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RELEVANCE OF EU CASE PRECEDENT FOR THE VODAFONE/SKY NZ MERGER

Response to the DotEcon report

1 DotEcon has prepared a report for Spark which relies heavily on EU precedent cases to draw conclusions regarding the likely competitive effects of the Vodafone/Sky New Zealand merger. Given the material differences in market context further explained below, this reliance on overseas cases is inappropriate.

2 Based on the relevant facts in New Zealand, the parties have already set out in detail the reasons why the merger will not lead to any lessening of competition in New Zealand. Notwithstanding this, below we discuss why DotEcon'suse of EU precedent is wholly inappropriate, and is based on misconstruing the competition issues examined in those cases.

3 We discuss each of the EU cases relied upon by the DotEcon report in more detail below, but in summary we would note the following.

- The common theme that each of the cases relied upon by DotEcon involved material horizontal competition concerns in the Pay TV market. And similarly the remedies discussed in the DotEcon report were all put in place to address those horizontal concerns. That is in clear contrast to the present case which involves, as the LOUI recognises, a purely conglomerate issue.
- Of the cases mentioned by the DotEcon report, the case which provides the most insight into the European Commission's approach toconglomerate issues is the Vodafone/Liberty Global in the Netherlands. This was a case in which the Commission explicitly considered and comprehensively **rejected** concerns raised by third parties regarding foreclosure based on anti-competitive bundling. Yet the DotEcon report entirely neglects to mention that bundling-based foreclosure concerns were even considered in that case – despite the similarities in the issues. The Commission's reasoning on bundling concerns in Vodafone/Liberty Global is particularly insightful because it rejected foreclosure concerns on the basis of arguments and evidence similar to that put forward by the Parties in this case – in circumstances where the Commission in that case was also of the view that the transaction might lead to a greater uptake of bundles.

4 The Commerce Commission should therefore place no weight on the DotEcon report in its assessment of the present transaction, and cannot rely on the horizontal aspects of the EU cases it mentions as relevant precedents for the Vodafone/Sky New Zealand merger. If anything, the Commission should place weight on the EU's conclusions on anti-competitive bundling in the comparable Netherlands case, which is discussed first below.

Vodafone/Liberty Global (Netherlands) merger

5 The DotEcon report points to the remedies offered in the Vodafone/Liberty Netherlands merger as an example of competition concerns arising in relation to TV+telecommunications bundles. However, the DotEcon report is incorrect to suggest that this is a similar concern to those expressed in the LOUI. The issues in that case for which the remedy was offered relate to *horizontal* competition concerns: namely the overlap between the parties in the provision of fixed line telecommunications, including offers involving triple- and quad- play bundles.

6 The European Commission was therefore principally concerned about the loss of Vodafone as a recent entrant into the fixed-line telecoms market as a result of the merger. The remedy that was offered in order to obtain Phase 1 clearance was therefore a divestment of the Vodafone fixed business in order to maintain the pre-merger situation in competition within the relevant fixed market.

7 More significantly, it is important to note that the European Commission did carry out a detailed assessment of the potential for non-horizontal concerns as a result of anti-competitive bundling in the Vodafone/Liberty merger. The DotEcon report overlooks this fact, despite its more obvious read across to the issues set out in the LOUI. In particular, the Commission examined a potential anti-competitive bundling theory of harm in the context of:

a. one of the merging parties (Liberty Global) having a strong market position in Pay TV (principally via sales of fixed triple-play bundles); and

b. the other merging party (Vodafone) being a non-dominant player in a competitive telecoms market (in this case mobile telecoms).

8 The Commission examined and rejected the theory that the merged entity could either:

a. leverage its market position in TV+telecommunications to foreclose rival standalone mobile rivals; or

b. leverage its market position in TV+telecommunications to foreclose rival standalone broadband rivals.

9 Crucially, the European Commission concluded that "*the Transaction does not give rise to anti-competitive conglomerate effects*".

