Vodafone Europe BV and Sky Network Television Limited

Summary Submission in response to Statement of Preliminary Issues

FetchTV Pty Ltd

1. Introduction

1.1 FetchTV Pty Ltd (***FetchTV***) welcomes the opportunity to provide this confidential summary submission (***Summary Submission***) to the New Zealand Commerce Commission (***NZCC***) in relation to the proposed merger between Sky Network Television Limited (***Sky***) and Vodafone New Zealand Limited (***Vodafone***) (***Proposed Merger***).

1.2 The purpose of this submission is to respond to the NZCC's Statement of Preliminary Issues (***SPI***) which sought views about:

(a) the markets potentially affected by the Proposed Merger; and

(b) the unilateral, vertical and conglomerate affects that might result from the Proposed Merger, including the extent to which the merged entity will be able to engage in behaviour that either forecloses rivals or otherwise renders them less able to compete.

1.3 This Summary Submission sets out a summary of FetchTV's position and submissions in relation to the impact of the Proposed Merger on competition. As discussed with the NZCC, FetchTV proposes to supplement this Summary Submission by Friday 26 August 2016 with:

(a) a more detailed explanation of each of the key matters raised in this Summary Submission, including the nature of competition, the relevant markets and the manner in which the Proposed Merger is likely to substantially lessen competition in those markets; and

(b) an economic analysis of certain key aspects of the likely impact of the Proposed Merger, including the extent to which the merged entity will have the ability and incentive to foreclose competition.

1.4 In addition, FetchTV would of course be happy to discuss its views directly with the NZCC to address any questions it might have.

2. Overview

2.1 FetchTV has strong concerns in relation to the Proposed Merger on the basis that:

(a) the Proposed Merger will have the effect of creating barriers to entry to the relevant markets, effectively locking out FetchTV and other potential competitors from entry; and

(b) in the context of rapidly evolving markets, the Proposed Merger will enable the merged entity to foreclose competition.

2.2 In order to understand how this outcome would arise, it is necessary to have a detailed understanding of the nature of competition in the relevant markets and the key drivers of competition into the future. These issues are largely overlooked in the Notice Seeking Clearance as lodged by the parties, inviting the NZCC to adopt a highly simplistic analysis in which Sky can be characterised as a subscription television (***Subscription TV***) provider, Vodafone as a telecommunications provider and the Proposed Merger as largely complementary.

2.3 FetchTV submits that adopting this approach risks overlooking the impact of the Proposed Merger on competition and that the following key considerations need to be taken into account in order to assess the competitive constraints operating on the merged entity:

(a) the key to competition in Subscription TV is maintaining control over the way in which the customer acquires, views and then pays for content. This requires control of the remote control unit, the user interface and the customer's bill – these items form the primary platform utilised by the customer;

(b) Sky already has substantial market power with respect to Subscription TV services based on a broad range of exclusive arrangements for the acquisition of content;

(c) access to customers is only possible through relationships with large telecommunications providers, of which there are a limited number operating in New Zealand; and

(d) the provision of bundled Subscription TV, telephony and broadband (***triple play***) services provides a significant competitive advantage for the merged entity by greatly reducing or eliminating the costs associated with product and customer acquisition and substantially reducing customer churn.

2.4 When these market dynamics are taken into account, it is clear that the Proposed Merger has a real likelihood of causing a substantial lessening of competition in the relevant markets.

3. Sky/Vodafone's market analysis

3.1 In the Notice Seeking Clearance, Sky and Vodafone submit that the two key markets potentially affected by the Proposed Merger are as follows:

(a) the national retail market for the provision of residential fixed-line broadband services; and

(b) the national market for the retail provision of Subscription TV services.

3.2 Although these two markets are important for the NZCC's consideration of the Proposed Merger, FetchTV submits that the following markets are also critical to the analysis of the impact on competition of the Proposed Merger:

(a) the market for the acquisition of Subscription TV content; and

(b) the market for the retail provision of Subscription TV services as part of a bundled triple play (or quad play, that is, adding wireless services to voice, broadband or data and audio-visual).

3.3 FetchTV submits that once these two key markets are included as a focus of the competition analysis, it is clear that the combination of Sky and Vodafone pursuant to the Proposed Merger will substantially alter market dynamics.

4. Competition in Subscription TV: the Battle for HDMI 1

4.1 The Notice Seeking Clearance points to sources of potential competitive constraint in the relevant markets, including the existence of competitors in the Subscription TV market. However, this analysis is simplistic and does not take account of the nature of that competition and the extent to which those various competitors may impose an effective competitive constraint on the merged entity.

4.2 As Subscription TV markets evolve rapidly, the significance of maintaining control over the primary platform utilised by the customer in acquiring and viewing content is emerging as the key to competition. This is the so-called "Battle for HDMI 1", being the primary port for a set top box in a consumer's television. The entity that supplies the device which controls this access point enjoys a significantly privileged position with respect to engagement with the consumer, including because it typically has:

(a) control over the remote control primarily used by the consumer to access television content;

(b) control over the consumer's user interface upon switching on their television;

(c) a primary billing relationship with the consumer; and

(d) the ability to act as a platform for the hosting of third party services (including over-the-top (***OTT***) and other subscription video on demand (***SVOD***) services), making it a distribution channel controlling access to other content providers and generating additional distribution or "platform" revenues.

Sky currently has an effective monopoly over this access point as utilised by consumers in New Zealand

4.5 FetchTV notes in this regard that:

4.6 FetchTV does not agree with the submissions made in the Notice Seeking Clearance to the effect that such providers will constitute a significant ongoing competitive constraint on Sky or the merged entity or that their presence signifies the existence of a strongly competitive market.

5. Content acquisition

5.1 Sky has extensive exclusive content arrangements, including in particular in respect of key linear channels. These arrangements in some cases include the use of other mechanism to entrench exclusivity in Sky's acquisition of content, such as through exclusive rights to brands (for example the "History Channel") and specific content in channel licensing agreements and through the use of Sky-controlled play-out facilities.

Sky is able to require content providers to enter into exclusive arrangements, at least in part, due to its position as the operator of the only major Subscription TV platform in New Zealand.

5.8 The Proposed Merger will enhance the ability and incentive for Sky to acquire content on an exclusive basis. By enhancing Sky's already strong market position, the Proposed Merger will result in additional pressure on content suppliers to enter into exclusive arrangements with Sky, to the detriment of competition.

5.9 Concerns relating to access to content were recognised by the ACCC in its merger review of the acquisition of Austar by Foxtel. To ensure that competition was not foreclosed, Foxtel was required to provide undertakings that limited its ability to acquire content on an exclusive basis. These undertakings have been critical to ensuring the ability of competitors such as FetchTV to acquire a core content offering that have enable it to compete with Foxtel in Australia. FetchTV encourages the NZCC to engage with the ACCC on its approach to help build an understanding of the impact of access to content on the relevant markets.

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