# Submission by TVNZ in response to the Commerce Commission Letter of Unresolved Issues

**VODAFONE EUROPE B.V. AND SKY NETWORK TELEVISION LIMITED**

**11 November 2016**

# PUBLIC VERSION

## 1. Background and Executive Summary

1.1 In this submission Television New Zealand (**TVNZ**) responds to the Commerce Commission's Letter of Unresolved Issues (**LOUI**) dated 31 October 2016 to Vodafone Europe B.V. (**Vodafone**) and Sky Network Television Limited (**Sky**) in relation to their proposed merger.

1.2 The LOUI states that at this stage, the Commission is not satisfied that the proposed merger will not have, or would not be likely to have, the effect of substantially lessening competition in telecommunications and Pay TV markets.

1.3 The Commission acknowledges third party submissions relating to the impact of the proposed merger on the provision of free-to-air (**FTA**) services or on a wider market for the provision of Pay TV and FTA services. However, it does not currently consider that the proposed merger is likely to substantially lessen competition in any such markets. The Commission has not provided any substantive analysis as to how it has reached this view, and TVNZ is concerned that the Commission has dismissed important competition considerations in these markets.

1.4 In Sky's full response to submissions on the Statement of Preliminary Issues dated 9 September 2016, Sky *"agrees with the Commission that FTA TV services can and do provide a competitive constraint on pay-TV services"* but alleges that TVNZ's concerns are derived from a desire to compete with a weakened Prime. This misconstrues TVNZ's key argument – free services can *only* act as a constraint on pay services where the free and pay services are being offered by different providers. As the only operator with both Pay and FTA interests, Sky has the ability and incentive to leverage its substantial market power to the detriment of consumers and competitors operating in either Pay or FTA markets.[1]

1.5 The Commission has already recognised this principle in the context of the proposed merger – one of the concerns raised in the LOUI is that *"the merged entity would have substantial market power by virtue of its portfolio of content, including premium content such as live rugby"*.

1.6 TVNZ submits that if the goal is to protect consumers by preserving competition in a converging media industry, it is far more important to maintain a clear distinction between the type of platform (FTA vs Pay) rather than the means of delivering that platform (broadcast vs online). TVNZ therefore reiterates its position that if the Commission were otherwise minded to clear the proposed merger it should only do so on the basis that Sky's FTA channel Prime is required to be divested by the merged entity.

1.7 In this submission TVNZ provides new evidence of recent conduct by Sky which supports this conclusion.

## 2. Merged entity will leverage its substantial market power to damage competition in FTA markets

2.1 TVNZ made an initial submission in response to the Commission's Statement of Preliminary Issues on 12 August 2016 (**TVNZ's Submission**) and a cross-submission dated 7 October 2016 (**TVNZ's Cross-Submission**). The key arguments advanced by TVNZ were:

(a) The time has come to expand the definition of FTA and Pay TV to recognise the growing importance of fixed and mobile infrastructure as platforms to deliver video content;

(b) It is necessary to examine the competition effects of the proposed transaction in a broader market for television services (encompassing both FTA and Pay services) as well as in the

[1] Consumers are disadvantaged because in terms of the wider market for the provision of Pay TV and FTA services, the ability of FTA to effectively constrain Pay TV is undermined by the fact that Sky has a foot in both camps. Second, competitors within the standalone Pay TV or FTA markets are disadvantaged because Sky (or Prime as the case may be) is able to leverage its market power to substantially lessen competition within that standalone market.

retail markets for FTA services and Pay TV services and upstream content acquisition markets;

(c) Since its acquisition of Prime, Sky has increasingly engaged in strategies of purchasing bundled Pay and FTA rights, and overbidding for FTA rights in order to put more and more premium content behind its pay walls. This has had the effect of degrading the quality of programming available on third-party FTA platforms, and therefore lessening the constraint imposed by FTA on Sky's Pay TV service;

(d) Sky's acquisition of FTA rights has led to a dramatic reduction in the availability of live sport on FTA, even though Sky has paid for the rights to provide live FTA coverage. This is simply because Sky uses (or more correctly put, doesn't use) its FTA rights to advantage its Pay TV business;

(e) The proposed merger of Sky and Vodafone will accelerate the degradation of FTA platforms by creating an entity with the ability and incentive to acquire content rights for premium sport and entertainment in a single bundle across FTA, Pay TV, SVOD and TVOD, making it even more uneconomic for a standalone FTA provider such as TVNZ to acquire premium content for FTA alone, or for telecommunications companies to acquire VOD rights alone; and

(f) In the absence of anti-siphoning rules, content regulation and a regime for binding behavioural undertakings, the only means of ensuring that the proposed merger does not undermine the competitive constraint provided by FTA on Pay services is to require that the merged entity divest its FTA asset.

