EXECUTIVE SUMMARY

1. Spark has reviewed the Commerce Commission's Letter of Unresolved Issues (**LOUI**) in relation to the proposed Sky / Vodafone NZ merger (**the Merger**) and supports the preliminary conclusions the Commission has reached in regard to the Merger. We consider that, on the evidence, the Commission must confirm its decision to decline clearance.

2. It would fundamentally change the nature of competition in broadband and mobile markets. Premium sport has long been used as what Rupert Murdock describes as the "battering ram" of Pay TV to achieve significant profits in media and our analysis shows that it is now likely to be used to similar effect in broadband and mobile markets in New Zealand.

3. The relevant markets identified by the Commission are converging. As that convergence occurs, in both the factual and the counterfactual, consumers will increasingly purchase triple-play or quad-play bundles of Pay TV and telecommunications services. And premium sport will be an important determinant of the competeviness of triple-play or quad-play bundles, because it is “must-have” content. All of that “must-have” sports content, though, is controlled by one entity; Sky. Therefore, how it is made available in bundles to broadband and mobile telecommunications customers will have a significant effect on competition between providers of those bundles.

4. In the counterfactual, we expect consumers will have a number of differentiated, competitive, bundles to choose from many of which will include Sky sports content. In this counterfactual we expect Sky would be more open to considering new wholesale services or terms of access to its “must-have” sports content, which would allow telecommunications service providers to design these new triple-play and quad-play bundles. We consider this would have pro-competitive effects. Even if Sky did not become more open to new forms of wholesale access and continued to insist on the restrictive wholesale terms it offers today, those restrictions would apply equally to all telecommunications service providers, so there would not be any competitive effects from Sky’s position.

5. In the factual, though, the merged Sky-Vodafone will have very different incentives. Because at the heart of the proposed merger is the ability of the merged entity to offer triple-play and quad-play bundles of Pay TV and telecommunications services that other telecommunications service providers cannot effectively compete with. This is because the merged Sky/Vodafone will control premium content that is key to driving broadband market share through differentiated OTT offerings, and more generally the content that is at the core of driving the uptake of UFB.

6. It would be profitable for the merged entity to:

   (a) engage in anti-competitive bundling (pricing a bundle of Sky and Vodafone broadband at a level that cannot economically be replicated by others); and

   (b) increase the standalone price of Sky services relative to the bundle price.

   In the short to medium term this will drive significantly increased broadband and mobile churn from other RSPs to Sky / Vodafone; and in the medium term will give the merged entity the power to profitably increase the price of bundled and individual services.

7. The medium term effect on the market is that effective broadband competitors will weaken; fledgling providers will struggle to gain scale and likely exit. More importantly innovation, investment and dynamic efficiency will reduce.

8. As the major industry leader in innovation and investment, Spark would continue to seek to impose competitive constraint on the merged entity. But we are under no illusions. The merged entity's control of premium sport, satellite and cable infrastructure, together with the substantial mobile and fixed network assets it will control and the scale it will have through a substantial customer base will be unrivalled. Were it to use such advantages to win over significant numbers of additional customers, in the long term, competitors will have a substantially reduced ability to invest in assets and services that provide a competitive constraint on the merged entity.

9. Since the announcement of the proposed merger Sky and Vodafone have started introducing more deeply discounted bundled offerings to the market. **[ ]**

10. Without access to premium sport on reasonable wholesale terms the bundles offered by the merged entity cannot be replicated, so for a significant number of customers, Spark and other RSPs become an even less close substitute. Access to those customers (which are predominantly high ARPU customers) will likely be entirely foreclosed to Spark and other RSPs, or at best, significantly more expensive to win back from the merged entity.

11. This will impact on [

]

12. Sky claims that it already provides wholesale access to its content on commercially reasonable terms. That just is not the case. We expect that rather than providing incentives to improve wholesale terms of access to content, the proposed merger will instead result in an even more restrictive approach to wholesaling content.

13. By contrast [

:

(a) [ ];

(b) [ ].

(c) The counterfactual that Spark initially proposed – that Sky would in the medium term be more likely to agree to commercially reasonable wholesale terms as it sought to expand its distribution through broadband and mobile channels – is not "fanciful" as Sky characterised it. In fact, it is more likely than not to occur.

14. The Commission has correctly recognised that the statutory test requires that it must be satisfied that proposed merger will *not* substantially lessen competition. It is not for the Commission to grant clearance *unless* it is satisfied that a substantial lessening of competition is not likely. When weighing the evidence presented by Spark and other interested parties against the evidence provided by the merging parties it is clear that the merging parties have not discharged the burden on them. Accordingly clearance of the Merger as things stand must be declined.

15. Spark has been clear throughout this process that 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, and Sky/Vodafone's ability and incentive to foreclose access to that content from other RSPs. Spark approached Sky in July seeking wholesale supply of content on reasonable terms not dissimilar to the BSkyB open access deed in the UK. Spark has not received any

meaningful engagement from Sky on the details of that proposal. If Sky is willing to enter into an open access deed, that is directly enforceable by any RSP, making premium sport content available to all RSPs on a fair, reasonable, and non-discriminatory basis (including retail minus pricing that is commercially viable, anti-avoidance provisions) and without key commitments that impose unduly restrictive exclusivity requirements on access seekers, then that may resolve the concerns. In the absence of an acceptable, open access commitment of that nature locked in to the market structure moving forward, Spark remains of the view that the Merger should be declined.

INTRODUCTION

16. Spark welcomes the opportunity to submit on the LOUI.

17. Spark agrees with the Commission that it cannot be satisfied that the Merger would not have, or be likely to have, the effect of substantially lessening competition in the national broadband services and mobile markets.

18. Obviously Spark has already provided the Commission with significant volumes of evidence to date demonstrating why that is the case, and therefore it does not intend to re-traverse that evidence in detail in this submission. Instead, Spark wishes to use this submission to demonstrate that the Commission's concerns are:

(a) Consistent with the way Sky refers to its long-term exclusive sports rights holdings;

(b) Consistent with Vodafone's concerns expressed in overseas jurisdictions;

(c) Consistent with the approach that overseas competition regulators have taken in relation to the bottle-neck nature of pay-TV sports content;

(d) Particularly acute in New Zealand, vis-a-vis overseas jurisdictions, given:

(i) the inability of the Commission to accept behavioural undertakings in New Zealand;

(ii) the absence of any "anti-siphoning" or "designated events" broadcasting regulations in New Zealand, which means Sky can have a monopoly over <u>all</u> key premium sports content;

(iii) the ownership by Sky of both a pay-TV and FTA platform, which is unique internationally;

(e) Consistent with the approach that the Commission has taken in previous decisions, including where it has declined mergers that give rise to vertical foreclosure concerns;

(f) Consistent with the way the Sky and Vodafone's Explanatory Memorandum (**EM**) say the markets are likely to develop;

(g) Consistent with the ability and incentives that the merged Sky/Vodafone will have to foreclose competition post-Merger;

