

Cross-Submission to the Commerce Commission following the LOUI

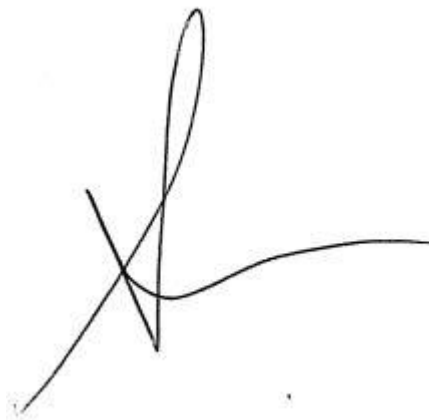
23 November 2016



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1. This cross-submission addresses the Commerce Commission's LOUI.
2. We are grateful for the opportunity to assist the Commission by way of this cross-submission.



Andrew Cushen
Deputy Chief Executive

1. Introduction and Summary

- 1.1 In their latest submissions, Vodafone submit that, for example, “Bundled content is not a major driver of sales of mobile plans”. In each of our submissions so far, we have focussed on the issue as to mobile, including the zero-rated considerations.
- 1.2 The Vodafone submissions focus on what is happening today in New Zealand, when Vodafone Europe BV is, as we submitted, marketing content and mobile bundles, including sports content, in some instances on a zero-rated basis. This implies that bundled content is a significant driver of mobile sales, as do Vodafone and Sky shareholder materials.
- 1.3 We conclude by addressing the implications of zero-rating as to differentiating the merged entity’s service from competitors’ services.

2. Vodafone submission on Sky content and mobile

- 2.1 In their 11 November submission, Vodafone notes, as to the LOUI:¹

[The LOUI] does not state a view that SKY content is likely to be a compelling driver of sales of mobile services. Rather, it appears to suggest that because consuming content over mobile phones and the associated data usage will become more important to Mobile Network Operators (MNOs) in the future, Vodafone will be able to disadvantage its rivals by foreclosing access to SKY content.

- 2.2 In relation to those two points, Vodafone stated:²

The evidence of actual behaviour in the mobile market demonstrates that these concerns are unfounded.

- 2.3 Vodafone continue, in answer:³

Bundled content is not a major driver of sales of mobile plans.

- 2.4 And Vodafone say this:⁴

It is true that consumption on mobile is increasing, but there is nothing to suggest that SKY content is going to become a valuable driver of mobile data consumption.

3. Focus by Vodafone continues to be almost exclusively on what is happening today

- 3.1 Apart from a single brief statement – “*live sport has value because it is live...*”,⁵ implying mobile is not suitable for live sport – all the reasons given in this section of the Vodafone 11 November submission⁶ are focussed solely on current New Zealand market conditions, as the basis for determining the future factual and counterfactual.
- 3.2 That is despite the submissions by opposing parties outlining why the status quo is largely irrelevant, given the evidence of major market and technology change. Those submissions are not addressed by Vodafone. Wigley & Company have addressed those issues in their memorandum today.

4. What Vodafone says to its shareholders

- 4.1 What is quoted above (for example, Vodafone’s statement to the Commission that “*Bundled content is not a major driver of sales of mobile plans*”) appears to be inconsistent with what Vodafone Group says to its

1 Vodafone 11 November submission at Para 13.1

2 Vodafone 11 November submission at Para 13.2

3 Vodafone 11 November submission at Para 14.1

4 Vodafone 11 November submission at Para 15.1

5 Vodafone 11 November submission at Para 14.4

6 Namely, Vodafone 11 November submission at Para 13-15

shareholders in the Vodafone Group's 2016 annual reports. In the following extracts, the context shows that "broadband" includes fixed and mobile broadband (highlighting is added):⁷

- Customers are increasingly converging or unifying communications by sharing content between their fixed and mobile devices – phone, tablet, laptop or TV

- **Television and content, when bundled with broadband, are becoming increasingly important drivers of customer demand**

- The growing demand for converged services drives data usage, which in turn requires the combination of mobile and fibre infrastructure...