10 The Commission found no prospect for anti-competitive bundling to result in competitive harm, noting "*Overall, the Commission is of the view that the effects of bundling together fixed products of Ziggo and mobile products of Vodafone after the Transaction would not make consumers worse-off compared to the scenario that would prevail absent the Transaction.*"

11 Also particularly interesting in terms of the present New Zealand case was the Commission's finding that "*As regards the sale of bundles at a discount, the Commission considers this to be in the interest of consumers*" and that this was "*unlikely to lead to the marginalisation*" of standalone rivals. A crucial consideration in the Commission reaching this view was their view that "*any effective foreclosure strategy based on leveraging market power…requires a sufficient share of the customer base of [competitors] to be affected*". In finding that only around 25-30% of rivals' customers could be targeted by a foreclosure

strategy (because only a minority of rivals' mobile customers sourced their TV/fixed products from Ziggo), the Commission concluded that any such strategy would not give the merging parties the ability to impact standalone rivals' market share "*to such an extent that they would be marginalised*".

12 It should be noted that these findings were in the context of a market – unlike the situation in New Zealand – where the market had already shifted significant towards triple- and quad- play bundles, and where customers already on these bundles accounted for a very significant proportion of the market.

13 The findings of the Commission therefore apply *a fortiori* to the Vodafone/Sky New Zealand case, since:

a. bundling of TV with telecommunications (either triple-play or quad-play) is a significantly less prominent feature of the market in New Zealand than it is in the Netherlands – where such offers have been heavily promoted by a fully integrated dominant fixed incumbent (KPN);

b. the same logic applies whereby the alleged foreclosure strategy (in this case leveraging from Sky's Pay TV market position) could only ever affect a minority of rival's subscribers – and therefore would not be capable of bringing about their marginalisation; and

c. there is stronger evidence in the present case that rivals would be insulated from the effects of attempted foreclosure, because they compete in a highly regulated market in which structural separation guarantees lower entry barriers.

14 Therefore, contrary to the suggestion of the DotEcon report, if one were to apply the logic of the European Commission's approach to the market in New Zealand, one would conclude that there were no prospect of competitive harm arising from bundling by the merged entity – and that this continues to hold true *even if* it bundling becomes a much more prevalent feature of the New Zealand market in the future.

Ofcom's Pay TV market review

15 The DotEcon report itself recognises that Ofcom's concern was related to "*restricting wholesale distribution of its premium channels to pay TV competitors*"[1]. Ofcom's concern was therefore related to the restriction of horizontal competition between rival Pay TV providers in the Pay TV market.

16 DotEcon argue that the Ofcom case remains relevant because it also took account of competition in Pay TV that took place via bundles, in particular DotEcon note that "Ofcom found that competition in the provision of pay TV services happened over bundles of channels".[2] It is misleading to suggest that competition over "bundles of channels" in Pay TV in the UK closely mirrors a situation of competition over bundles of Pay TV and telecommunications services in New Zealand. In particular because:

[1] DotEcon, page 5.

[2] DotEcon, page 7.

a. consumers purchasing bundles of channels is a standard feature of almost all TV markets - based on obvious consumer preference;

b. it is far from obvious that the same logic applies to bundling TV with telecommunications services – in fact the evidence suggests the contrary in New Zealand, where almost all consumers continue to prefer to buy these services separately.

17 It would therefore be wholly inappropriate, and contrary to the facts in this case, to import Ofcom's logic in relation to bundles of TV *channels* into the entirely separate issue of bundles of TV and telecommunication services.

18 Whilst the Ofcom determination did also touch on the issue of bundling Sky with telecommunications issues, it did so only as it related to its examination of horizontal competition issues in the Pay TV market. The concern in relation to TV+telecoms bundle competition was therefore peripheral to the central Pay TV issue, and not itself the source of the competition concern. Indeed, Ofcom's position is quite the opposite, in the sense that Ofcom was concerned about lack of availability of new and innovative bundled offers as being a *consequence* insufficient Pay TV competition – not that such bundles might themselves be the root *cause* of a competition problem.

19 It should therefore be clear that the competition issues traversed by Ofcom in its reviews of the UK Pay TV market have no direct bearing on the *purely non-horizontal* issues under consideration in the Vodafone/Sky New Zealand merger. This is a critical distinction to make, because Ofcom's actions were intended to safeguard competition within the Pay TV market, not the broadband market.