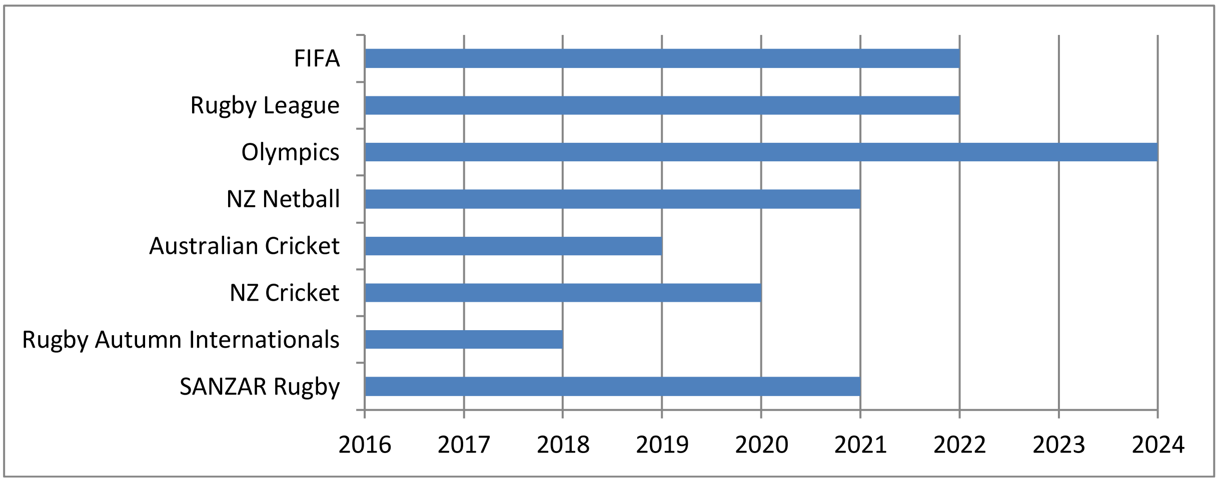
(h) Consistent with the impact that vertical foreclosure by the merged Sky/Vodafone will have on other retail telecommunication service providers (**RSPs**);

(i) Consistent with the test that the Commission is obliged to apply - i.e. before it clears a Transaction it must be satisfied that there is not a real chance (i.e. a substantial risk) of a substantial lessening of competition occurring. The Commission cannot be so satisfied in this instance.

THE COMMISSION'S CONCERNS ARE CONSISTENT WITH SKY'S OWN STATEMENTS

19. As the Commission identified, Sky has tied up exclusive rights to key sports content until at least 2020/21, as shown in the now familiar Figure 1 below.

Figure 1 - Sky's exclusive content rights for premium sports



20. The fact that these represent the "key sports" content for New Zealanders is reflected in Sky and Vodafone NZ's release to NZX announcing the Merger:[1]

> **All of New Zealand's key sports can be found live on SKY including Rugby, Rugby League, Cricket and Netball**. More than 350 sporting events are produced annually making SKY New Zealand's largest creator of local content. [Emphasis added]

21. Echoing Rupert Murdoch's description of sport being the "battering ram" of pay TV, which "absolutely overpowers film and everything else in the entertainment genre",[2] Sky has said that its exclusive holdings of rugby, rugby league, cricket are a "key factor in the retention and growth of its subscriber base".[3]

22. For example, in announcing its exclusive deal for NZ Rugby / SANZAR content through to 2021 Sky CEO John Fellet said:[4]

> “We are really pleased to have signed this agreement and are working hard to finalise the paper work. **Kiwis are madly passionate about rugby and nothing is more popular to watch than live All Blacks matches on SKY**. [Emphasis added]

[1] "SKY and Vodafone NZ merger to create a leading integrated telecommunications and media group in New Zealand" (media release, 9 June 2016). Accessed at https://www.nzx.com/files/attachments/237127.pdf

[2] Robert Milliken "Sport is Murdoch's 'battering ram' for pay TV" (16 October 1996) Independent. Accessed at: http://www.independent.co.uk/sport/sport-is-murdochs-battering-ram-for-pay-tv-1358686.html.

[3] *Investment Statement and Prospectus for the issue of bonds by SKY Network TV Limited* (11 September 2006). Accessed at http://www.chrislee.co.nz/modules/current_investments/pages/files/13-bonds-Sky%20TV%20-%20SKTFA.pdf .

[4] "SKY, NZ Rugby and SANZAR ink deal" (media release, 24 October 2014). Accessed at: https://www.sky.co.nz/-/mk_pressrelease_141024?eventId=?eventId=.

23. Similarly, in announcing its exclusive deal for NZ Netball content through to 2021, John Fellet said:[5]

> "This deal further cements SKY as the home of sport in New Zealand. **To have secured Netball on a long-term deal means we have locked in the big four; Rugby, Cricket, Rugby League and New Zealand's leading female sport, Netball**." [Emphasis added]

24. The above reinforces that the Commission is correct to identify that Sky's ownership of these key live sports content gives it market power in the retail and wholesale pay TV markets and the premium sports content market.

25. Furthermore, as noted in Spark's 12 August 2016 submission, this is a self-fulfilling (entrenched) source of market power due to the unique features of the pay TV / premium sports content markets (so-called the "vicious circle" effect).

26. This is reflected in the long-term nature of Sky's relationships with these key sports content holders, with those relationships extending back significantly beyond the entry into the current contractual commitments. For example:

(a) In relation to the current NZ Rugby / Sanzar contract, Sky said:[6]

> We've had the privilege of enjoying a long relationship with both SANZAR and NZ Rugby.

Reflecting this, NZ Rugby did not even put those rights out to open tender:[7]

> NZR did not feel the need to test the open broadcast market, having reached an agreement inside an "exclusive negotiation period" with Sky. That alone indicates it achieved the desired result.
>
> Other Sanzar territories were progressing, as planned.
>
> "We would have [gone to the market] if we thought it was beneficial for New Zealand Rugby and in the end we decided it wasn't," NZR boss Tew said.

(b) In relation to the current NZ Cricket contract:[8]

> **NZC and SKY have enjoyed a mutually beneficial relationship spanning 20 years**, and we're delighted cricket fans will continue to benefit from SKY's first-rate production and coverage for the next six seasons. [Emphasis added]

(c) In relation to the current NZ Netball contract:[9]

> **SKY has been the home of Netball in New Zealand since 2007** and this deal further cements Netball's standing in the New Zealand sporting landscape.

(d) In relation to the current Rugby League:

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[5] "SKY extends commitment to Netball NZ" (media release, 19 May 2016). Accessed at https://www.sky.co.nz/-/sky-extends-commitment-to-netball-nz?eventId=?eventId=.
[6] "SKY, NZ Rugby and SANZAR ink deal" (media release, 24 October 2014). Accessed at: https://www.sky.co.nz/-/mk_pressrelease_141024?eventId=?eventId=.
[7] Liam Napier "NZ Rugby and Sanzar ink new deal with Sky" (24 October 2014) Stuff. Accessed at: http://www.stuff.co.nz/sport/rugby/all-blacks/10658013/NZ-Rugby-and-Sanzar-ink-new-deal-with-Sky.
[8] "SKY TV & NZC sign long-term agreement" (5 August 2014) BlackCaps. Accessed at: http://www.blackcaps.co.nz/news-items/archive/sky-tv-nzc-sign-long-term-agreement.
[9] "SKY extends commitment to Netball NZ" (media release, 19 May 2016). Accessed at https://www.sky.co.nz/-/sky-extends-commitment-to-netball-nz?eventId=?eventId=.

> We are absolutely thrilled to let our customers know SKY will continue to be the home of Rugby League through to 2022. Working with both NZ and Australia Rugby League we will proudly deliver all the action to homes and devices through SKY and Fan Pass. **I've been looking through the archives and it's pretty incredible to know Rugby League has been on SKY since our first broadcast in 1990 every year right through to today. That's 26 years and it will be 32 at the conclusion of this new deal**. [Emphasis added]

27. Accordingly, if the Merger were to proceed there is little prospect of other RSPs being able to successfully bid for these key premium sports content rights when they expire - in particular given Sky would be vertically integrated across the pay TV markets, FTA markets, satellite distribution, cable distribution, broadband services, and mobile services - and so the Commission has correctly identified the control of this key sport content as a source of substantial market power, not just until 2022 but also beyond that.