We're aiming to expand our TV services, to support the take up of broadband. We already have TV services in seven markets...

4.2 We cannot see any reason why New Zealand's circumstances are different from the Vodafone Group's overview above of all its markets including New Zealand. We also note Vodafone's annual report has a focus on change in the future, which firmly contrasts with the backward-looking approach in what Vodafone are saying to the Commission.

4.3 Wigley & Company in their memorandum today deal with disclosure obligations. It appears that the Vodafone Group and the applicant, Vodafone Europe BV – the main operating company holding entity in the group – would hold substantial material relevant to the issues before the Commission. That is so even if, contrary to this submission, there are some reasons why there is a material difference from what applies in New Zealand.

5. What Vodafone is saying to other regulators

5.1 There is a number of examples of contrary statements to regulators, where Vodafone seeks the opposite of what it is seeking here. However, Vodafone Europe BV makes no mention of this in what it says to the Commission. Contrary to earlier Vodafone submissions, we submit that these passages cannot be distinguished from NZ circumstances. Vodafone said to Ofcom in October 2015:⁸

As consumers are increasingly attracted to bundled offers of TV, broadband, fixed and mobile voice services, the control of that exclusive content will increasingly steer their overall purchasing decisions. Therefore, exclusive 'must have' content is no longer just a TV issue, but impacts across the whole of the £43bn telecommunications and TV market.

5.2 Again, that seems to be inconsistent with what Vodafone is saying to the Commission (and/or reflects relevant information not provided to the Commission). Similarly, the following statement, from the same submission to Ofcom, again strongly points to the effect of content on mobile uptake:⁹

Ignoring the effects of 'key content' across wider and traditionally unrelated markets, such as mobile or broadband only customers, will have an enduring and irreversible effect, as the focus moves to TV bundled competition.

6. Vodafone and Sky statements to Sky shareholders

6.1 In the Explanatory Memorandum (EM) to Sky shareholders, as to which Vodafone say that they as well as Sky have statutory and other obligations to ensure "accuracy and validity",¹⁰ the picture that is painted is different from what is being said to the Commission by Vodafone. The EM explicitly and at multiple

7 At page 12

8 Vodafone response to Ofcom's consultation: Strategic Review of Digital Communications discussion document (8 October 2015), at pages 2-3 (available at http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/responses/Vodafone.pdf).

9 At page 8-9: this passage has already been submitted in our 12 August submission

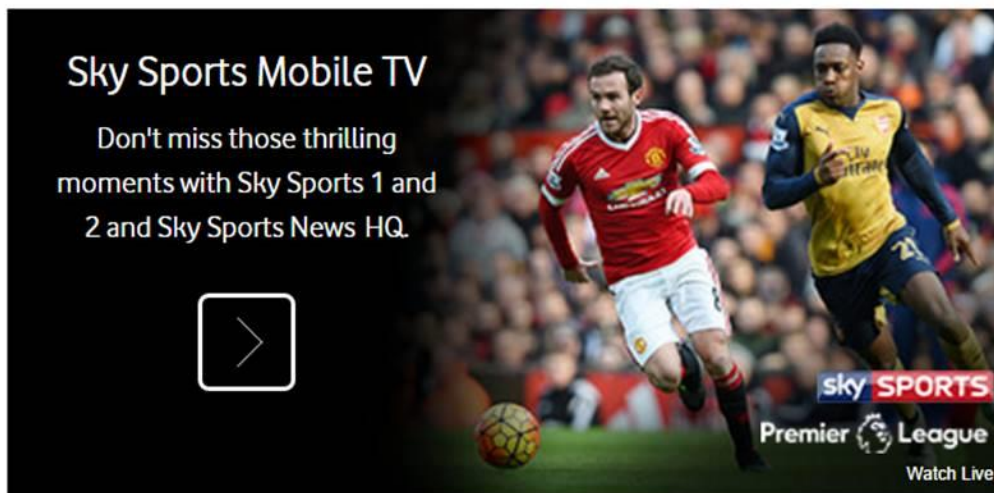
10 Vodafone 11 November submission at Para 17.4

points throughout focusses on the opportunities and challenges presented by the major market and technology changes.