20 Finally, it is important to note that Ofcom has in any case recently removed the WMO obligation.

Liberty Global/Ziggo merger

21 Similar considerations apply to DotEcon's reliance on the European Commission's findings in the Liberty Global/Ziggo merger in the Netherlands. This transaction principally concerned a *horizontal* concentration between cable networks that were also Pay TV providers. In particular, the remedies imposed in that case were closely related to:

a. a horizontal concentration resulting from combining two Pay TV channels (HBO and Film1 in particular); and

b. a horizontal concentration resulting from combining two large Pay TV subscriber bases.

22 No such horizontal concentration arises in the present case in New Zealand: Vodafone has no meaningful Pay TV presence, and it holds no material TV subscriber base (and to the extent that it does, those customers are already wholesale Sky subscribers).

23 This difference is critical, because although the EU decision considers vertical issues in relation to wholesale TV channel access and TV content procurement, it does so only as a result of the horizontal concentration mentioned above. No such vertical issues could have arisen without the horizontal overlap between the Parties in Pay TV. In particular:

a. the issue in relation to the wholesale supply of Pay TV channels to Pay TV retailers arose precisely because the transaction caused a horizontal concentration between Pay TV film channels which were considered to be important to the purchasing decisions of consumers and which were previously under the separate control of Liberty Global and Ziggo; and

b. the issue in relation to the vertical foreclosure of rival OTT TV services arose precisely because of the incentive effects resulting from the horizontal concentration of the existing Pay TV subscriber bases of Liberty Global and Ziggo.

24 The DotEcon report therefore misrepresents the applicability of this case to the Vodafone/Sky New Zealand merger. DotEcon's claim that the case illustrates how "merger-specific effects can arise even in relation to strategies that would have been open to one of the parties pre-merger" is misleading. The change of incentives referred to in the Commission decision is the result of a horizontal merger, not a vertical one. Indeed, it is notable that the Commission's examination of vertical effects focused narrowly on rival TV retailers, and did not examine the impact of the transaction on standalone broadband retailers (such as Online.NL) via TV+telecoms triple-play or quad-play bundles.

Telefonica/Canal+ merger

25 As in the Liberty/Ziggo case, the core issue in the CNMC investigation was – as highlighted by the DotEcon report itself – a lessening of horizontal competition within Pay TV: "*giving the merged entity a market share of 69% by subscribers and 85% by revenues*"[3] Indeed, the transaction combined the two largest Pay TV operators, with a significant gap to the next largest operator. Again, as in the Netherlands, the main thrust of the remedies in the case were aimed at using wholesale TV access conditions to solve a horizontal competition issue in the Pay TV market. It is therefore misleading to suggest, as the DotEcon report does, that the concerns in that case closely mirror the situation in New Zealand because it involved the combination of a Pay TV player with a telecoms operator. In that case, Telefonica was not only telecoms operator – it was already a significant Pay TV player in its own right.

26 So whilst the Telefonica/Canal+ merger involved a closer consideration of competition and foreclosure for triple- and quad- play bundles, this must be seen in the specific market context: Telefonica was already heavily marketing its Pay TV offering via a commercial strategy of triple- and quad- play bundled offers. These bundles were not only an existing feature of Telefonica's strategy, but were a very significant feature of the overall market in Spain – with many operators using a similar strategy and, as a result, a large proportion of the market was made up of subscribers on such bundles. Moreover, and again unlike the situation in New Zealand, the merger involved the dominant fixed line telecoms incumbent: creating the prospect that the merger created a dominant force in both the Pay TV and the fixed line markets, combined with a market leading position in mobile.

[3] DotEcon, page 13.

27 This highlights the inapplicability of the Spanish market as a reference point for New Zealand. Spain is an exceptional case, even within Europe, in respect of the rapid speed and extent of TV+telecoms bundle take-up. This meant that any consideration of primary horizontal concentration issues in Pay TV in Spain was inevitably linked to a consideration of the associated bundled market segments.