enclosed, demonstrates that this strategy would be possible and profitable for the merged entity.
8. And it is clear to us that the ability to leverage Sky's monopoly on sports content to achieve and apply market power in the Pay TV, broadband and mobile markets is at the heart of the rationale for Merger. Telecommunications network operators and Pay TV providers the world over are, in one form or another, attempting to effect mergers that achieve the same thing. The relevant competition authorities have typically either imposed behavioural undertakings or declined to approve the mergers even where there were pre-existing legislative or regulatory access frameworks that supported much more competitive markets for premium sports content that we have in New Zealand

9. In this context, the statements in Sky's and Vodafone's submissions about the relevance of bundling of Pay TV, broadband and mobile services, and of the potential for customers to want to use mobile networks to view premium sports content simply do not match Spark's (or any objective industry commentators') expectation of how the pay TV, broadband, and mobile markets are likely to evolve within the next 5 years. Nor do they match the statements, or conduct, by Vodafone in other countries. This serves to reinforce the concerns that Spark has had throughout the process about the nature, extent, and accuracy of the information that the applicants are disclosing to the Commission.
10. To the extent Vodafone has made submissions to the Commission that have been shown to be inconsistent with what it has said, or what it has done, overseas, Spark expects the Commission will rigorously test those submissions.
11. Spark reiterates its concerns are the detrimental impacts on competition in the broadband, mobile, and pay TV markets that arise due to the Merger from Sky/Vodafone having exclusive control over premium content rights, especially sports rights, and Sky/Vodafone's ability and incentive to foreclose access to that content from other RSPs.
12. Indeed the evidence that Spark, and others, have presented the Commission is that the Merger is likely to substantially lessen competition across a number of key New Zealand markets:
 - (a) **Pay TV:** The Merger will be the death-knell for any prospect of RSPs emerging as new competitors to Sky in the provision of pay sports content. As the Commission has previously concluded in relation to Sky, the loss of any potential nascent competition to Sky ought to be regarded as substantial.¹ No other RSP will be able to outbid Sky/Vodafone for premium sports content in circumstances where Sky/Vodafone owns a monopoly over all other sports rights (remembering the bidding for these rights are staggered), ~800,000 subscribers, a satellite and STB distribution system, a FTA broadcaster, a HFC cable network, New Zealand's largest mobile customer market share, and second largest broadband market share.
 - (b) **Broadband:** The Merger will substantially lessen competition in the broadband market. Video bundles, in particular premium sports video bundles, are expected to become an increasingly important feature of broadband competition in the coming years. The competition for, and uptake of, such bundles has to date been severely hamstrung in New Zealand, in comparison to other countries, by Sky's exclusive monopoly over all key sports content and its refusal to wholesale that content on commercial terms. Consumers have been the losers to date from that approach by Sky as they have missed out on the innovative content and dynamic bundle competition that is a strong feature of broadband markets in other markets. At least however, Sky's stubbornness has not translated to distortive effects in the broadband and mobile markets as it has been equally uncommercial and unduly restrictive to all.
 - (c) **Mobile:** The Merger will substantially lessen competition in the mobile market. All the overseas data we have reviewed indicates that demand for live premium sports content over mobile is increasing exponentially in developed markets where mobile operators are able to offer competing bundles of mobile services and sports content. The merged Sky/Vodafone will have strong incentives to withhold wholesale access to mobile rights from other mobile operators and use its control of mobile and broadcast premium sports rights to foreclose competition in mobile markets through the use of quad play bundles. This will

¹ New Zealand Commerce Commission "Investigation Report on Sky TV contracts" (8 October 2013) at [23.1].

prevent new and dynamic content competition emerging in the New Zealand mobile markets.

SUMMARY OF SPARK'S SUBMISSIONS TO DATE

13. Before addressing the assertions of the merging parties' submissions, we summarise the key reasons and evidence set out in Spark's submissions to date on why the Commission must decline clearance of the proposed merger.
- (a) New Zealand has the most concentrated pay TV market in the world. Sky is the only satellite TV provider in the country; the only provider of content to the one cable TV network (owned by Vodafone) that competes with it; the only provider of premium sporting content; and has locked up all key sports rights until 2020 and beyond. It also owns one of the three largest free-to-air TV services and uses its ownership of this service to limit other free-to-air broadcasters' access to key sports rights.
 - (b) As highlighted during the recent Olympics, New Zealand has no other legislative or regulatory obligations or safeguards in place for access to sports of national interests, no safeguards against exclusive exploitation and distribution of sports rights; no fair reasonable and non-discriminatory terms for wholesale access to sports content; and no sub-licensing of premium sports content. As a result it does not have a competitive wholesale market for premium sport and New Zealanders simply do not have choice or flexibility as to how they access premium sport. Other content, which is often available in contestable markets including general entertainment, and music is not a substitute for premium sport. Not even global sports of global content providers offer a competitive constraint in respect of sports of national importance.
 - (c) So we are already a global outlier. We can think of no other developed economy in the world with this level of Pay TV market concentration and yet no legislative or regulatory access framework. And the harm this creates is already evident in difficulties existing broadcasters and media companies are having in dealing with Sky.
 - (d) The monopoly position Sky enjoys is so intractable that all submitters, including Spark, have advised the Commission their best case is to partner with Sky in order to be able to provide sports content, and bundles of sports content and telecommunications services, in the future. None of us can get access to premium sports rights for at least the next 5 years because Sky already owns them. None of us consider it likely that we could economically compete with Sky for those rights. And none of us consider it likely that the sports bodies that sell those rights will feel confident enough to forego the exclusivity premium they currently receive from Sky (and which is not a feature of other markets) to give direct to consumer models a real go.
 - (e) The Merger exacerbates this problem and enables Sky to strengthen its monopoly position and perpetuate it far into the future – to the detriment of New Zealanders. Because by tying Sky's monopoly sports content assets to Vodafone's competitive broadband and mobile networks and services, it will be able to offer Pay TV services and bundles of Pay TV and telecommunications services that other retailers cannot economically replicate or effectively compete with. The result will be a significant lessening of competition in the broadband, mobile and Pay TV markets compared to any reasonable counterfactual including the status quo.
 - (f) One of the ways in which this plays out is by the merged entity using its monopoly control of premium sport to substantially reduce competition in mobile and

broadband markets and so reduce the ability of existing mobile and broadband providers to fund the development competitive content products (including the ability to invest in sports content) and network upgrades in future.

- (g) When broadband and mobile competition is weakened and RSPs are no longer able to incrementally build competing sports media propositions there will be little to no incentive on the merged entity to innovate and expand the range of media offerings it does provide – especially in relation to the least contestable portion of the market – premium sports. We see evidence of these incentives in how Sky has behaved in relation to its sports content to date – consistently lagging or not introducing the innovations made available in competitive Pay TV markets overseas. We will effectively be transferring the monopolistic experience in pay TV of the last 15 years to the next 15 years of digital, enabling the stifling of competition and innovation before it can really get going.
- (h) To grant clearance, the Commission must be satisfied the Merger will not significantly lessen competition in any market. Any reasonable doubt about this, or concern that a significant lessening of competition may occur is enough to require the Commission to decline clearance. In this case, not only is there sufficient doubt to make the granting of a clearance impossible, we conclude that the merged entity will have both the ability and the incentive to foreclose competition in a number of markets and will in fact effect that outcome.
- (i) The counterfactual In the counterfactual, Sky's monopoly position in sports content remains, but the speed at which customers' viewing is shifting to broadband and mobile will weaken the power of Sky's existing bundles of satellite network distribution, set-top boxes and content. It is likely that without the merger Sky in this dynamic will, in the short to medium term, in order to offset declining subscriber numbers, provide broader access to its content to wholesale distributors (such as retail telecommunications service providers (**RSPs**)) in more diverse forms (such as digital feeds and potentially skinnier packages or sub-licences to resupply each other's content) and introduce a range of more appealing consumer oriented products, including skinny or lite bundles and lower prices. We have previously referred to this occurring in a number of major other markets overseas.
- (j) There are a number of key elements that make this Merger likely to substantially lessen competition in at least one relevant market:
 - (i) Sky's monopoly control of premium sports content in New Zealand will become the key driver of uptake of broadband (and mobile) services for high ARPU customers who value live sport. This will likely be achieved through highly attractive bundles of broadband and premium Sky content which are priced and marketed aggressively by the merged entity. The incentives to do so are dramatically changed post-merger.
 - (ii) The commercial wholesale rates and conditions under which Sky has offered RSPs access to its content (including premium sport) are entirely unreasonable. They lock in the advantage Sky has today. They will cement the advantage the merged entity will have going forward, in a market for a bundle of broadband and Sky services. These wholesale terms will enable the merged entity to foreclose RSPs from economically replicating a competitive bundle of services, raise rivals costs and ultimately drive competitors from the relevant part of the market and cause them to retrench or refocus on less profitable niche market areas. []