- 6.2 The same point applies as to the independent report for shareholders and directors prepared by the independent expert, Grant Samuel.

7. What Vodafone Europe BV in fact is doing

- 7.1 Vodafone Europe BV's 11 November submissions also seem to be inconsistent with what in fact they are doing in other countries where there is no discernible market difference (and/or the circumstances are such that they are relevant and the applicant and its subsidiaries will have substantial information that is relevant and should have been disclosed).
- 7.2 The applicant in fact provides and firmly promotes content services over mobile including premium live sport. This seems inconsistent with the approach outlined above.
- 7.3 We have previously outlined services as to own content provided on a zero-rated basis to Vodafone Ireland customers (although that zero-rated service is currently suspended). Vodafone Ireland is a subsidiary of the applicant. Both Vodafone Ireland and Vodafone UK assertively market Sky Sports over mobile, implying a disconnect from the statements being made in the 11 November submission. But even if Vodafone Europe BV argues the circumstances are different here, the information it and its subsidiaries have is material to the decision making.
- 7.4 The point is clearer as to Vodafone Europe BV's subsidiary, Vodafone Greece. We turn to the UK first, then Ireland, and then Greece.
- 7.5 There is this from Vodafone UK's website, at <http://www.vodafone.co.uk/explore/music-tv-and-sports/>:



- 7.6 And at <http://www.vodafone.co.uk/explore/music-tv-and-sports/sky-sports-mobile-tv/>:

Sky Sports Mobile TV

Benefits
Vodafone apps
Music, TV & Sports
NOW TV
Spotify
Sky Sports Mobile TV
Vodafone Charge to Bill
Costs
Network

Sky Sports Mobile TV. A front row seat, wherever you are

Enjoy up to 24 months' access to Sky Sports 1, 2 and Sky Sports News HQ when you buy a Red Value Bundle (excluding Red Value 2GB Bundle) or a SIM only Red Value Bundle.

Sky Sports Mobile TV is available on a variety of devices



Never miss a thing

With up to 24 months of Sky Sports 1, 2 and Sky Sports News HQ you can enjoy the best live sport wherever you are including Premier League football, cricket, tennis and much more.



Sports on the go





Premier League football




Sky Sports 1 and 2

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@VodafoneUK

Struggling to pick your #4G entertainment pack? Check out what's coming up on TV, #4GSport and #4GMusic this month vdfn.co/April4G



April 2015 on 4G: What's hot on ...
Having difficulty choosing your Vod...
blog.vodafone.co.uk

  05 Apr

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Can't make the choice between TV, #4GMusic or #4GSport? Check out our March entertainment round up to help you decide vdfn.co/march4G


[Embed](#) [View on Twitter](#)

7.7 Vodafone Ireland is currently promoting Sky Sports Mobile TV in a similarly assertive manner to Vodafone UK (at <http://www.vodafone.ie/red-connect/sky-sports/>):

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



- 7.8 Turning to Greece, Vodafone Greece also provides zero-rated access to Vodafone's own content and that includes its sports channels,¹¹ raising the issues noted in our 11 November submission and two earlier submissions.
- 7.9 Zero-rating content is a key strategy to drive customers to Vodafone mobile services and it is key consideration not only for the content markets but also, as we outlined in our last submission, as to Pay TV, mobile and fixed location markets.
- 7.10 In the screen shots below from Vodafone Greece's marketing, Vodafone states:
- Now you can watch live TV on your mobile phone anytime. Watch live the matches of your favourite football team....
- 7.11 Translated by Google Chrome, Vodafone Greece market this service at <http://www.novasports.gr/applications/novasports-mobile-wap/#.WCt91OZ96Uk>:

The Novasports.gr play ball everywhere!