THE COMMISSION'S CONCERNS ARE CONSISTENT WITH VODAFONE'S STATEMENTS OVERSEAS

28. As set out in Spark's 12 August 2016 submission, the Commission's concerns that Sky's control of key sports content will give rise to vertical foreclosure issues is consistent with Vodafone's statements overseas. In summary, Vodafone has said in numerous different regulatory forums overseas [emphasis added]:

    (a) live sports events "**have no close substitutes**";[10]

    (b) "sport stands apart due to its very specific characteristics... **sport appears to be uniquely placed to drive consumer choice in Pay TV services and beyond**";[11]

    (c) "**[t]he incentive for vertically integrated providers is different**. While there remains a degree of differentiation in the broadband and telephony elements that providers include in their bundles (in particular, broadband speeds), content is one of the most important ways in which providers differentiate their bundle from competing providers. Such **a foreclosure strategy, in which content is only distributed over the vertically integrated network, will be successful in case of content that is sufficiently compelling to drive a significant number of consumers to switch** ("ideally" the entire bundle). One of the key characteristics of such content is that it has no close substitutes, such as live sport events, where the consumer is interested in the coverage of a particular sport, league or team";[12]

    (d) "**(vertically integrated) broadcaster[s] are becoming new bottlenecks** and that the European Commission needs to do more to ensure the consumer has **access to events of major importance and similar premium content**, particular live sports events, and to enable distributors to offer this content in a consumer-friendly way";[13]

[10] 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.

[11] 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.

[12] 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.

[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:

(e) "given the rise in converged services, **content providers will be incentivised to leverage their rights of such 'key content' and limit distribution, in order to protect market share in adjacent markets**... 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;"[14]

(f) "[a]s network convergence becomes a reality, TV and video content is now provided not just over satellite or cable systems, but over a standard broadband connection. Audio visual content has driven the take up of 4G mobile services: convergence may soon be the norm. **Triple play and quad play consumer packages mean that the capacity of 'key content' to act as a significant driver of consumer choice influences not just the choice of Pay TV provider but the telecommunications services provider as a whole**";[15]

(g) while switching "may indicate the good deal that consumers are getting from bundled package in the short term... **when a driver of consumer choice, key content, is left largely unchecked, it can easily translate into a re-monopolisation of network services**";[16]

(h) "[t]hus for customers subscribing to bundles, **the variations in the price/quality between fixed line suppliers are not likely to have the same impact on their choice of bundle, as this is dominated by the exclusive availability of the content highly valued by these customers**. Accordingly, the market available for alternative suppliers is materially reduced".[17]

THE COMMISSION'S CONCERNS ARE CONSISTENT WITH INTERNATIONAL FINDINGS

29. Identifying Sky's control of key sports content as a source of market power that would harm competition in downstream markets is consistent with the concerns identified by regulators in numerous overseas decisions.

30. Accordingly, the Commission's concerns reflect international best practice and accepted antitrust analysis. For example:[18]

(a) In 2002, the Spanish Competition Authority (**SCA**) only cleared the merger of Via Digital and Sogecable on certain conditions, including that:

(i) Sogecable's premium football rights contracts must not exceed three years;

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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 8-9. Accessed at: http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/responses/Vodafone.pdf.

[15] 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.

[16] 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.

[17] Vodafone submission to "Public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services" (2 December 2015) at 31. Accessed at: https://www.vodafone.com/content/dam/group/policy/downloads/01_12_2015_DSM_Framework_Review_Vodafone_submission.pdf.

[18] "Summary of competition investigations involving pay TV in other jurisdictions" (18 December 2007) Ofcom at 5.5 onwards. Accessed at https://www.ofcom.org.uk/__data/assets/pdf_file/0029/53678/annex16.pdf.

(ii) Sogecable must not exercise or acquire exclusive rights for transmission of Spanish League and Copa del Rey matches over mobile and data transmission networks;

(iii) If Sogecable controls or acquires exclusive rights over Spanish League or Copa del Rey matches (and highlights) it is required to offer the rights for wholesale over FTA and pay-per-view TV;

(iv) Sogecable must not discriminate in the sale of its content in favour of the Telefonica Group, or against other RSPs.

(b) In 2003, the European Commission (**EC**) only approved the merger of *Newscorp/Telepiù,* which created Sky Italia, on conditions that:[19]

(i) Sky Italia waived any right of exclusivity over existing pay TV rights for premium sports;

(ii) Sky Italia must grant a unilateral right of termination for content rights holders of certain world-wide sports rights, and movie rights, among other content;

(iii) Sky Italia must limit new agreements for exclusive sports rights to a maximum of two years;

(iv) Sky Italia was obliged to offer offer premium channels on a non-exclusive, non-discriminatory and unbundled basis to third parties, for distribution on other platforms, with the wholesale price calculate on a "retail minus" principle;

(v) Sky Italia maintained accounting separation between its broadcasting, retail distribution and platform operations.

(c) In 2006, the Hungarian Competition Council only approved the merger of Chellomedia Programming B.V. and Sport1 TV Műsorszolgáltató Zrt, due to vertical foreclosure concerns, on the basis that Chellomedia agreed to grant access to the Sport1 TV channels (which were approximately 70% of the sports channels available in the Hungarian language) to third party broadcast distributors on a non-discriminatory basis until 2010;[20]

(d) In 2007, the EC only approved the merger of SFR (controlled by pay TV provider Vivendi) and Tele 2 (a RSP) on conditions including that Vivendi must offer its channels to other distributors on non-discriminatory basis including "in terms of commercial conditions (including possible joint offers), package content, broadcast quality (particularly, high-definition) assuming comparable and compatible technical conditions, and technical and security performance";[21]

[19] Case No COMP/M.2876 NEWSCORP / TELEPIÚ. Commitments outlined at 53. Accessed at http://ec.europa.eu/competition/mergers/cases/decisions/m2876_en.pdf.
[20] Márk Lengyel "'Must Offer' Obligation Imposed by the Competition Council" (13 September 2006) IRIS Merlin. Accessed at: http://merlin.obs.coe.int/iris/2006/9/article19.en.html.
[21] Case No COMP/M.4504 -SFR/Télé 2 France (18 July 2007). Accessed at: http://ec.europa.eu/competition/mergers/cases/decisions/m4504_20070718_20600_en.pdf

(e) In 2013, the OECD stated that:[22]

> **Access to premium content is a serious bottleneck and a source of market power**. In particular, premium sport events (*e.g.* Olympic Games or football matches) and new releases of movies, which have no substitutes, are essential to the successful functioning of pay TV providers.
>
> Barriers to accessing content can arise from the integration of content owners and broadcasters, exclusive contractual arrangements or from vertical foreclosures by a dominant firm. **Premium content may also have an impact on competition in other non-TV markets. For instance, in triple or quadruple play markets, content can increase the attractiveness of the package**.
>
> The success of entry into television broadcasting is moreover determined by the ability of new broadcasters to gain access to the content that consumers demand, and to differentiate their offering from that of incumbent broadcasters. Whereas technological convergence, and digitisation in particular, have gradually resolved the problem of spectrum and channel scarcity, convergence has not, as a matter of fact, had any direct impact on the provision of content. As there are only a few blockbusters and a limited number of premium sport events every year, content has consequently become scarcer, and has effectively become a new bottleneck in the broadcasting market.

(f) In 2013, the EC stated:[23]

> With respect to premium sports, in a large number of Member States **football rights qualify as must have content for media operators** (although in some countries other sports, such as ice hockey or basketball may be more important, depending on the national taste).

(g) In 2013, the Portuguese Competition Authority (**PCA**) found that Sport TV, (demonstrating it had the ability and incentive to do so) had abused its dominant position in the national market for premium sports pay-TV channels by imposing discriminatory contractual conditions (in particular in terms of price) with downstream pay-TV providers, in particular to favour the pay-TV operator, ZON Multimédia, that it had corporate links with.[24] This ruling was upheld by the Lisbon Court of Appeal.[25]

(h) In 2014, the PCA blocked a vertical merger between PT, ZON Optimus, and Controlinveste due to vertical customer and input foreclosure concerns - including the ability to foreclose their downstream rivals' access to must-have sports premium channels.[26]

(i) In 2015, as a condition of Telefónica receiving approval to acquire 56% of pay TV provider Canal+ España, the SCA required Telefónica, to make 50% of its premium channel content, including premium sports services centred on

[22] "Competition Issues in Television and Broadcasting 2013" Organisation for Economic Co-operation and Development. Accessed at: http://www.fne.gob.cl/wp-content/uploads/2014/03/OECD_2013-Competition-issues-in-television-and-broadcasting.pdf.