- (iii) It will be profitable and rational for the merged entity to engage in anti-competitive conduct. The Castalia report outlines how this could be achieved and the likely impact on competition.
- (iv) In the medium to long term price will increase for consumers and the quality and quantity of services available to them will be substantially reduced and less dynamic than will occur in the counterfactual.
- (k) The competition issues Spark has raised are real. The risks to competition arising from such vertical integration been identified in a number of overseas markets and have been addressed by competition authorities in those jurisdictions by blocking mergers or imposing behavioural undertakings. The likelihood of the Merger substantially lessening competition in New Zealand is even greater than in other markets.
- (l) The Merger is likely to undermine the benefits that have so far accrued to telecommunications markets as a result of the structural separation of Chorus and Spark and open, non-discriminatory access to inputs for broadband services.

CROSS-SUBMISSION ON SKY AND VODAFONE'S ASSERTIONS

14. The key assertions of the merging parties and Spark's response to them are:

- (a) Competition will be harmed, New Zealand consumers will pay more for pay TV, broadband and mobile services - The merging parties assert that broadband and mobile markets are competitive today and so robust that the merger will barely have an impact.

However, that is not correct. While competition is vigorous in the broadband market, a number of competitors are still incurring costs to grow their market share. The Merger will result in a fundamental structural shift in the broadband market, including by vertically integrating a key input to a single monopoly provider in the form of Sky/Vodafone. This will:

- (i) Drive a significant portion of the 40% of New Zealand households that highly value premium sports content to Sky/Vodafone for their broadband and mobile services;
- (ii) Enhance broadband and mobile consumer stickiness to Sky/Vodafone, thereby lowering churn and increasing customer acquisition costs to all other RSPs; and
- (iii) Drive a significant proportion of the key high average revenue per user ("**ARPU**") broadband and mobile consumers to Sky/Vodafone.

This will substantially reduce the field of contestable consumers for other RSPs, in particular by increasing rivals' acquisition costs and controlling high ARPU customers. The Merger will therefore:

- (iv) Drive other RSPs below competitive scale (or prevent them achieving such scale in the future), including by:
 - (aa) Precluding their ability to win high ARPU customers; and
 - (bb) Increasing their marginal costs and lower their margins

These impacts will be particularly acute for smaller RSPs in the broadband market such as TrustPower and 2Degrees.

- (v) Make it harder and more expensive for other RSPs to win customers off the merged entity, without the merged entity having to incur any material incremental costs to achieve that outcome.
- (vi) Impact on the ability of Spark and other RSPs to continue to invest in key infrastructure that will be critical to innovation and competition in the provision of broadband and mobile in the long term.

As a result the Merger will undermine the gains to competition that structural separation and open access to key inputs has delivered, will:

- (vii) significantly reduce the ability of other RSPs, in particular smaller RSPs, to compete in the broadband and mobile markets as they will be unable to effectively compete with Sky/Vodafone in the future for broadband and mobile customers; and
- (viii) limit the uptake of UFB if a wide variety of innovative, data rich products are not being distributed across New Zealand by a wide range of competitors. In this regard, Spark notes the update from MBIE yesterday on the progress of UFB roll out still had generally low (20-30%) levels of uptake across the country, including in areas where roll out is 100% complete.

Even for larger RSPs such as Spark, [] and the benefits that otherwise accrue to the entire market (but which are funded by high ARPU customers) will be lost.

Unless fair, reasonable and non-discriminatory access to premium sports content can also be made available to RSPs and other access seekers, the broadband and mobile markets will be substantially less competitive and consumer welfare will be materially reduced as a result of the Merger.

- (b) Historical uptake of content bundles is not indicative of the importance of content going forward - The merging Parties assert that Sky content bundles have not historically driven significant uptake of broadband.

However, that is a backward looking assessment based on market dynamics driven by Sky deliberately hamstringing the attractiveness of Sky content bundles by refusing to wholesale on commercially viable terms.

It is necessary to consider the likely impact of premium sports content on broadband and mobile markets on a forward-looking basis. Overseas evidence and trends, more recent Spark evidence, the significant impact of the roll-out of UFB, and expected rapid uptake in content viewing on mobile are better indicators of the importance of premium sports content going forward:

- (i) "[I]n mature markets triple-play dominates and here content becomes the key differentiator at both the operator and plan level."²
- (ii) "Revenue from so-called quad-play bundles in the UK are set to triple from 2015 to 2020 according to a report from Strategy Analytics."³

² Ovum. Telecoms, Media & Entertainment Outlook 2015. http://info.ovum.com/uploads/files/Ovum_Telecoms_Media_and_Entertainment_Outlook_2015.pdf

³ (3 August 2016). UK subscribers are latching onto quad-play." Retrieved from: <http://www.fiercewireless.com/europe/uk-subscribers-latching-onto-quad-play>

- (iii) Spark's [] surveys [] indicate that [] in the market. []. Of particular note [].
- (iv) As the Commission has noted in respect of the roll-out of UFB: "Long form video content is likely to be a major driver behind consumers' uptake of high speed broadband over the first few years... Existing content arrangements will continue to define the New Zealand market over the next few years."⁴

The applicants have not provided the Commission with an accurate forward-looking description of the ability and incentives that the merged Sky/Vodafone will have to use its control of premium sports content to achieve significant growth in broadband and mobile market share, in particular:

- (v) Lower customer acquisition costs (and conversely higher customer acquisitions costs for competing RSPs);
- (vi) Lower churn rates (and conversely higher churn rates for competing RSPs);
- (vii) Lock-in of high ARPU customers (and conversely lock-out from high ARPU customers for competing RSPs).

Those abilities and incentives have not existed historically as between the separate Sky and Vodafone entities. However, since the announcement of the merger, those incentives have already changed, as Vodafone looks forward to a world in which it is merged with Sky and this is reflected in [].

- (c) Restrictive wholesale is not a solution – The merging parties say the merged entity will and will be incentivised to, offer wholesale Sky to other RSPs on the same terms that has to date.

However, Spark has first-hand experience that Sky's approach to wholesale offers to date (including since the announcement of the Merger) has been to price wholesale offers so that a competitive Sky/broadband bundle cannot be offered to consumers; and to restrict content from being sold alongside any other content, which might otherwise allow a differentiated offering to bridge the gap. Spark has provided the Commission with evidence on the lack of commercial viability of those existing prices and terms.