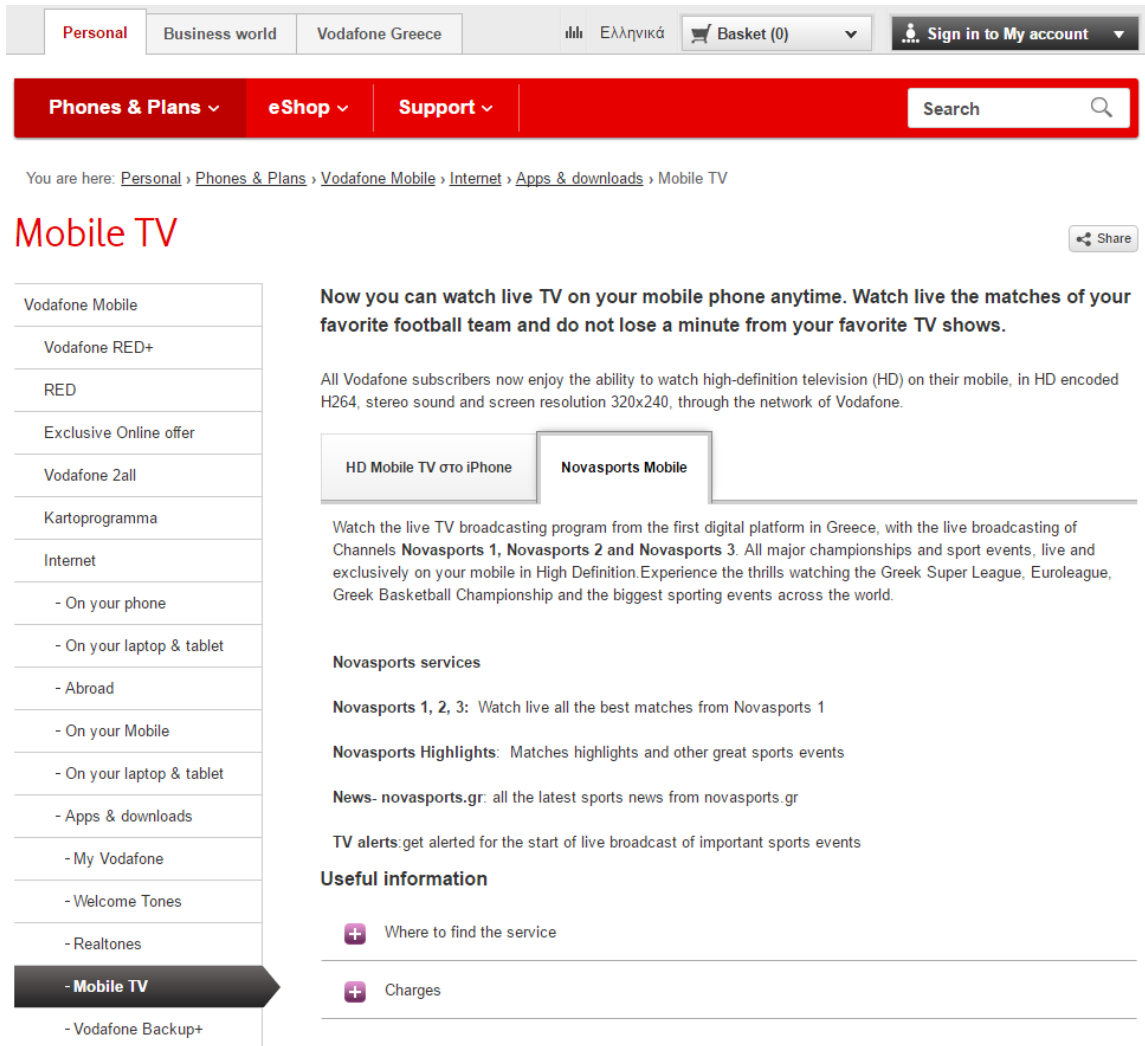
The Vodafone customers are able to enjoy only the rich sports content Novasports.gr wherever they are in high definition (HD) to their mobile. Enjoy channel program Novasports 1, Novasports 2, Novasports 3*, which are broadcast live in high definition encoded I264, stereo sound and a screen resolution of 320x240, through the Vodafone network, directly on your mobile.

