Telecommunications Users Association of New Zealand Inc.

(TUANZ)

Submission to the Commerce Commission in regards to the proposed merger of Vodafone Europe B.V. and Sky Network Television Limited

12th August 2016

TUANZ

1. The Telecommunications Users Association of New Zealand (TUANZ) has been in existence for nearly 30 years, advocating for the continued improvement in the use and supply of telecommunications technology and services to all end users of such services. We have always advocated that connectivity, and fast connectivity, will enable businesses to improve productivity and to deal far more efficiently with well-connected customers. Families, wherever they live, will become far better connected. Smart young Kiwis will be much more attracted to living here rather than overseas. The world's capitals will be on our electronic doorstep, while we will become earlier adopters of leading-edge services like fibre-powered television on demand and the widespread use of cloud services for businesses such as on-demand accounting and file storage.
2. TUANZ is a not-for-profit membership association with over 150 members, predominantly large organisations with a strong dependency on telecommunications technology as well as small enterprises and individual members. These small businesses and residential users are the customers of our large corporate members, who are just as focused on the quality of their customers' connectivity as their own.
3. During 2015, we undertook a full review of the strategic direction of TUANZ. We hosted three workshops around the country, which involved 30 individuals from our membership base discussing about what they wanted from TUANZ, and what they thought our purpose was in the era of digital technology.
4. We found that while our purpose may have changed, TUANZ is still as relevant and important as ever.

   Our purpose is to ensure that New Zealand can make the most of a digitally connected world.

5. Our vision, which is the outworking of our purpose, provides a readily measurable target for us to aim for. It reflects our focus on businesses and their use of the technologies rather than the technologies themselves.

6. We propose to use the World Economic Forum's Network Readiness Index as the key measure of our success. New Zealand is currently ranked 17 out of 143 nations on the overall index but we propose to use the Business Usage pillar. We are currently ranked 20th in the index for business usage.

7. Our 5 year vision is as follows:

   By 2020 New Zealand will be in the top 10 countries for business usage.

   This will be measured by using the WEF Global Network Readiness Index.

8. TUANZ further developed its strategic goals and the concepts and issues around "convergence" are important areas for the organisation to be involved with.

Our Principles

9. As part of our strategic review, we identified our key principles that would guide what TUANZ would say in regards to matters such as this discussion paper. It is pertinent to point out that our answers contained within this submission should be seen in the light of these principles.

   - **We desire to see a lift in the digital competency within the NZ economy**.
   - **We will listen and have brave face to face conversations.**
   - **We will promote fair and sustainable competition.**
   - **We will focus on outcomes.**
   - **We want our members to be successful.**

Our Paper

10. TUANZ appreciates the opportunity to submit on the Commission's Statement of Preliminary Issues in regards to the proposed merger of Vodafone Europe B.V. (Vodafone) and Sky Network Television Limited (Sky).
11. TUANZ as a user representative group, does not employ legal resource that has expertise in the fields of mergers and takeovers and as such will leave the substantive legal and regulatory issues to be covered by other submitters.
12. Our brief submission will focus on the few key issues of concern to our members and end-users of information and communications technology that we believe the Commission must take into consideration during their decision making process.
13. TUANZ position has been consistent and clear: we support competition where possible and regulation where required. We are also a commercially aware organisation and therefore would not submit on a commercial undertaking unless we considered that it could possibly have detrimental impacts on the end users of ICT services.

Issues of Concern

Market Definition and Competition

14. Over the last 5 years, we have seen significant developments as a result of the market structure instigated by the structural separation of Telecom into Chorus and (now) Spark and the creation of the Local Fibre Companies. We have also seen the development of a large number of small players in the retail service provider space as the drive to move consumers to higher speed services continues.
15. However, we have also seen as the market becomes more congested at the smaller end, an aggregation of market share at the other end of the market - the large all-of-market players.

16. To measure the effect of this aggregation, the easiest available proxy to us is the Commission's own calculations for the annual Telecommunications Development Levy allocation. The most recently available numbers are for the 2014/2015 year.

17. The TDL calculation is based on applicable revenue and is only applied to those that meet a qualifying revenue level. It also applies to wholesale market providers as well, so to make an estimate of market share we have made the following adjustments:

    a. Removed wholesale providers from the list (Chorus, UFF, Enable, REANNZ, Northpower and Transpower)

    b. Assumed that the share of the market that non-qualifying service providers make up is 7% (based on our own estimates)

18. This allows us to calculate a rough estimate of market size for those we consider are competitors in the retail space as follows:

Provider	Estimated Market Share
Spark	36%
Vodafone (and WorldxChange)	27%
2degrees (and SNAP Internet)	5.5%
Vocus (incl M2 brands)	3%
Teamtalk	1%
Kordia	0.3%
Compass	0.13%
Trustpower	0.13%

19. Again it should be stressed these are rough estimates and there has been market movement over the last 12 months with significant offerings in the broadband market from both 2degrees and Trustpower. The numbers include mobile revenues which we believe are relevant to this discussion. The aim of this analysis is not however to show the exact market share that

each player currently enjoys but to highlight the large part of the market that the two largest players represent.

20. There is always a possibility that aggregation will continue, and whilst it is likely to occur below the top 2 providers, any other acquisitions by the bigger players will in our view lead to a reduction in competition.