[23] "Competition Issues in Television and Broadcasting 2013" Organisation for Economic Co-operation and Development. Accessed at: http://www.fne.gob.cl/wp-content/uploads/2014/03/OECD_2013-Competition-issues-in-television-and-broadcasting.pdf.

[24] The Portuguese Competition Authority fines". Accessed at: http://www.academia.edu/8604242/The_Portuguese_Competition_Authority_fines

[25] "Portuguese Competition Authority's decision against Sport TV confirmed by Lisbon Court of Appeal " (17 March 2015) Autoridade da Concorrência. Accessed at http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/Pressrelease_201504.aspx.

[26] Mariana Lameiras & Helena Sousa "Competition Court Upholds Regulator's Decision on Sports Broadcaster" (1 April 2015) IRIS Merlin. Accessed at: http://merlin.obs.coe.int/iris/2015/4/article22.en.html.

Spanish top-tier football; Formula One motor-racing; Moto GP; international basketball; and coverage of the Olympic Games, available at wholesale to rival pay TV providers.[27]

(j) In 2015, the OECD noted:[28]

> While bundling services may make economic sense for communication providers, **economic literature provides evidence that bundles can be used to substantially limit competition**: some market players may face constraints to replicate products and services **if they do not have access to some important inputs that act as network bottlenecks or content** (e.g. local loops, wireless access, competitive interconnection **or the most popular television content, such as the rights to offer sports and movies**). [Emphasis added]

(k) In 2016, the Swiss Competition Commission (**COMCO**) fined Swisscom for abusing its dominant position "particularly with respect to live broadcasting of Swiss football and ice hockey championship games on pay TV" by refusing to supply competitors with broadcasts of live sports for their platforms, or only granted access to a reduced range of sports content. Additionally, Swisscom's competitors were only able to offer the sports content as part of a bundle with the basic package.[29]

(l) The ACCC, in its new 2016 draft Media Merger Guidelines, stated:[30]

> Compelling, premium or key content is content that is likely to attract significant numbers of consumers. Premium content can allow providers to implement cross promotions and 'lead-in' strategies, leading to a ratings 'halo' effect that increases the provider's ratings overall.
>
> **The ACCC's past reviews have found that live sports content, in particular premium sports, is an extremely important part of a free-to-air network and a pay-TV provider's program offering due to the higher ratings it achieves, and the fact that viewer interest in major sports is generally focused on live content**.
>
> ... **The ability of existing suppliers to control access to compelling content can create a barrier to entry and expansion, as it can hinder the ability of suppliers that do not have access to this content to grow and compete**. [Emphasis added]

31. As such, accepting Sky and Vodafone's assertions that control of this key sports content does not give rise to market power and downstream vertical foreclosure concerns would run counter not only to the evidenced market dynamics in New Zealand but would also make the Commission an outlier in the international antitrust community.

THE CONCERNS ARE PARTICULARLY ACUTE IN NEW ZEALAND

32. The above demonstrates that the foreclosure effects of a vertically integrated entity controlling premium sports content have been identified in a number of jurisdictions. Even in comparison to these other jurisdictions, the vertical foreclosure concerns arising from

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[27] "Telefónica closes Canal+ Spain acquisition" (1 May 2015) Digital TV Europe. Accessed at: http://www.digitaltveurope.net/360992/telefonica-closes-canal-spain-acquisition/.

[28] http://www.oecd-ilibrary.org/docserver/download/5js04dp2q1jc.pdf?expires=1478592686&id=id&accname=guest&checksum=CE095257F736C9A340BEEA7A99745AAD

[29] "COMCO sanctions Swisscom with respect to live sports broadcasting on pay TV" (24 May 2016) COMCO. Accessed at: https://www.weko.admin.ch/weko/en/home/latest-news/press-releases/nsb-news.msg-id-61823.html

[30] Australian Competition and Consumer Commission *Media Merger Guidelines* (draft) (August 2016) at 52, 53, and 58. Accessed at https://consultation.accc.gov.au/mergers-and-adjudication/draft-media-merger-guidelines/supporting_documents/Draft%20Media%20Mergers%20Guidelines.pdf.

the Merger are more acute in New Zealand due to various unique attributes of New Zealand:

(a) Unlike most other developed jurisdictions, the Commission cannot accept a behavioural undertaking from Sky/Vodafone to resolve the vertical foreclosure concerns;

(b) Unlike most other developed jurisdictions around the world, there are no "anti-siphoning" or "designated events" broadcasting regulations to prevent a single broadcaster from monopolising the acquisition of sports content in New Zealand. This means that Sky's monopoly of key sports content is a true monopoly of all key sports content; and

(c) Unlike most other developed jurisdictions, Sky is not only New Zealand's incumbent dominant pay-TV provider, it is also integrated into the FTA market through its ownership of Prime. This means that when Sky is bidding for premium sports content, it can (i) provide rights holders with a guarantee of showing FTA as well as pay TV coverage (if having the sport shown FTA is an objective of the rights holder), and (ii) build in advertising revenue from both subscriber and FTA (and often also pay TV) channel advertisements, in addition to subscription revenues, to further ensure it outbids all other bidders for almost all premium sports content across both pay TV and FTA platforms.

THE COMMISSION'S CONCERNS ARE CONSISTENT WITH THE COMMISSION'S PREVIOUS DECISIONS

33. The Commission's concerns are also consistent with its previous decisions. The NZCC previously concluded, in 2013, that Sky has a substantial degree of market power:[31]

> Sky is likely to have a substantial degree of market power (SMP) in the pay TV market. Sky's share of the supply of the pay TV market has been close to a monopoly for a sustained period of time, and new entrants face significant barriers to entry that they must overcome.

34. For the reasons outlined above, and in Spark's 12 August 2016 submission, the emergence of SVOD providers such as Lightbox and Netflix has not diminished that market power. It is well recognised that such SVOD services are complements to, not substitutes for, full service pay-TV services such as Sky that control premium sports content,[32] as demonstrated by the significant price difference in New Zealand between Sky's Basic + Sky Sport package in comparison to other SVOD services.

35. The Commission's *Mergers & Acquisition Guidelines* set out that a merged firm will have the ability to "foreclose competitors if it has market power at one or more level(s) of the supply chain." That is evidently the case in this instance for the reasons set out above.

36. The Commission's *Mergers & Acquisition Guidelines* then go on to say that a firm will rationally foreclose competitors if it is profitable to do so. That is also the case in this instance, for the reasons set out below.

37. Reflecting this, the Commission has previously declined a number of proposed mergers due to vertical foreclosure concerns. For example:

(a) The Commission declined the proposed Waste Management / Waste Care merger in 1999 due to concerns that the merged entity would control a significant

[31] New Zealand Commerce Commission "Investigation Report on Sky TV contracts" (8 October 2013) at [27].