Without the Merger Sky's incentives to engage in more commercially viable, and less restrictive, wholesale terms will change in the short to medium term as it needs to expand its relationships with a number of RSPs as customers increasingly "cut the cord" and look to access video content via broadband and mobile channels.

But with the Merger (with Vodafone's additional customer and distribution channels to market) any change to Sky's key wholesale terms, or products, appears highly unlikely.

- (d) Mobile sports viewing is the next big trend – The merging parties assert that the evidence suggests that mobile viewing of premium sport is unlikely to materially increase in future.

⁴ (2012). Commerce Commission. *High speed broadband services demand side study*.

That statement is inconsistent with all the overseas data and commentary that Spark has seen, and is inconsistent with Vodafone's own business practices in overseas markets.

Demand for live premium sports content via mobile networks is increasing exponentially in all developed markets where mobile operators are able to offer competing bundles of mobile services and sports content. Overseas analysis has found:

- (i) "that more than 45% of sports viewing occurs on smartphones and tablets";⁵ and
- (ii) "[r]evenue from so-called quad-play bundles in the UK are set to triple from 2015 to 2020."⁶

Vodafone Group has been an active participant in the promotion of live sports content in a bundle with mobile in a number of markets, and overseas data shows that the ability to provide a mobile extension of an already subscribed for sports or other content product provides a significant advantage to the operator that controls or has access to the key content.

As such, it is difficult to understand how, on a forward looking basis, the applicants suggest that the evidence does "not support a large increase in the consumption of live sports over mobile networks and devices."⁷

To the contrary, the Explanatory Memorandum suggests that the ability of the Merger to deliver "significant opportunities" in mobile quad-play bundles and mobile data consumption is a key driver for the Merger.

Those drivers will further reinforce the incentives on the merged Sky/Vodafone to foreclose access to its premium sports content from other mobile operators such as Spark and 2Degrees.

By contrast, without the merger Sky would have the incentive to create a contestable market for the wholesale licensing of mobile content - a market in which all mobile operators could compete for and provide attractive mobile sports content bundles to their customers – as occurs in other markets.

Quad play bundles – The merging parties downplay the effect of quad play bundles on mobile competition. The ability to provide a bundle of broadband and television available in the home and on a customer's mobile for one price is a compelling proposition. Spark has had good uptake since making Lightbox available with mobile subscriptions since September 2016. In addition overseas data shows that the ability to provide a mobile extension of an already subscribed for sports or other content product provides a significant advantage to the operator that controls or has access to the key content. The impact of quad play bundles will accordingly be felt acutely in mobile markets in New Zealand with the Merger, which will control rights to ALL key sports content.

- (e) The Merger puts at risk ongoing network and value-add investment - Sky and Vodafone have asserted that the Merger does not risk any future network investment by RSPs, and have indicated that they consider that the

⁵ Ooyala, 'State of the Broadcast Industry 2016 – OTT Moves to Center Stage' <http://go.ooyala.com/rs/447-EQK-225/images/Ooyala-State-Of-The-Broadcast-Industry-2016.pdf>

⁶ (3 August 2016). UK subscribers are latching onto quad-play." Retrieved from: <http://www.fiercewireless.com/europe/uk-subscribers-latching-onto-quad-play>

⁷ Paragraph 69. Buddle Findlay letter to the Commission dated 11 November 2016.

Commission's concerns relate to investment in fibre unbundling and 5G technology.

While fibre unbundling and 5G are medium term investments to consider in the context of this Merger (discussed further below), Spark wonders if Sky and Vodafone have diverted to attention to those future investments to shift attention from the key issue - namely the ability of Spark and other RSPs to make the necessary investments in network and infrastructure on an ongoing basis.

For example, without the merger over the next 3 years:

- (i) Spark's 3 year plan anticipates the [];
- (ii) Spark will invest [] in capex in broadband and [] in capex in mobile networks and infrastructure over the next 3 years [];
- (iii) Spark anticipates spending additional capex to [];
- (iv) In addition Spark will invest around []:
 - (aa) [];
 - (bb) []; and
 - (cc) [].

Even setting aside any consideration of broadband unbundling or 5G rollout, these are significant ongoing investments. The business case for Spark to make investments of this nature is underpinned (a) by its modelling of likely future market share, and (b) in particular, its assessment of the number of high ARPU customers that it can attract to its networks. The same will be true of other RSPs.

Today Spark leads the market in innovation and investment in high quality value inclusive broadband networks and services – which is attractive to the high ARPU segment. As noted, even though the business case for such investment relies on high ARPU customers the benefits of that investment accrue to all segments of Spark's broadband customer base. The impact on Spark's ability to innovate will therefore be disproportionate to the market share that would be lost, as Spark will be less able to sustain its investment in high value broadband solutions and consumers will lose the benefits of these investments, and the competition between RSPs for these investments as Sky/Vodafone will not need to invest in network enhancements and additional value add services if other RSPs cannot make those investments.

- (f) The Merger puts at risk investment in LTE broadcast technology - The merging parties' submissions have said the evidence does "not support a large increase in the consumption of live sports over mobile networks and devices".

However, overseas Vodafone is investing in LTE broadcast technology for the broadcast of live sports content across mobile networks. This raises further concerns for Spark about:

- (i) The level, nature, and disclosure of the information the applicants are providing the Commission; and
- (ii) The impacts that the Merger will have on delaying such technology being deployed in New Zealand as Sky/Vodafone will control all of the

key content that could provide a business case for investment in such LTE broadcast technology.

LTE broadcast technology is the most efficient way to deliver video content to consumers via a mobile network - in effect enabling content, such as live sports content, to be multi-cast to an unlimited number of consumers at the same time. LTE broadcast technology reuses the 4G LTE spectrum and allocates only a small fragment to the multicast purpose, which transmits identical multimedia content from a single source to multiple receivers - improving reception and signal quality.

Verizon, for example, has rolled-out its entire mobile network in overseas markets with LTE-broadcast technology, and Vodafone has conducted a number of LTE-broadcast trials across its networks in Europe. For example, in 2015 Vodafone "held the first demonstration of LTE broadcast in Spain, offering users five channels of live, HD content during a football match."⁸ Vodafone Germany has observed:⁹

"There is growing demand for high quality video content on mobile devices and LTE Broadcast gives our customers a brand new mobile media experience. This technology enables multiple broadcast sessions to be viewed simultaneously, so our customers will be able to watch Sky's Premiere League Summary or exclusive video content from the stadium they're in."

This technology is expected to be represent the future of live content, such as sports and concerts, delivery via mobile networks with expected device penetration to start from 2017/18 in overseas markets:¹⁰

Mike Wright from Telstra said that consumption of video on mobile was increasing, particularly for sport. He said that LTE Broadcast was a key technology, adding that the alliance sent a message to others in the industry that there is a need to line up to "accelerate the ecosystem" and bring about significant penetration of LTE Broadcast-enabled devices by next year.

Spark has significant concerns that Sky/Vodafone's monopoly control over the key content that would be delivered via LTE-broadcast technology will prevent other RSPs, such as Spark and 2Degrees, from being able to justify the business case to invest in this technology. This will also reduce the competitive tension on Vodafone that would, in the absent of the Merger, also drive it to potentially make investment in LTE-broadcast technology.

Spark considers that this is another key potential investment / loss of dynamic competition that the Commission should be considering as it evaluates the Merger. In particular, given Vodafone's investment in such technology overseas, it is surprising that Sky's/Vodafone's submissions to the Commission have not mentioned these developments, and have instead suggested that the evidence does "not support a large increase in the consumption of live sports over mobile networks and devices."

- (g) The Merger's impact on future fibre unbundling - The merging parties assert that the Merger is unlikely to lessen competition from delaying/discouraging future fibre unbundling investments because a RSP's decision to unbundle is unlikely to be affected by scale.