21. Vodafone through its acquisitions in recent years, and as a result of the break up of Telecom, is now the largest vertically integrated telecommunications provider in NZ. At the access level they do re-sell a significant amount of Chorus services, but they also own the ex-TelstraClear fibre and copper urban business networks as well as the residential HFC networks in Wellington and most of Christchurch. They also have a complete 4G mobile network which is not only being used for traditional mobile services, but is also being used for providing broadband services under the RBI construct. There is no doubt that this ability to provide a full service offering is of real benefit to end users, but can also be used to stifle competition if it was so desired.

22. We do recognise that this proposed merger is not between two telecommunications providers and that they are currently operate generally in separate markets. And indeed it may be this merger does not necessarily lead to a reduction in competition directly, but it does place significant premium content into the hands of one of the two largest providers in the NZ market (which we address in the next section).

23. The aim here then is to remind the Commission that the retail telecommunications market is skewed with two major players. This should be read in light of comments made during the course of this merger proposal that there is a large and growing retail service provider market. In light of this, it is our view that the proposed merger does not in fact necessarily lead to improved efficiencies within the telecommunications market nor directly bolster competition.

Wholesale offers of Premium Content

24. As already stated, one of TUANZ's key objectives over many years, and reiterated in our latest set of principles is for the continued development of fair and sustainable competition in the market for information and communication technology. That has been a consistent theme for TUANZ.
25. The area of access to premium content for end users is our most significant concern in regards to the proposed merger where this content would now be in the control of one of our largest telecommunications retail service providers.
26. We want to ensure that there is vibrant competition within the marketplace and that access to premium content is available to all end users on reasonable terms. To ensure this, there needs to be a robust and reasonable wholesale offering on both price and nonprice terms for other service providers to bundle that service with their own offerings.
27. Over the last few years as the capability of the broadband networks has improved through investments in both the fixed and mobile networks, the availability of TV and other content over those networks has become increasingly important (the idea of convergence).
28. It is true that the Over The Top (or OTT) players have taken full advantage of this and with the launch of services such as Netflix and Lightbox in New Zealand, consumers have an increasing choice of provider for their viewing options. However, these have been limited to date to movie and TV series catalogues.
29. Over the years since the pay television was introduced into New Zealand, the ability to acquire the rights to premium content has seen them end up in the hands of one player in the NZ market, Sky. In this paper we define premium content as being the rights to broadcast and distribute coverage of major ball sports important to New Zealanders (Rugby Union, Rugby League, Netball and Cricket in particular).

30. The issue of fair access to premium content has been identified around the world as an issue for regulators to manage carefully. Indeed Vodafone Group PLC made the following point in their 2016 Annual Report at page 12:

> "Our goal is to ensure access to premium content where our customers value it. In several markets, incumbents have sought to gain exclusive access, which may increase our costs. We also encourage regulators to prevent incumbents from using content - in addition to their dominance in fixed access markets - as a lever to reduce competition."

31. At present consumers may choose to take premium content through Sky's satellite service and are not limited in their choice of retail service providers for their broadband or mobile services.
32. It is this "lever to reduce competition" that concerns our organisation and the end users that we represent. Premium content as we define it has become in our view "must have" inputs in the sense used in the competition arena.
33. Whilst there are no current numbers available to understand how many Sky customers choose to add this premium content to their basic services, the network did disclose in their 2014 annual report that around 71% of their subscribers took Sport or Sport+Movies tiers. This indicates the importance of this content to New Zealand pay TV customers.
34. This view appears to be in line with overseas regulatory proceedings. For example in Vodafone's own submission to Ofcom in 2015 they stated at Page 9 of their submission that "Vodafone ultimately remains concerned that if access to this content cannot be secured on Fair, Reasonable and Non Discriminatory terms, competition and consumer choice across a variety of telecommunications markets will be severely harmed."
35. In the clearance application, the parties recognise that wholesaling of the services is a key element of the merger and state they will continue to sell wholesale services in line with what they see are growth opportunities in the market.
36. However, these sort of statements, no matter how well intentioned, do not provide the level of comfort that we would be looking for in this form of merger.

37. We have advice that under New Zealand law, the Commission is unable to procure behavioural undertakings in these matters and so we are unable to conclude that there will indeed be a robust wholesale offering with fair, reasonable and nondiscriminatory terms. New Zealand does not have a history of willing wholesalers without the threat of strong regulation or regulatory intervention.

38. We understand other parties may submit on the counterfactual to the possible merger. One possible outcome of the merger not going ahead might indeed be a stronger wholesale offering from Sky given the nature of the market place and the competition now being provided by OTT players in other content areas. We are not in a position to make any other comment about this and will leave it to other submitters.

39. In summary, our concern on behalf of our members and end-users is that in its current proposed form, the merger does not guarantee a strong wholesale offering of premium content to service providers other than the retail arm of the merged entity, and this is enough to raise serious concerns about the risk this proposed merger places to competition in the telecommunications market that currently exists in New Zealand today.

Concluding comments

40. TUANZ welcomes the opportunity to provide the Commerce Commission with this submission in regards to the questions raised in the issues paper regarding the proposed merger. This paper provides the key issues that we, the body representing end users, consider to be important for the Commission to consider carefully.

Contact

Craig Young
Chief Executive Officer
Telecommunications Users Association of New Zealand Inc.

craig.young@tuanz.org.nz

021 488 188