[32] Gideon Spanier "Netflix: Effect of video streaming boom on pay-TV subscriptions 'greatly exaggerated' " (6 January 2015) Independent. Accessed at:http://www.independent.co.uk/news/business/news/effect-of-netflix-boom-on-pay-tv-subscriptions-greatly-exaggerated-9959451.html.

share of collected waste, and would then direct the waste to its landfills at the expense of other downstream landfill competitors (i.e. vertical input foreclosure concerns).[33] The Commission only subsequently cleared that merger, when the parties reapplied, after undertaking to divest "certain contractual rights that would facilitate the availability of waste volumes to landfills not owned or operated by Waste Management."[34]

(b) The Commission declined the proposed Transpacific Industries Group (TPI) / EnviroWaste Services Limited merger on the basis that the merged entity would control such a volume of the waste streams that it would prevent a new refuse transfer station entrant entering the market.[35]

38. The Commission's concerns in this instance also mirror, almost word-for-word, the Commission's articulation of the circumstances in which conglomerate effects can arise:[36]

> Foreclosure arises differently in a conglomerate merger than in a vertical merger. For example, a merged firm may provide bundled discounts where customers buy products together rather than separately, or may refuse to sell one product to customers unless they also buy a second product from it (tying).

39. In particular, the Commission has previously concluded that conglomerate effects concerns can arise where a merged entity has market power in one product that makes up the overall bundle,[37] which is of course the case here.

40. Accordingly, the Commission's decision to block the Merger will be entirely consistent with its previous practice and findings.

THE COMMISSION'S CONCERNS ARE CONSISTENT WITH THE WAY THE MARKETS WILL DEVELOP

41. The Commission has correctly identified that as UFB is rolled out the opportunity to retransmit Sky over fibre will increase. This transition has long been signalled by Sky, for example with its CEO, John Fellet, stating:

(a) In 2009:[38]

> In the 1990's analogue UHF was the best way, during the last ten years it was satellite, in the future, broadband will most likely be the best way to distribute both linear and pay-per-view content

(b) In 2013:[39]

> At SKY we are backing ultra-fast broadband to play an increasingly important role in the future to deliver quality video content to our customers.

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[33] Decision No. 355 *Waste Management NZ Limited / Waste Care Limited* (14 May 1999).
[34] "Commission clears Waste Management to acquire Waste Care subject to divestment" (media release, 9 June 1999). Accessed at: https://comcom.govt.nz/the-commission/media-centre/media-releases/detail/1999/commissionclearswas.
[35] Decision No 604 *Transpacific Industries Group (NZ) Limited / Ironbridge Capital Pty Limited* (30 May 2007)
[36] Para 5.13.
[37] Decision No. 406. *Lion Nathan Ltd / Montana Group (NZ) Ltd.* (8 December 2000).
[38] "Sky Welcomes Govt Ultra-Fast Broadband Initiative" (media release, 21 September 2009) Scoop. Accessed at: http://business.scoop.co.nz/2009/09/21/sky-welcomes-govt-ultra-fast-broadband-initiative/.
[39] "SKY backs UFB Future" (media release, 21 October 2013). Accessed at: https://www.sky.co.nz/-/mk_pressrelease_131030.

42. The time for this transition has arrived, with the Government aiming to have 97.8% of New Zealanders with access to faster broadband, either UFB or RBI, by 2019,[40] hence the Sky / Vodafone EM in describing the rationale for the merger, stating that "Sky, and the entire media industry, is at a crossroads":[41]

> The growing consumption of media and entertainment services over the internet has permanently changed viewing behaviours, and requires greater ability to deliver content in new and innovative ways.
>
> …
>
> **The Proposed Transaction is also ideally timed to take advantage of the increasing demand for digital content and New Zealand's national roll-out of UFB**. [Emphasis added]

43. Similarly:

(a) Vodafone stated in its 11 September 2016 response to submissions that "fibre [is] likely to become the key channel for delivering content in the future";[42]

(b) John Fellet has stated, in response to being asked whether the Merger would remove Sky's need to satellites:[43]

> We're locked into our current satellite deal until 2021, so there'll be no movement ahead of that but one of the advantages of this deal is that it **gives us access to Vodafone's expertise in UFB and we certainly have plans to roll out internet-only packages to homeowners**. [Emphasis added]

44. The Commission has also correctly identified that this transition to UFB will lower Sky's costs of distribution. Again that development was signalled in the Sky / Vodafone EM:

> Whereas for a standalone Sky TV the rollout of the UFB is principally a threat (because it facilitates consumer access to competing OTT services), **for the Combined Group it will provide an opportunity to lower distribution costs and deliver new products using Sky TV's content in different ways**. [Emphasis added]

45. As the Commission has correctly identified, those lower costs of distributing content via UFB (in comparison to satellite) will mean the merged Sky / Vodafone will be earning a greater margin on its Sky Sports service and, therefore, it will have an even greater ability to lower its triple and quad-play bundle prices to consumers, while keeping the standalone Sky Sports service the same price, to attract an even greater proportion of consumers to its services.

46. The Commission has also correctly identified that, while multi-play TV + broadband or mobile services, are not that common in New Zealand to date, such bundling is likely to significantly increase if the Merger were to proceed to due to the ability of the combined Sky/Vodafone to change the relative price between purchasing products on a standalone or bundled basis. Indeed, the ability to significantly grow New Zealanders' purchases of such multi-play bundles was identified in the Sky/Vodafone EM as a key rationale for the Merger:

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[40] *June 16 Broadband Deployment Update* Ministry of Business, Innovation and Employment. Accessed at: http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/fast-broadband/documents-image-library/june-2016-quarterly-broadband-deployment-update.pdf.

[41] Sky Network Television Limited "Notice of Meeting and Explanatory Memorandum Relating to the Merger of the Businesses of SKY and Vodafone NZ" at 4.

[42] At paragraph 7.9.

[43] Damien Venuto "Sky and Vodafone executives answer questions on the proposed merger" (10 June 2016) StopPress. Accessed at: http://stoppress.co.nz/news/sky-and-vodafone-executives-answer-questions-proposed-merger.

> The Combined Group will be able to **cross-sell** a much broader range of services across the Sky TV and Vodafone NZ subscriber bases, reduce subscriber churn through bundled service offerings, and deliver incremental revenue through new offerings
>
> …
>
> **The Combined Group will be able to sell bundled fixed line and mobile, pay television and internet packages more effectively than either business under the existing alliance arrangements**. [Emphasis added]

47. Indeed, the reason that New Zealand currently has triple-play pay TV + broadband bundle penetration that is less than half of many other developed markets is because:

    (a) Sky has an exclusive monopoly over all the key sports content (i.e. it controls the "battering ram" of pay TV); and

    (b) Sky has refused to provide wholesale supply to its content to other RSPs on terms that make economic sense (i.e. a constructive refusal to deal by a firm with market power).

48. It is inevitable that New Zealand consumers' purchasing of multi-play bundles would significantly increase to match, and more likely exceed, the multi-play bundle penetration of other developed markets in circumstances where the combined Sky/Vodafone could, and would (indeed that is the stated key rationale for the Merger), provide incentives for consumers to purchase multi-play bundles from Sky/Vodafone. Again the EM speaks well to the difference between Sky's incentives in the status quo and if the Merger were to proceed:

> While SKY and Vodafone NZ have existing commercial partnerships to enable the cross-marketing and joint marketing of services across their respective businesses, **SKY does not consider that these initiatives are as effective as they will be in a single, integrated entity with a common ownership and strategic objectives**. [Emphasis added]

49. Spark also agrees with the Commission's view that the process of switching to UFB will provide an even greater ability of the merged Sky/Vodafone to attract greater number of consumers to its triple / quad-play bundles. As the Commission noted its in 2012 *High speed broadband services demand side study*, the control of content will be a key factor driving consumers' decisions to adopt 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**. [Emphasis added]

50. At present, approximately ~23% of consumers with access to UFB have switched to UFB.[44] This is expected to increase to 53% by 2020. Given access to content is a key driver for switching to UFB, and as those consumers will likely be considering alternative RSP offerings in switching to UFB (i.e. it is "switching event"), 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 - in particular given "long form content "is likely to have been the driver behind them making the decision to switch to UFB.