⁸ <http://www.mobileeurope.co.uk/press-wire/huawei-vodafone-demo-lte-broadcast-at-la-liga-match>

⁹ <http://telecoms.com/225682/vodafone-germany-in-europes-first-lte-broadcast-trial/>

¹⁰ <http://www.digitaleurope.net/531892/telcos-unite-to-create-lte-broadcast-alliance/>

The important feature of the prospect of fibre unbundling is that overseas research indicates that any RSP that does unbundle fibre will significantly increase the barriers to switching. That is because when a customer seeks to churn from one fibre RSP to another fibre RSP when at least one of those RSPs has unbundled, a truck roll is required. That means the switching cost (normally borne by the gaining RSP and/or the end customer) is more likely to be in the region of several hundred dollars, compared with the current transfer fee which is limited to the equivalent of one month's rental of the UFB wholesale input (\$41.50 for a standard residential customer).¹¹

Spark also knows that Vodafone, during its submissions on the future regulatory framework and their position in respect of other recent Chorus copper processes has emphasised its intention to do fibre unbundling.

When one steps back and consider the implications of the above, Spark can see a real and material risk that the incentives on a merged Sky / Vodafone will be to use their control of premium sport to gain significant market share and then unbundle fibre from 2020 in order to lock in that market share advantage, so that none but the most well-funded rivals can compete for that market share. The end users will be the ones most affected, with fewer broadband choices and lower levels of innovation. While the actual timeframe and regulations surrounding fibre unbundling are yet to be determined, the prospect simply reinforces the incentives that Spark has described that Sky/Vodafone will have to foreclose access to Sky premium content from other RSPs in order to drive market share growth.

□

- (h) The Merger puts at risk future 5G investment - The merging parties assert that the Merger is unlikely to lessen competition from delaying/discouraging future 5G network investment because it is unlikely that scale would impact a RSP's ability to deploy 5G services as those roll-outs are done on an incremental basis.

Vodafone's statements do not reflect the known economics that are expected to underpin investment in 5G rollout. []:

(i) [];

(ii) [];

(iii) [];

(iv) [];

(v) [].

[].

[]. In recent times Spark has invested heavily in this as evidenced by Spark:

(vi) []

¹¹ Item 7.1 on the Chorus price list. Available at <https://www.crownfibre.govt.nz/wp-content/uploads/2011/07/Chorus-Price-list-August-2016.pdf>

- (vii) []
- (viii) []
- (ix) []
- (x) []
- (xi) []
- (xii) []

5G serves three main use uses:

- (xiii) Massive download (Speeds of 20Gps);
- (xiv) Interenet of Things ("IOT"); and
- (xv) Low latency services.

[]

[].

Accordingly, Spark considers that control of key premium sports content creates a very real risk that Spark's investment in 5G network will be delayed.

- (i) The Merger will increase pay TV, broadband and mobile prices to consumers - The merging parties assert that the Merger will not result increased prices to consumers.

The **enclosed** Castalia report demonstrates that based on likely assumptions in relation to consumer behaviour that the Merger will enable the merged Sky/Vodafone to implement a sustained and profitable 5% pay TV and broadband market price increase, and that the same conclusions are likely to also hold for mobile.

POINT-BY-POINT RESPONSE TO MERGING PARTIES' ASSERTIONS

15. Spark's responses to specific assertions made by the merging parties are detailed in the table below.

Sky / Vodafone assertion	Spark response
The New Zealand broadband market is highly competitive at present due to structural separation	Yes it is. All the more reason to not let competition be substantially lessened by re-vertically integrating the structure of the market (this time with "premium sports content", which Vodafone has said: "when a driver of consumer choice, key content, is left largely unchecked, it can easily translate into a re-monopolisation of network services" .) ¹²
The merged entity will have the same incentives to resell Sky services on the same terms as Sky offer today.	This is cold comfort. The terms Sky offers today are non-commercial and, therefore, a constructive refusal to deal, as set out in the evidence Spark has provided the Commission. Over the course of the last ~4 years, the only RSP that has resold Sky services is Vodafone, and that is because it has significantly different economics to other RSPs due to its HFC cable network areas.
Other RSPs have not seen Sky Sport content as important to distribute to date.	Yes they have. The reason Spark, and others, do not currently re-sell Sky content is not because it is not considered highly attractive, but because Sky has not made it available on commercially viable terms (as reflected in the information Spark has provided the Commission). Those commercially unattractive terms and the other switching barriers that Sky has in place to limit the shift of Sky standalone customers onto broadband bundles, have meant that even Vodafone, with its wholesale deal, has not had an incentive to actively market its deal. So while Sky content bundles have not been a feature of competition in the broadband and mobile markets to date, Sky's and Vodafone's incentive will plainly change in the Factual as a single merged entity.
Sky Sport content has not driven changes in market shares in broadband and mobile markets to date.	As noted above, that is because Sky is not vertically integrated with any RSP. Sky's strong incentives currently, as evidenced by its constructive refusal to deal with RSPs, is to maintain direct subscriber relationships itself. Therefore, its current incentives are to make standalone Sky a more attractive offer than consumers purchasing a bundle of Sky plus resold broadband. I.e. it currently has no incentives to increase the price of standalone Sky services to drive consumers to a bundle, or otherwise provide better content/quality in a bundle, and therefore it has not driven market share changes to date. Furthermore, even though Vodafone currently resells Sky content, that is primarily to do with its economics in respect of its HFC cable network. It has not actively market/promoted its bundle to date. [] low awareness of Vodafone's Sky

¹² Vodafone "Response to Ofcom's Consultation: Strategic Review of Digital Communications discussion document" (8 October 2015) at 8-9. Accessed at: http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/responses/Vodafone.pdf.

	<p>bundle offer []. In addition, at present, Sky's incentives are to make Sky as attractive as possible as a standalone proposition.</p> <p>Those incentives will change post-Merger - in particular the merged Sky/Vodafone will have incentives to make standalone Sky less attractive in order to drive customers to triple-play and quad-play bundles.</p>
Sky Sport content is not "must have" content for broadband/mobile providers	<p>It is "must have" content for at least 40% of New Zealand households, and once it becomes available in broadband bundles, is likely to become a staple for other consumers as well. In particular it is, and will become, more entrenched as "must have" content for a high proportion of high ARPU customers that have a willingness to pay for value-added services such as content. []</p> <p>Premium sport content is recognised worldwide, including by Vodafone overseas, as "having no close substitutes"¹³ and a "significant driver" of consumer choices for telecommunications provider.¹⁴ That content will become even more fundamental to competition in broadband markets as UFB uptake increases.</p>
Other types of bundles, e.g. Trustpower's electricity broadband bundle or Spark's Spotify bundle, have been attractive to consumers.	<p>The success of other types of (non-sport) bundles in attracting consumers will be significantly different post-Merger than they are today. This is because, at present, Sky's incentives are to make Sky as attractive as possible as a standalone proposition. However, post-merger its incentives will be to drive consumers to purchasing Sky via a Vodafone triple-play or quad-play bundle.</p> <p>In those circumstances, bundles of broadband plus a contestable service (such as music or electricity) will be a much less attractive bundle vs. a Vodafone bundle with a monopoly service when the only other alternative to obtain that service is to pay an increased price (or receive a degraded content offering) via Sky standalone.</p> <p>The difference in consumer elasticities as between premium sport content, and other types of contestable services, and the implications that has for Sky/Vodafone's ability drive significant market share via bundling is addressed in the enclosed Castalia report.</p>
A strategy of deeply discounting Sky/Vodafone bundles is unlikely to be profitable or drive material market share growth.	<p>The evidence from overseas is that other vertically integrated pay-TV / broadband providers are doing exactly that (i.e. deep discounting to drive broadband market share growth):</p> <ul style="list-style-type: none"> • <u>16 November 2016 in the USA:</u>¹⁵

¹³ Vodafone submission to "Public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services" (2 December 2015). Accessed at: https://www.vodafone.com/content/dam/group/policy/downloads/01_12_2015_DSM_Framework_Review_Vodafone_submission.pdf.