¹¹ See the Vodafone Greece website, which states "Watching Mobile TV free of charge in terms of data usage (i.e. does not bear any data usage charge and does not consume the available MB of your data tariff)". (http://www.vodafone.gr/portal/client/cms/viewCmsPage.action?pageId=10858&request_locale=en)

The service offers:

- With service Novasports Mobile now have all sports live on your mobile!
- Live coverage of racing and sports viewing from Novasports channels 1, Novasports 2 and Novasports 3.**
- The highlights from the biggest championships and major sporting events.
- News of the sports news with reliability novasports.gr

7.12 From another translated page on the Vodafone Greece website
http://www.vodafone.gr/portal/client/cms/viewCmsPage.action?pageId=10858&request_locale=en:



The screenshot shows the Vodafone Greece website interface. At the top, there are navigation tabs for 'Personal', 'Business world', and 'Vodafone Greece'. A search bar is visible on the right. Below the navigation, there are menu items for 'Phones & Plans', 'eShop', and 'Support'. The main content area is titled 'Mobile TV' and features a sidebar with a list of services including 'Vodafone Mobile', 'Vodafone RED+', 'RED', 'Exclusive Online offer', 'Vodafone 2all', 'Kartoprogramma', 'Internet', and 'Mobile TV' (which is highlighted). The main text area contains a headline: 'Now you can watch live TV on your mobile phone anytime. Watch live the matches of your favorite football team and do not lose a minute from your favorite TV shows.' Below this, it states: 'All Vodafone subscribers now enjoy the ability to watch high-definition television (HD) on their mobile, in HD encoded H264, stereo sound and screen resolution 320x240, through the network of Vodafone.' There are two tabs: 'HD Mobile TV στο iPhone' and 'Novasports Mobile'. The 'Novasports Mobile' tab is active, showing details about watching live TV broadcasting from the first digital platform in Greece, including Novasports 1, 2, and 3. It also lists 'Novasports services', 'Novasports Highlights', 'News- novasports.gr', and 'TV alerts'. A 'Useful information' section includes links for 'Where to find the service' and 'Charges'.

7.13 None of the above operations by Vodafone Europe BV is apparent from what the applicants are telling the Commission.

8. Foreclosing access to Sky content, and zero rating

- 8.1 As noted above, Vodafone deny that they would foreclose access to Sky content, saying for example, in their 11 November submissions to the Commission that *“To somehow restrict SKY customers from accessing content on the basis of the mobile network they choose would be wholly irrational”*.¹²
- 8.2 Vodafone do not address the extensive submissions and experts reports as to why such a course would in fact be wholly rational for the merged entity to do. Here we focus on one aspect: that of zero rating – which is a major feature of all of our prior submissions.
- 8.3 As we outlined at Para 3 of our 11 November submission, zero rating is not only a matter of differentiation as against other content providers. It is also a mechanism to leverage the market power in premium content as against other RSPs.
- 8.4 High mobile data charges make a content play over mobile largely prohibitive, unless there is zero rating or some similar mechanism. At Para 1.8 of our 10 October submission, we gave an example:

The price difference to the consumer, as between zero rated Vodafone content and third OTT content, is considerable, and well beyond what could be seen as pro-competitive differentiation. The Irish service includes HD downloads in the zero rated service. To download just one two-hour, third-party HD movie in Ireland, after exceeding low data caps, would cost NZD \$45 on the cheapest mobile plan (NZD \$270 on the most expensive). In NZ, the equivalent would be NZD \$108 to NZD \$3,000 respectively.

- 8.5 That is not a strategy which is available to Sky if it is not merged with Vodafone (and if merged with a smaller RSP or if it develops its own RSP, the impact is much lower). As noted above, given the fact that Vodafone Europe BV is using the zero rating strategy already, there is evidence that the merged entity would have the ability and the incentive to effectively foreclose competitors by zero rating content.

¹² Vodafone 11 November submission at Para 13.3