51. In addition, the Commission has also correctly identified that merged Sky/Vodafone will have even greater incentive to foreclose other RSPs' access to Sky's key sports content

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[44] *June 16 Broadband Deployment Update* Ministry of Business, Innovation and Employment. Accessed at: http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/fast-broadband/documents-image-library/june-2016-quarterly-broadband-deployment-update.pdf.

if the merged Sky/Vodafone considers it will also be able to capture margins on mobile customers via that strategy. Again all industry literature, including the Sky/Vodafone EM and Vodafone statements elsewhere (see paragraph 28 above), demonstrates that Sky/Vodafone is very likely to have the ability to also capture additional mobile revenue by adopting an input foreclosure strategy.

52. Firstly, 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 - for example:

(a) As noted by Cisco:[45]

> Today's video consumer likes to watch things whenever they want wherever they are – and they don't take kindly to restrictions – which is why mobile devices are so prevalent in the modern world. Watching video on mobile devices in surging immensely, so users and providers need to be prepared for some serious data plan upgrades.
>
> <u>The immense rise of mobile video</u>
>
> Mobile video consumption is incredibly popular right now, and it is only expected to get stronger by the end of the year and beyond.
>
> In fact, according to a recent report by Cisco, three-fourths of the world's mobile data traffic will be video by 2020. Mobile video will rise 11-fold between 2015 and 2020, making up 75 percent of total mobile data traffic by the end of the forecast period. An astonishing rate of growth.

(b) As noted by Strategy Analytics:[46]

> **From 2015 to 2020, quad-play revenues for U.K. service providers will triple, while total multiplay market revenues grow by 34 percent**, according to research from Strategy Analytics. The research firm also sees double-play subscriptions peaking in 2016 and beginning to decline as customers move to triple and quad-play bundles. **By 2020, quad-play will account for more than 21 percent of bundled subscriptions in the U.K., Strategy Analytics predicts**. [Emphasis added]

53. The Sky/Vodafone EM reflects this proliferation:

> Importantly, it will also provide SKY with a greater ability to benefit from the switch of content distribution from traditional broadcast platforms to alternative platforms including fixed and **mobile broadband**. The Combined Group will benefit from a constantly growing demand for mobile data, driven by the proliferation of smartphones and the switch to fourth generation mobile telecommunications technology (commonly known as '4G'). [Emphasis added]

54. Reflecting this, the ability of the Merger to enable the merged Sky/Vodafone to achieve additional mobile content consumption revenues as been stated as one of the "significant" opportunities for the merged entity:

> **The Board also expects that there are significant opportunities for the Combined Group to generate additional revenue synergies through the monetisation of entertainment content on mobile devices**, which have not been included in the estimated NPV of synergies discussed above. Throughout the world, increased smart-phone penetration and higher mobile data speeds

[45] Benedicte Guichard "Mobile Video Growth Has an Impact on Bandwidth Usage Patterns" (5 August 2016) Cleeng. Accessed at: https://cleeng.com/blog/mobile-video-growth-bandwidth-consumption-patterns/.
[46] Laura Hamilton "U.K. Multiplay Bundles on the Rise, Research Firm Reports" (29 July 2016) CED. Accessed at: https://www.cedmagazine.com/news/2016/07/uk-multiplay-bundles-rise-research-firm-reports.

> show a clear trend towards greater consumption of entertainment content on mobile devices, which is in turn resulting in increased mobile data usage and higher data spend by mobile users. This trend is expected to present additional revenue synergy opportunities for the Combined Group.
>
> …
>
> As viewing behaviours continue to shift to mobile platforms the Board expects that **there will be significant opportunities for the Combined Group to generate additional revenue synergies through the monetisation of entertainment content on mobile devices**.
>
> …
>
> The Board also expects that there are significant opportunities to generate additional revenue synergies (in addition to the $435 million referred to above) **via the monetisation of entertainment content on mobile devices that have not been included in the estimated NPV of revenue synergies described above**. **Throughout the world, the increased penetration of smart-phone devices and higher mobile data speeds has resulted in a clear trend towards greater consumption of entertainment content on mobile devices, which is in turn resulting in increased mobile data usage and higher data spend by mobile users. This trend is expected to present revenue synergy opportunities for the Combined Group as viewing behaviours continue to shift to mobile platforms**. There is evidence in other markets throughout the world that these opportunities are already being pursued by mobile and content providers. [Emphasis added]

55. The only way for the merged entity to achieve those "significant … revenue synergies through the monetisation of entertainment content on mobile devices" through the merger would be to foreclose access to that content to other mobile operators, or otherwise provide incentives for consumers to only view such content on the Vodafone network (e.g. zero-rating as part of a broader quad-play bundle). Absent such exclusionary tactics, the forecasted exponential growth in mobile video consumption would be shared equally across mobile networks, and that growth could not be claimed as a merger specific revenue synergy.

56. Accordingly, Spark agrees with the Commission (and Sky and Vodafone's own statements) that viewing content on mobile devices will become an increasingly important revenue stream for RSPs in the future and, therefore, increase the potential for the merged Sky/Vodafone to foreclose competitors through bundling content in a way that other RSPs cannot match.

57. In addition, as a second way of achieving additional mobile revenue via the Merger, the EM sets out that the Merger is intended to enable the merged Sky/Vodafone to significantly grow its quad-play revenues:

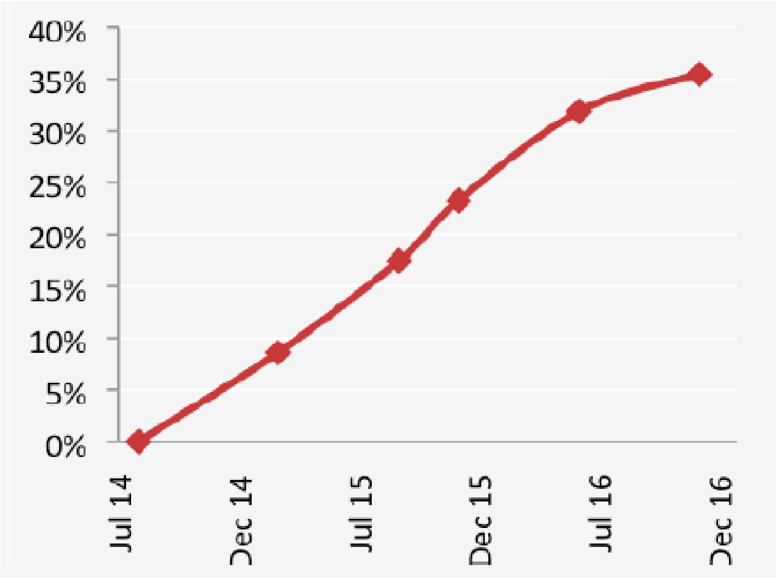
> The Combined Group will have the opportunity to optimise the packaging and cross-marketing of media and entertainment, and telecommunications services to create attractive packages for customers. This potential includes multi-play offerings combining **mobile**, fixed (including voice and broadband), traditional pay television and other digital content offerings (including OTT content services).
>
> …
>
> The Combined Group will be able to sell bundled fixed line and **mobile**, pay television and internet packages more effectively than either business under the existing alliance arrangements. Subscribers for these bundled packages are typically much “stickier” than subscribers to a single product (e.g. pay television or mobile phone)

58. The ability of quad-play bundles to win significant consumer numbers can be seen overseas. For example just last month commentators were observing the significant success of Telenet's new quad-play bundle in Belgium:[47]

> Liberty Global-owned Telenet has signed up almost 100,000 customers to its WIGO quad-play offering in the first three months since the service launched.
>
> WIGO had 99,900 customers at the end of September, after launching at the end of June. Telenet describes WIGO as its first all-in-one converged offering. The growth of its base took Telenet's quad-play penetration to 23% of its cable customers base.