¹⁴ Vodafone "Response to Ofcom's Consultation: Strategic Review of Digital Communications discussion document" (8 October 2015) at [3.1]. Accessed at: http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/responses/Vodafone.pdf.

¹⁵ <http://variety.com/2016/tv/features/att-directv-now-pay-tv-1201918857/>

The pay-TV business finally looks like it's about to get seriously disrupted by the internet. And the insurgent now leading the most aggressive attack the industry has ever seen is Randall Stephenson — who runs the largest pay-TV business in the U.S.

The AT&T chief proudly dropped a bombshell in announcing that the new DirecTV Now service will include a core bundle of more than 100 live channels, priced at a head-turning \$35 per month. **That's far lower than anyone expected, prompting analysts to suggest the internet-delivered offering likely has a negative net margin.** It's also much more affordable than DirecTV's entry-level satellite service that features 145-plus channels, which carries a regular price of \$88 monthly.

"This is the most exciting thing I've been a part of in a long time, and I can't wait," Stephenson said last month at the Wall Street Journal-hosted WSJD Live conference, where he announced initial details of DirecTV Now. "I border on the evangelical about it," he added. The telco, which declined to make execs available for interviews for this story, expects to launch the suite of DirecTV Now services later this month.

The implications are huge for all players in the sector. That includes DirecTV and its parent company, AT&T, which will likely see their combined 25.3 million video subscriber base cannibalized to some extent by practically tempting its own subs to shift to the cheaper package. **The strategy demonstrates that the telco is willing to suffer short-term pain to establish a pole position in the rapidly changing over-the-top marketplace.**

...

But operators like AT&T and Dish are playing a long game, and they have the financial reserves to withstand protracted unprofitability from their nascent OTT plays. "They're weighing the financial downside to the strategic upside in the long term," says Tuna Amobi, CFRA Research analyst. "This is going to be a marathon — and a survival of the fittest."

In any event, Spark's primary concern is not that Sky/Vodafone will deeply discount Sky/Vodafone bundles to drive material market share growth. Rather, Spark's primary concerns are that (a) Sky/Vodafone will foreclose access to Sky Sports content to other RSPs (consistent with Sky's conduct to date), and (b) increase the price of standalone Sky. In addition the risk that Sky will otherwise degrade the quality of its standalone offering, by e.g., including some content only within Sky/Vodafone multi-play bundles is a significant concern. Each of these concerns arise because of the incentives on the merged entity to favour its own downstream RSP entity to achieve significant broadband and mobile market share / revenue growth.

That Sky/Vodafone will have the ability and incentive to do so, even on conservative assumptions in relation to consumer behaviour, is evidenced in the **enclosed** Castalia report.

<p>The likely synergies have been calculated using the current \$15 discount.</p>	<p>As above, Spark's primary concern is not that Sky/Vodafone will deeply discount Sky/Vodafone bundles to drive material market share growth. Rather, Spark's primary concerns are that (a) Sky/Vodafone will foreclose access to Sky Sports content to other RSPs (consistent with Sky's conduct to date), and (b) increase the price of standalone Sky.</p> <p>The Commission needs to consider what pricing or quality levers, in particular in relation to standalone Sky, that Sky/Vodafone will be incentivised to use to drive synergies, market share growth, and/or competitive foreclosure.</p>
<p>Undermining standalone Sky would be too risky</p>	<p>Not if Sky/Vodafone can successfully recapture a proportion of those within a triple or quad-play bundle. The enclosed Castalia report demonstrates that, even on conservative assumptions in relation to consumer behaviour, it is likely to be profitable for Sky/Vodafone to undermine standalone Sky services.</p>
<p>It would not be rational for the merged Sky/Vodafone to set wholesale prices/terms to other RSPs at levels that do not allow them to compete against Sky/Vodafone's merged bundle because Sky/Vodafone would not want to sacrifice wholesale revenue.</p>	<p>Sky's incentives to forego wholesale revenue will depend entirely on how that revenue sits in the overall mix of revenue opportunities, and revenue risks, for the merged entity.</p> <p>Sky's current in-market conduct demonstrates that even today it does have incentives to sacrifice wholesale revenue to drive its own retail revenues. Over the last ~4 years it has only been able to conclude a deal with one RSP, with ~27% market share, representing that it has sacrificed wholesale revenue by not concluding a deal with other RSPs that together have over 70%+ market share.</p> <p>This is the best indicator of what the merged Sky/Vodafone's incentives are likely to be post-Merger.</p>
<p>The Commission has previously recognised that bundling is generally pro-competitive.</p>	<p>The Commission has also previously cautioned against, specifically in relation to the provision of broadband services, that bundling where a firm has market power in one product can be anti-competitive.¹⁶</p> <p>Bundles can be pro-competitive, but also can be an instrument to leverage market power from a monopoly to a potentially competitive market. Firms can bundle products for strategic reasons, to artificially raise entry barriers, to limit the market available to competitors and to adversely affect their ability to compete.</p> <p>...</p> <p>Firms can also use a bundle discount anti-competitively. It is the horizontal equivalent of a vertical price squeeze. A firm with market power in good C and facing competition in good D can price a C+D bundle in such a way as to make it impossible for equally efficient, independent producers of good D to compete. One way that this can be accomplished is by it over-pricing good C and under-pricing good D. The diversified firm is thereby able to leverage market power in respect of one good to another, by reducing rivals' profits and driving them out of the market.</p> <p>The enclosed Castalia report demonstrates that Sky/Vodafone will have precisely the incentives to undertake the conduct that the Commission was concerned about in the quote above.</p>

¹⁶ Commerce Commission. []

<p>The merged Sky/Vodafone will not be able to profitably increase prices, or decrease quality, to consumers.</p>	<p>The enclosed Castalia report demonstrates that, even on conservative assumptions in relation to consumer behaviour, it is likely to be profitable for Sky/Vodafone to increase prices / decrease quality to consumers.</p>
<p>The merger will not drive any material broadband market share increases for the merged Sky/Vodafone.</p>	<p>By engaging in unreplicable bundling it is inevitable that the merged Sky/Vodafone will drive material broadband and mobile market share growth.</p> <p>Furthermore, even on conservative assumptions in relation to consumer behaviour, the Merger would not need to lead to significant market share growth for consumers to be harmed by a profitable 5% price increase. The enclosed Castalia report demonstrates that even on those conservative assumptions, the merged Sky/Vodafone could profitably increase its prices and grow its broadband market share in ways which would, when averaged across all of the market, translate to a profitable and sustainable 5% market price increase.</p>
<p>It is unlikely that the scale of smaller (non-Spark) RSPs will be changed by any increase in Sky/Vodafone's broadband market share because they are already small.</p>	<p>That is a static / backward looking view. The relevant test is a forward-looking test,¹⁷ i.e. what scale would those (currently) smaller RSPs have in the future without the Merger, and what increased investments / competitive constraint could they impose in the future if they were to grow.</p> <p>Looking at current trends in broadband market shares, [] provides a better gauge for the Commission on the extent of future scale / competition that could be lost by the merger directing market share from those smaller RSPs to Sky/Vodafone.</p> <p>[]</p> <p>By engaging in unreplicable bundling it is inevitable that the merged Sky/Vodafone will drive material broadband and mobile market share growth and, therefore, will halt the growth in market share, scale, revenue and fixed costs recovery that these other RSPs are currently achieving.</p> <p>On a forward looking basis, it is not necessary to establish that the Merger will drive Sky/Vodafone to achieve a specific significant market share to consider that a substantial lessening of competition is likely. Rather, it is necessary to consider what the extent of competition would be in the absence of the Merger and ask whether the market is likely to be substantially less competitive as a result. Based on the growth trajectories that these other RSPs are currently on and could potentially continue in the absence of the Merger, even market share growth of ~5 - 10% for Sky/Vodafone, when in the counterfactual its market share would be declining, will lessen the competitive constraint that these other</p>

¹⁷ *Commerce Commission v Woolworths Ltd* [2008] NZCA 276 at [75].

	<p>RSPs could otherwise impose as they achieve scale economies, lower per unit costs, and enable further competitive investments from continuing growth trajectories that they are currently on.</p>				
<p>Economic literature says that competition can only be harmed by making competitors sub-scale if they are "pushed out of the market" as a result.</p>	<p>That is not what the economic literature referred to says. The reference says that competition can be harmed by forcing competitors to be sub-scale to such an extent that their marginal costs increase. This is the concern that Spark, and others, have raised with the Commission.</p> <p>Comparing the quotation included in Sky/Vodafone materials with the full quotation from the economic literature makes this clear:</p> <table border="1" data-bbox="656 485 2031 1074"> <thead> <tr> <th data-bbox="656 485 1317 517">What the Sky/Vodafone materials say</th> <th data-bbox="1326 485 2031 517">What that economic literature says</th> </tr> </thead> <tbody> <tr> <td data-bbox="656 523 1317 1074"> <p>Regarding the sub-scale issue, the literature actually says that the rivals would need to be pushed out of the market. For example, Carlton, Greenlee, and Waldman (2008, 618-619) state:</p> <p><i>It is not enough to show that the rival firm was "foreclosed" from some customers, or that it was foreclosed from a substantial share of them. The key to establishing competitive harm is showing that the foreclosed business left insufficient scale for the firm to remain in business...</i></p> </td> <td data-bbox="1326 523 2031 1074"> <p><u>As we have discussed above, such discounts can harm competition only if they deny important scale to a rival firm. Thus, this instruction is consistent with our approach only if "substantially foreclose" is interpreted to mean something like "deny enough of the market to drive the competitor out of business or raise its marginal cost."</u> It is not enough to show that the rival firm was "foreclosed" from some customers, or that it was foreclosed from a substantial share of them. The key to establishing competitive harm is showing that the foreclosed business left insufficient scale for the firm to remain in business (or the denied scale led to increased marginal cost). How "substantial" such foreclosure must be will depend on the scale economies for the competitive product(s).</p> </td> </tr> </tbody> </table>	What the Sky/Vodafone materials say	What that economic literature says	<p>Regarding the sub-scale issue, the literature actually says that the rivals would need to be pushed out of the market. For example, Carlton, Greenlee, and Waldman (2008, 618-619) state:</p> <p><i>It is not enough to show that the rival firm was "foreclosed" from some customers, or that it was foreclosed from a substantial share of them. The key to establishing competitive harm is showing that the foreclosed business left insufficient scale for the firm to remain in business...</i></p>	<p><u>As we have discussed above, such discounts can harm competition only if they deny important scale to a rival firm. Thus, this instruction is consistent with our approach only if "substantially foreclose" is interpreted to mean something like "deny enough of the market to drive the competitor out of business or raise its marginal cost."</u> It is not enough to show that the rival firm was "foreclosed" from some customers, or that it was foreclosed from a substantial share of them. The key to establishing competitive harm is showing that the foreclosed business left insufficient scale for the firm to remain in business (or the denied scale led to increased marginal cost). How "substantial" such foreclosure must be will depend on the scale economies for the competitive product(s).</p>
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<p>Sky content is not likely to become more important to broadband competition in the future / bundled offers have reached saturation in New Zealand.</p>	<p>All evidence predicts that premium sport content is likely to become increasingly important to broadband and mobile competition in the future:</p> <ul style="list-style-type: none"> • While multi-play TV + broadband or mobile services, are not that common in New Zealand to date, that is because Sky's incentives have been to maintain a direct relationship with pay-TV subscribers by not offering commercially viable terms to other RSPs. For this reason, the proliferation of triple and quad play bundles is significantly hamstrung in comparison to overseas jurisdictions. 				

	<ul style="list-style-type: none"> • Evidence from more mature overseas jurisdictions makes the current difference between New Zealand and those jurisdictions clear:¹⁸ <p style="text-align: center;">"[I]n mature markets triple-play dominates and here content becomes the key differentiator at both the operator and plan level."</p> • The proliferation of triple and quad bundles is likely to significantly increase if the Merger were to proceed due to the ability of the combined Sky/Vodafone to change the relative price between purchasing products on a standalone or bundled basis. • Amplifying that the Commission has observed: <ul style="list-style-type: none"> ○ "Long form video content is likely to be a major driver behind consumers' uptake of high speed broadband over the first few years... Existing content arrangements will continue to define the New Zealand market over the next few years."¹⁹ The uptake of UFB, which is expected to increase from 23% to [] by 2020 represents a significant churn event, and the merged Sky/Vodafone will be uniquely placed to take advantage of Sky's premium sports content monopoly to win a significant number of those new UFB adopters (for example, by increasing the price of standalone Sky to drive uptake of Sky/Vodafone UFB bundles). ○ The consumption of TV content via mobile devices, and accordingly the popularity of quad-play bundles, is expected to increase exponentially in the period to 2020:²⁰ <p style="text-align: center;">"[r]evenue from so-called quad-play bundles in the UK are set to triple from 2015 to 2020."</p>
<p>Fixed network costs have largely been expended therefore the Merger will not affect other RSPs' capex investment decisions until those RSPs face 5G and unbundling capex decisions.</p>	<p>This is not true. RSPs need to make fixed cost capex investments in their networks and infrastructure on an ongoing basis to drive best price, and best quality, service performance and offerings for their consumers. For example, over the next 3 years Spark will invest:</p> <ul style="list-style-type: none"> • [] in capex in broadband and [] in capex in mobile networks and infrastructure over the next 3 years []; • Spark anticipates spending additional capex to []; • In addition Spark will invest around []:

¹⁸ Ovum. Telecoms, Media & Entertainment Outlook 2015. http://info.ovum.com/uploads/files/Ovum_Telecoms_Media_and_Entertainment_Outlook_2015.pdf

¹⁹ (2012). Commerce Commission. *High speed broadband services demand side study*.