59. Similarly, SFR in France has had significant success with its quad-play bundle, as reflected in Figure 2 below:

Figure 2 - Quad-play as a portion of total SFR broadband customers[48]



60. It has been said that one of the reasons for the significant rise of such bundles is that vertically integrated operators make it increasingly difficult to buy the components of the bundle on a standalone basis:[49]

> One reason for the rise of bundles is that operators increasingly make it difficult (or even impossible) to buy components on a standalone basis. For example, a consumer visiting the SFR website and selecting 'ADSL & Fibre' is presented with triple play offers. A standalone broadband offer is available, but it is 'below the fold' (at the bottom of the web page, with a scroll-down required to find it in a default browser view). It also occupies roughly one-eighth the screen 'real estate' of the triple play offers. As a consequence, it is extremely easy to miss even if you're looking for it.

61. The merged Sky/Vodafone will have such incentives post-Merger, and will inevitably use such tactics on either its Vodafone and Sky websites to drive consumers to triple or quad-play bundles.

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[47] "telenet hails success of converged quad-play" (27 October 2016) digitalTVeurope.net. Accessed at: http://www.digitaltveurope.net/620782/telenet-hails-success-of-converged-quad-play/.
[48] Vivendi and SFR financial reports. Accessed at: http://www.ccianet.org/wp-content/uploads/2013/10/Consumer-Lock-In-For-Fixed-Broadband.pdf.
[49] Robert Kenny & Aileen Dennis *Consumer lock-in for fixed broadband* (5 September 2013) Communications Chambers. Accessed at http://www.ccianet.org/wp-content/uploads/2013/10/Consumer-Lock-In-For-Fixed-Broadband.pdf.

62. The corollary of the significant success that these quad-play bundles can have for the operators that can provide is the significant detriment that they are having of the other mobile operators that cannot provide them:[50]

> Ovum said **the popularity of quad-play services in Europe has been damaging for pure-play mobile operators, which tend to be the smallest operators in their respective markets**.
>
> According to Mark Newman, chief research analyst at Ovum, latest research from the company indicates that smaller mobile operators often have only 5–7 per cent of the combined national mobile and broadband market. Ovum's analysis of 10 markets includes eight European markets that have -- or had until recently -- four mobile operators.
>
> "**Even though most are still growing their share of the mobile market, they are excluded from the big-ticket bundled services and experience higher rates of churn than their competitors because of the relative ease with which consumers can switch mobile providers**," Newman said in a research note.
>
> Quad-play, which refers to the tactic of bundling four different services such as mobile voice and data, TV, fixed voice and fixed broadband and offering them as a single package to subscribers, has been adopted with enthusiasm across Europe. France and Spain were among the earliest markets to offer multi-service plans but quad-play offers can now be found in Portugal, the Netherlands, Italy Germany, Greece and many more markets.
>
> **Newman noted that convergent offers now account for more than 50 per cent of new business in many European countries. Incumbent operators, which in most cases are the largest providers of retail mobile and retail broadband services, have led the multi-play market for that very reason** [Emphasis added]

63. **[**

64. **]** It suggests that the incentives on the merged entity to substantially limit access to lower costs and reduce innovation will increase.

65. Spark also agrees with the Commission's concerns that the merged Sky/Vodafone will be able to attract a significantly higher ARPU through its triple/quad-play bundles vis-a-vis other RSPs. This is for two reasons:

    (a) In Spark's experience, the prevailing demographic of Sky Sport subscribers tend to be older and wealthier than other consumers and, therefore, are on average significantly higher ARPU customers in both broadband and mobile than other consumers.

    (b) Irrespective of any differences in demographics, the Merger will drive higher ARPU for the merged Sky/Vodafone at the expense of other RSPs who will not be able to offer triple or quad-play bundles (or not at competitive levels) due to the incentive on Sky/Vodafone to drive all triple and quad-play customers to their own offer, for example:

[50] Anne Morris "Ovum: Popularity of quad-play 'damaging' for pure-play mobile operators" (22 April 2016) FierceWireless. Accessed at: http://www.fiercewireless.com/europe/ovum-popularity-quad-play-damaging-for-pure-play-mobile-operators.

(i) As noted by Communication Chambers:[51]

> Bundling - combining multiple communications services from a single supplier – is attractive both to telcos and to consumers. **For telcos it means the cost of the physical connection to the customer can be shared across more services. It increases ARPU (average revenue per user) and, as we will see, reduces churn**. [Emphasis added]

(ii) As noted by Morningstar last month in respect of Orange:[52]

> We view Orange as one of the prime beneficiaries of the movement to converged services (the merging of the traditional triple play of fixed-line telephony, broadband, and pay television with wireless telephony). **Convergence leads to lower churn and more-valuable customers**. [Emphasis added]

66. Accordingly, the evidence demonstrates that:

(a) There will be a significant increase in consumer purchasing of multi-play bundles in both the factual and counterfactual:

(i) In the factual this will occur (a) due to the increasing uptake of UFB and increasing consumer preference for internet/mobile delivery of content, and (b) as the merged Sky/Vodafone will have the ability and incentive to increase the price (or lower the quality) of the standalone Sky service, and/or decrease the price of Sky/Vodafone triple/quad-play bundles, to drive consumer uptake of multi-play bundles;

(ii) In the counterfactual this will occur (a) due to the increasing uptake of UFB and increasing consumer preference for internet/mobile delivery of content, and (b) as Sky will have increasing incentives to enter commercially viable wholesale agreements with a range of third party RSPs, such as Spark, Vodafone, 2Degrees etc, to reach as many consumers as possible as consumers increasingly move from satellite delivery of content to internet/mobile delivery;

(b) This will include significant growth not only in triple-play bundles, but also quad-play bundles; and

(c) Viewing long-form video content, such sports content, on mobile devices, and the data consumption associated with it, will become an ever increasing revenue stream for RSPs in the future.

67. As such, the Commission is correct to identify that the merged Sky/Vodafone will have both the ability, and the incentive, to foreclose access to its key content to other RSPs by making wholesale supply terms unattractive, including by lowering the price of its own bundled offers and/or increasing the price of standalone Sky Sport, in order to:

(a) Significantly grow its own broadband market share to achieve additional retail margin on broadband services itself through triple-play bundles - in particular as the popularity of triple-play bundles increase due to the roll-out of UFB and the

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[51] Robert Kenny & Aileen Dennis *Consumer lock-in for fixed broadband* (5 September 2013) Communications Chambers. Accessed at http://www.ccianet.org/wp-content/uploads/2013/10/Consumer-Lock-In-For-Fixed-Broadband.pdf.

[52] http://analysisreport.morningstar.com/stock/research/c-report?t=XNYS:ORAN&region=usa&culture=en-US&productcode=MLE&cur=

merged Sky/Vodafone can take advantage of that switching even to direct significant numbers of broadband consumers to its multi-play offer; and

(b) Significantly grow its share of retail mobile margins, including by taking advantage of that key sports content to drive as much mobile data traffic to its own network and achieve significant uplift in quad-play bundles to significantly grow its mobile market share as well. Given both quad-play bundles, and mobile consumption of long-form video content, is only expected to increase exponentially over the next five years, Sky/Vodafone's incentives to achieve such mobile uplift will also increase significantly.

INCENTIVES OF SKY/VODAFONE POST-MERGER

68. The above demonstrates that the incentives on the merged Sky/Vodafone to foreclose other RSPs' access to its key content will only increase in the future.