²⁰ (3 August 2016). UK subscribers are latching onto quad-play." Retrieved from: <http://www.fiercewireless.com/europe/uk-subscribers-latching-onto-quad-play>

	<ul style="list-style-type: none"> ○ []; ○ []; and ○ []. <p>These figures are prior to any potential investments in 5G or fibre unbundling. Spark has [] (without the Merger).</p> <p>Even setting aside any consideration of broadband unbundling or 5G rollout, these are significant ongoing investments. The business case for Spark to make investments of this nature is underpinned (a) by its modelling of likely future market share, and (b) in particular, its assessment of the number of high ARPU customers that it can attract to its networks. The same will be true of other RSPs.</p>
<p>Premium live sport content is the least likely to be consumed over mobile networks, and there is nothing to suggest that is likely to increase.</p>	<p>At present live sport is not a large driver of mobile revenue in New Zealand, however, that is due to Sky's exclusive control of premium sports content, and its incentive to drive consumers to its own satellite distribution channel, which has hamstrung the uptake of mobile sports content viewing in New Zealand in comparison to overseas.</p> <p>Overseas live sport content is a significant driver of mobile data consumption - as noted in some of the quotes below:</p> <ul style="list-style-type: none"> • <u>OOYALA State of the broadcast industry - 2016</u>:²¹ <p>Mobile continue to be drivers for sports. In the U.K. and Ireland for example, Ooyala has found that more than 45% of sports viewing occurs on smartphones and tablets.</p> <p>Everyone is trying to get in on the game. Operators have emphasized sports in new offerings—Verizon Go90 for example, has NBA content. Yahoo streamed the first regular-season NFL game to over 15 million viewers. CBS All Access could eventually carry the NFL; it has already streamed some live NFL games to mobile devices. But Netflix is interested in live sports only if they can own and build the event themselves.</p> <p>according to SNL Kagan, nearly 90% of OTT sports subscribers also pay for a multichannel TV service, enabling avid sports fans see all of their team's games despite factors like game blackouts and travel.</p> • <u>11 July 2016 in the UK</u>:²² <p>“Our customers have been telling us for a long time that they are watching more and more sport on the go, and this summer’s European Championship football tournament has driven traffic peaks that we’ve never seen before,” said EE CEO, Marc Allera.</p>

²¹ Ooyala, 'State of the Broadcast Industry 2016 – OTT Moves to Center Stage' <http://go.ooyala.com/rs/447-EQK-225/images/Ooyala-State-Of-The-Broadcast-Industry-2016.pdf>

²² (11 July 2016). <http://www.digitaltveurope.net/566732/ee-customers-to-get-free-bt-sport-access/>

- 19 September 2016:²³

The shift to mobile and online video is expected to draw millions of eyeballs away from traditional television viewing, providing both content creators and advertisers significant new opportunities to reach fans.

Mobile as Number One

Mobile is now seen as the first screen and can no longer be an afterthought or an add-on. Instead, mobile is at the center of every media company's content and engagement strategy. It provides advertisers with a level of customization and on-demand accessibility, so it's no surprise that we're seeing consumers turn off the TV and turn to mobile to stay connected, especially when it comes to some of the biggest sporting events of the year such as the 2016 Rio Olympics.

- 9 September 2016 in the USA:²⁴

"Are you ready for football? **And are you ready for cellular company wars around viewing football on your phone?** Verizon kicked off the 2016 NFL season with an announcement Friday that it would no longer charge its customers for data used while watching live NFL games via the NFL Mobile app, perhaps the biggest sign that the battle we predicted is now fully underway."

- 18 October 2016 in the UK:²⁵

Sky Q, the next generation box, now enables customers to watch their favourite TV on their mobile, with the new Sky Q smartphone app. For the first time customers will be able to access their downloaded recordings, browse Top Picks, and stream live and On Demand shows when they're out and about, on their phone.

So whether they're enduring the daily commute or working out on the treadmill, customers will be able to access their recordings or continue watching their favourite TV shows. From critically acclaimed The Night Of, to the new Premier League football season and blockbusters like The Martian and Minions, customers will never again miss a moment of the most talked about, exclusive shows.

- 16 November 2016 in the USA:²⁶

²³ <http://www.modernmarketingxchange.com/uncategorized/sports-impact-smartphone-usage-mobile-ads/>

²⁴ (9 September 2016). <http://www.mobilesportsreport.com/2016/09/verizon-drops-data-charges-for-live-nfl-streaming-via-nfl-mobile-app/>

²⁵ <https://corporate.sky.com/media-centre/news-page/2016/sky-q-launches-mobile-app-making-it-easier-for-customers-to-take-their-recordings-wherever-they-go>

²⁶ <http://variety.com/2016/tv/features/att-directv-now-pay-tv-1201918857/>

Boosting wireless business: AT&T has had success tying DirecTV together with mobile service, and expects to do the same with DirecTV Now. In January, it rolled out plans offering unlimited wireless data with TV and has signed up 6.7 million customers for that combo. It's also offering "zero-rated" data for subs with both wireless and video, so the DirecTV/U-verse content they watch on their phones doesn't count against their data plans — something AT&T is expected to do with DirecTV Now, too. But last week the FCC notified the telco that the zero-rating practices may be anticompetitive, because they put rival OTT services at an economic disadvantage. The panel asked AT&T to formally respond by Nov. 21.

- 21 November 2016 in Australia:²⁷

Optus CEO, Allen Lew, has commented on the strategic importance of content for Optus in an interview with The AFR.

Lew said, "**There is a saying 'the future of video is mobile' and I believe more than that, the future of mobile is video.** That's where we have made a big bet. It [EPL] is not the only bet we will make, next year we will be talking about other things we'll be doing."

Sky and Vodafone's submissions are also inconsistent with Vodafone's own business model in Ireland (and elsewhere) where it is offering a bundle of mobile services plus BSkyB sports:

²⁷ <http://www.afr.com/business/media-and-marketing/tv/inside-optus-sport-hq-with-chief-executive-allen-lew-20161111-gsn6ni>

Sky Sports Mobile TV

Sky Sports Mobile TV on RED Connect bill pay plan

exclusively on Vodafone

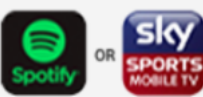
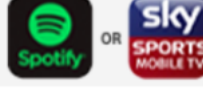
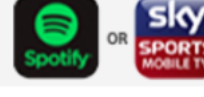


Sky Sports Mobile TV on Vodafone gives you unlimited live access to Sky Sports 1 & 2 live on your mobile, so you never have to miss another minute of the action. Catch all the big games live on the go, including the Barclay's Premier League and Champions Cup Rugby.

With Sky Mobile you can:

- › Stream live sports straight to your smartphone
- › Watch all the latest Premier League & Formula 1 on Sky Sports Mobile TV 1 & 2
- › Need more? Upgrade to Sky Sports Mobile TV Pack 2 to get Sky Sports 3, 4 & 5, F1, Sky Sports News all live on your mobile



Red Connect Essentials €40 per month	Red Connect €60 per month	Red Connect Super €80 per month
Pay €199.99 today	Get this phone FREE today	Get this phone FREE today
<p>4G</p> <ul style="list-style-type: none"> ✓ 3GB of Data ✓ Unlimited Vodafone to Vodafone calls ✓ Unlimited texts to any network ✓ 100 minutes to any network ✓ Roaming across Europe included ✓ 25GB Dropbox space with Backup+ ✓ 3 months Secure Net ✓ Red Entertainment Pack 	<p>4G+</p> <ul style="list-style-type: none"> ✓ 7GB of Data ✓ Unlimited calls and texts to any network ✓ 100 International minutes and texts ✓ Roaming across Europe included ✓ 25GB Dropbox space with Backup+ ✓ 12 months Secure Net ✓ Red Entertainment Pack 	<p>4G+</p> <ul style="list-style-type: none"> ✓ 17 GB of Data ✓ Unlimited calls and texts to any network ✓ 500 international minutes and texts ✓ Roaming across Europe included ✓ 25GB Dropbox space with Backup+ ✓ 12 months Secure Net ✓ Red Entertainment Pack
		
▶ More about this plan	▶ More about this plan	▶ More about this plan
(24 month minimum term contract)	(24 month minimum term contract)	(24 month minimum term contract)
<div style="background-color: red; color: white; padding: 5px; display: inline-block;">Select plan</div>	<div style="background-color: red; color: white; padding: 5px; display: inline-block;">Select plan</div>	<div style="background-color: red; color: white; padding: 5px; display: inline-block;">Select plan</div>

Spark has also significant concerns that Sky/Vodafone's monopoly control over the key content will prevent other RSPs, such as Spark and 2Degrees, from being able to justify the business case to invest in LTE-broadcast technology. This will also reduce the competitive tension on Vodafone that would, in the absent of the Merger, also drive it to potentially make investment in LTE-broadcast technology. Spark considers that this is another key potential investment / loss of dynamic competition that the Commission should be considering as it evaluates the Merger.