69. The merged Sky / Vodafone's incentives have been succinctly summed up by Vodafone in another context:[53]

> Content is not only increasingly sold in bundles, with the same company supplying content and connectivity to end users, but also increasingly owned by the distributor ... **Consequently, content is more and more sold exclusively to customers of the distributor's own distributing services, e.g. broadband, or, if available to other customers, at less attractive conditions both in terms of quality and price**. [Emphasis added]

70. That these will be incentives of the merged Sky / Vodafone is consistent with conventional economic literature in these markets. For example, as noted by the OECD in 2015:

> Rey and Tirole (2006) say that firms may choose to bundle a "competitive" final good with a "bottleneck good" (i.e. the standalone good where the firm dominates the market) to engage in horizontal foreclosure. In this sense, this behaviour can be considered predatory because, even if it involves offering the bundle at a discount and lowering current profits, the firm is seeking to lower competitor's profitability so it eventually exits the market, taking advantage of its dominant position in one market ("the bottleneck good"). Furthermore, operators may artificially alter prices charged for each of the stand-alone services (e.g. by selling them below average costs), which may lead to price squeeze or lack of replicability of the bundled offers by potential competitors.
>
> In addition, vertical foreclosure (i.e. denying competitors full access to a "bottleneck" input, as defined by Rey and Tirole, 2006), could also arise if alternative service providers cannot access all wholesale inputs necessary to deliver the bundled service. In this sense, the owner of the inputs (e.g. **television content**, local loop, mobile airtime, etc.) would be in a position to defend its market power over adjacent service markets.
>
> Many European communication regulators have expressed concerns about the lack of replicability of bundles by all players. In fact, the European Regulators Group (ERG) document on the replicability of bundles (ERG, 2009a) already mentioned that **video content and services were the main elements raising doubts about the replicability of these packages** (55.6% and 44.4 % respectively).3 In 2007, Oxera prepared a report for the Irish regulator Comreg, which included a decision framework for regulators to assess whether bundles would be replicable through retail-minus wholesale inputs (Oxera, 2007). In addition, the BEREC report on the impact of bundled offers on retail and wholesale market definition (2010) mentions that regulators consider that **the most likely source of competitive distortion in bundles is when rivals don't**

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[53] 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.

> **have access to television content and are thus unable to offer triple play** (BEREC, 2010b). For example, some competition authorities and regulators in OECD countries (e.g. France, United Kingdom and the United States) **have recognised the importance of access to television content as an input in order to foster competition**. [Emphasis added]

71. Sky/Vodafone's incentives will be to take advantage of Sky's monopoly over key premium sports content to:

    (a) Achieve as much retail broadband revenue as possible; and

    (b) Achieve as much mobile revenue as possible - including via monetising the driving of additional mobile data volume and by picking-up additional mobile accounts through the increased prevalence of quad-play bundles.

IMPACT OF VERTICAL FORECLOSURE

72. [

    ]

73. In particular, as previously advised to the Commission, Spark estimates that approximately 40% of all broadband customers in New Zealand are also Sky Sport subscribers.

74. These 40% of households represent:

    (a) Consumers with a high willingness to pay for premium sports content - it is a key element of their entertainment / social experience; and

    (b) Consumers that, typically, have a higher ability to pay for value-add services and add-ons - i.e. they are high ARPU consumers.

75. Given the importance that these consumers place on purchasing premium sports content (refer to paragraph 8 - e.g.: "*Kiwis are madly passionate about rugby and nothing is more popular to watch than live All Blacks matches on SKY*"), [

    ] in response to the various levers that Sky/Vodafone could pull to incentivize such switching - in particular, for consumers approaching "switching events" such as switching to UFB.

76. The merging parties have already started promoting bundles more heavily even though these are unlikely to be as profitable for the separate entities at this stage. [

    ]

77. That there will be [ ] is reflected in the fact that Sky/Vodafone are claiming $435m in merger revenue synergies, with a key area for such synergies being "sales from cross-marketing of services between Vodafone NZ and SKY", as well as "significant opportunities to generate additional revenue synergies (in addition to the $435 million referred to above) via the monetisation of entertainment content on mobile devices". As outlined to the Commission previously, in the context of the pay TV market where Sky is already leveraging its market power to the greatest extent permissible, Spark cannot see where an additional $435m plus of synergies can come from without leveraging that market power into the mobile and broadband markets to [ ] through a combination of increasing the price of the standalone Sky Sport service, decreasing the price of Sky/Vodafone multi-play bundles, and ensuring that wholesale

content terms to other RSPs are sufficiently unattractive to be unviable alternatives (i.e. largely reflecting Sky's approach to wholesaling to date).

78. In response to the questions posed by the Commission, Spark [

]:

(a) [ ]

(b) [ ]

(c) [ ]

79. [ ]

80. [ ]:

(a) [ ]

(b) [ ]; and

(c) [ ]

81. Accordingly, Spark agrees with the Commission's concerns that the Merger is likely to substantially lessen competition in the national broadband and mobile markets. That finding is consistent with regulator decisions overseas in this industry, economic literature, Vodafone's statements overseas, and the Commission's previous findings in respect of Sky's market power and other mergers that gave rise to vertical foreclosure concerns.

82. In comparison, in the counterfactual, as previously advised to the Commission Sky will have increasing incentives to wholesale to a range of different RSPs on commercially viable terms. That will drive dynamic triple-play and quad-play bundle competition between a range of different RSPs, introducing new and dynamic content package competitions in the broadband and mobile markets. In addition to the detrimental effects of other RSP's ability to compete in the broadband and mobile markets vis-à-vis the status quo, that dynamic triple and quad-play content bundle competition will be lost as a result of the Merger.

THE COMMISSION'S CONCERNS ARE CONSISTENT WITH THE TEST IT IS OBLIGED TO APPLY

83. In light of all the above, Spark agrees that the Commission cannot be satisfied that the Merger is not likely to substantially lessen competition.

84. As the Commission will be familiar:

(a) The Commission may only clear a transaction if it **satisfied** that a substantial lessening of competition is not likely.

(b) The onus is of course on the applicants to satisfy the Commission, on the balance of probabilities, and in light of all the evidence available to the Commission, a substantial lessening of competition is not likely. If there is **doubt**, then the Commission must decline the application.

(c) The Court of Appeal has stated that a "failure to exclude **a real chance** of a substantial lessening of competition"[54] will mean the Commission is "in doubt" about whether there will be a substantial lessening competition, and therefore must decline the merger.

85. For the reasons set out in this submission, and Spark's previous submission and information response, the applicants have not provided any evidence that comes anywhere close to ruling out the **real chance** or **substantial risk** of a substantial lessening of competition occurring. To the contrary, Spark submits that the evidence, consistent with regulator practice overseas and economic literature, demonstrates that a substantial lessening of competition in both the broadband and mobile markets is the very likely (inevitable) outcome from the merger. In fact, the EM demonstrates that the gains from leveraging Sky's dominant position into the mobile and broadband markets is Sky and Vodafone's motivation for the Merger.

CONCLUDING COMMENTS

86. A quote from Sky and Vodafone's EM succinctly captures the problematic competitive effects that will arise from the Merger - including the vertical foreclosure and conglomerate effects, the fact that Sky has "must have" premium sports content, and will be able to take advantage of that market power over premium sports content to achieve significant market share gains in downstream markets - in particular in UFB in the broadband market:

> The Proposed Transaction will in a single step **transform Sky TV's competitive position** in the New Zealand market. The Combined Group will be **the only participant with meaningful positions across all relevant market sectors**. It will have **market leading positions in the mobile telephony and video entertainment sectors** and strong fixed line broadband and telephony businesses. As well as **holding the leading portfolio of video content (including rights to all the most popular New Zealand sports)**, the Combined Group will own an extensive infrastructure suite, including mobile spectrum, local fixed line networks in Wellington and Christchurch, an inter-city fibre backbone, access to international data cables and satellite transmission rights. It will be well positioned to **take advantage of the opportunities afforded by the roll-out of the ultra fast broadband ("UFB") network across New Zealand**. [Emphasis added]

87. In light of the above, Spark agrees with the Commission that the evidence demonstrates that a substantial lessening of competition is likely to occur as a result of the Merger. As such, the Commission must decline the Merger.

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[54] *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, (2008) 12 TCLR 194. at [98].