	Furthermore, given Vodafone's investment in such technology overseas, it is surprising that Sky's/Vodafone's submissions to the Commission have not mentioned these developments, and have instead suggested that the evidence does "not support a large increase in the consumption of live sports over mobile networks and devices."
The fact that no mobile network has deployed a Sky Sports mobile network offer to date demonstrates it is not considered particularly compelling compared to other offers.	The fact that no mobile network has deployed such an offer to date is actually a reflection of Sky's exclusive control over premium sports content in New Zealand, its unwillingness to enter into commercially viable wholesale arrangements with RSPs, and its preference to hamstring the uptake of mobile sports consumption in New Zealand (in comparison to other countries) to continue to direct customers to its satellite distribution channel.
It is not clear how or why the merged entity could/would restrict its rivals' customers from accessing Sky content on their mobile devices.	<p>Restricting access to Sky's content is not Spark's concern. Rather it is the ability of Sky/Vodafone to provide special deals on Sky Sport content, including exclusive content, over the Sky/Vodafone mobile network that is Spark's concern. That is consistent with the actions taken by other vertically integrated content and mobile network owners overseas. For example:</p> <ul style="list-style-type: none"> • <u>6 February 2016 in the USA:</u>²⁸ <p>"Verizon Wireless is testing the limits of the Federal Communications Commission's net neutrality rules after announcing that it will exempt its own video service from mobile data caps—while counting data from competitors such as YouTube and Netflix against customers' caps.</p> <p>...</p> <p>"If you're a Verizon Wireless post-paid customer, stream Go90 videos over LTE without using up your data," the app update for iPhone and Android said.</p> <p>Go90 streams live sports and other shows. The app is free with ads, and it has some content that's exclusive to Verizon Wireless subscribers."</p> • <u>4 May 2016 in Australia:</u>²⁹ <p>Optus today unveiled pricing for the 2016/17 season of the English Premier League (EPL). New and existing customers who want to watch every round of the next EPL season can choose from a range of great value postpaid mobile, mobile broadband, and home broadband bundles, and then add EPL from</p>

²⁸ <http://arstechnica.com/business/2016/02/verizons-mobile-video-wont-count-against-data-caps-but-netflix-will/>

²⁹ <https://media.optus.com.au/media-releases/2016/optus-customers-to-get-english-premier-league-from-15-per-month-on-selected-plans/>

as little as \$15 extra per month. For eligible plans valued at \$85 per month and above, EPL will be included at no extra cost.

EPL, Any Way You Like It

Exclusive live access to every match of the world's greatest football competition is just the beginning.

- 11 July 2016 in the UK:³⁰

"EE mobile customers will be able to access BT Sport for free for six months, in the "first of a series of BT benefits" that will be made available to EE customers. The BT Sports App will be available for new and existing EE pay-monthly customers, with the move following BT's £12.5 billion (€16.7 billion) buyout of the UK mobile operator EE, which closed in January. From July 27, EE customers on consumer and small business pay-monthly handset, tablet and SIM-only plans will be able to access all the BT Sport channels on their smartphone or tablet – over 4G or WiFi."

- 9 September 2016 in the USA:³¹

Are you ready for football? And are you ready for cellular company wars around viewing football on your phone? Verizon kicked off the 2016 NFL season with an announcement Friday that it would no longer charge its customers for data used while watching live NFL games via the NFL Mobile app, perhaps the biggest sign that the battle we predicted is now fully underway.

From our perspective, some of the most-read stories in Mobile Sports Report history have been posts wondering about how much data customers might use watching a live football game on their phones. The answer now, for Verizon LTE customers, is easy: It's zero. You will still need to pay \$1.99 a month this fall to watch RedZone on your phone (to us, RedZone is even better than specific live games), but watching the live local and national-broadcast games (like Sunday night games and Monday Night Football) won't chew up any of the gigabytes in your data plan.

Whether or not this type of "free programming" will spark any net neutrality debate is best left for other outlets, though it's hard to think of a type of programming more popular than live NFL action. In the meantime, our guess is that the wildly popular NFL Mobile app (Verizon never releases figures on how many users it has for NFL Mobile, but if you start your guessing between 5 and 10 million you might not be far off) will get even more popular, and the promotion should help sell a lot of fence-sitters this weekend on buying with Verizon, just to get even the app's limited NFL schedule for basically free.

³⁰ <http://www.digitaltveurope.net/566732/ee-customers-to-get-free-bt-sport-access/>

³¹ <http://www.mobilesportsreport.com/2016/09/verizon-drops-data-charges-for-live-nfl-streaming-via-nfl-mobile-app/>

<p>Key sports rights will expire in 2020, and other RSPs will be able to bid for them then.</p>	<p>The economics of the "vicious circle" mean that no other RSPs will be able to outbid Sky/Vodafone for those premium sports rights in 2020. Demonstrating that is the fact that Sky has held the exclusive rights for rugby, cricket, and rugby league for 20+ years and, for example, NZ Rugby / SANZAAR did not even put its rights to the open market when they last expired.</p> <p>If the merger proceeds it will further entrench the vicious circle even, and make it even more unlikely that any other RSP could outbid the merged Sky/Vodafone for any key sports content rights in 2020. The merged entity will be in a position to shut down competition for sports rights even before it begins.</p>
<p>Decreased scale of other RSPs will not have any impact on their ability to invest or compete against Sky/Vodafone.</p>	<p>Significant ongoing investments are required to be a dynamic and attractive competitor in both the broadband and mobile markets. The business case for Spark to make investments of this nature is underpinned (a) by its modelling of likely future market share, and (b) in particular, its assessment of the number of high ARPU customers that it can attract to its networks. The same will be true of other RSPs.</p> <p>Reduced scale, combined with a lower ARPU cost base, and increased costs due to: higher costs of acquisition, higher churn rates, higher fixed cost recovery per user, will inevitably diminish the level of ongoing network and value add investment that other RSPs can make in competition against Sky/Vodafone.</p> <p>The competition between RSPs for these investments will diminish as Sky/Vodafone will also not need to invest in network enhancements and additional value add services if other RSPs cannot make those investments.</p>
<p>There is no reason why the proposed transaction would impact Spark and 2Degrees' ability to deploy 5G services.</p>	<p>[].</p> <p>Accordingly, Spark considers that control of key premium sports content creates a very real risk that Spark's investment in 5G network will be delayed.</p>
<p>To decline clearance the Commission must satisfy itself that it is more likely than not that a SLC will not arise.</p>	<p>This is not the test. The Commission must decline clearance unless it is satisfied that there is not a real chance (i.e. a substantial risk) of a SLC arising. As the Commissions M&A Guidelines state: "If we are not satisfied – including if we are left in doubt [about whether the a SLC will arise as a result of the proposed merger] – we must decline to clear the merger."</p> <p>This is confirmed by the approach set out by the Court of Appeal in <i>Woolworths</i>:</p> <p>"What is more important is that the Commission and thus the Court should approach the giving of a clearance by direct reference to the statutory test, that is by granting a clearance only if satisfied that a substantial lessening of competition is not likely. As is apparent from what we have said already, we think that the [High] Court instead in effect took the approach that it should grant a clearance unless satisfied that such an effect was likely. And, as will become apparent when we discuss the counterfactual,</p>

	the significance of this came to be magnified by the Court's very close focus on what was very limited empirical evidence."
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Spark Public Cross-submission

Spark Confidential Annex