2.2 Since TVNZ made its Submission and Cross-Submission, Sky has engaged in new conduct which provides clear evidence that the merged entity intends to further leverage its content rights to the detriment of consumers in FTA markets.

## 3. Sky's recent conduct

3.1 The clearance applications repeatedly state that the merged entity *"would not have the ability or the incentive to engage in any foreclosure strategy"*, stressing that it would not supply any "must have" inputs to either Sky's or Vodafone's competitors. Despite this assertion, in its most recent actions Sky is attempting to use its monopoly over premium sports content to impede the ability of New Zealand's news media to report on current sporting events in a timely manner.

3.2 In the latest development, Sky initiated proceedings against TVNZ and NZME in the Auckland High Court on 26 October 2016. This follows on from Sky's recent unsuccessful application for an interim injunction against Fairfax in relation to Stuff's news coverage of the Rio Olympics.

3.3 So far as the claim against TVNZ is concerned, Sky alleges that TVNZ has infringed Sky's copyright by posting video clips from Sky's broadcasts of rugby matches on the 1 NEWS NOW site. Sky claims it has suffered loss of advertising revenue, subscribers, and opportunities to offer or license secondary products and to develop Sky's market for them as a result of TVNZ's use of the clips.

3.4 TVNZ's view is that the use of these clips is for the reporting of current events, and is therefore permitted under the fair dealing provisions of the Copyright Act 1994[2] which recognise the public interest in news reporting and carves this out from the copyright monopoly.

3.5 TVNZ submits that Sky's conduct represents an attempt by Sky to leverage its monopoly over premium content, in order to effectively foreclose the ability of New Zealanders to access sports news – unless they are prepared to pay a premium subscription to Sky in exchange for such access.

[2] Section 42(2).

3.6 It is disingenuous that while Sky's merger applications point to the fact that:

(a) *"Consumers now expect pay-TV providers to deliver content in new and innovative ways";*

(b) The proposed merger will *"assist Sky's business to adapt to, and evolve with, changes to the way video content is delivered to, and consumed by, consumers in New Zealand";* and

(c) *"Increasingly, consumers prefer to consume video content on demand rather than from linear broadcasts, and on mobile devices anytime, anywhere, in addition to on their televisions or within the confines of their personal Wi-Fi networks"*;[3]

3.7 Sky is simultaneously taking legal action that (if successful) would prevent consumers from being able to exercise those same preferences when it comes to accessing the news. As the Commission is aware, the five mass market online national news services stuff.co.nz, nzherald.co.nz, newshub.co.nz, 1 NEWS NOW and radionz.co.nz are accessed by millions of New Zealanders each month, and all these sites carry video (and specifically sports clips) as part of their news offerings.

3.8 Sky has gone so far as to suggest that no use of premium sports clips should be permitted for the purposes of reporting current events online, and that adequate reporting can be achieved by the use of text and stills.[4] This is despite the fact that:

(a) Parliament has recognised that the public's right to be informed outweighs the commercial interest in copyright monopolies (and has taken steps to enshrine this principle in the fair dealing provisions of the Copyright Act);

(b) Rights holders for major international sports events, such as the Olympic Games, recognise the benefit that widespread awareness of events affords to the public and to the sport itself (and as a result often require rights holders to play some of those events on FTA television); and

(c) the wider industry recognises the importance that consumers place on being able to access content (be that news, sports, entertainment or other content) when and where they want it.[5]

3.9 Sky claims that TVNZ's online news service is competing with Sky's Pay TV sports service:[6]

> *"The TVNZ programming is essentially a commercialised entertainment package that competes with Sky's own opportunities to exploit its footage…*

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[3] See also Sky Network Television Limited, *Notice of Meeting and Explanatory Memorandum* (June 2016) at page 23, where it states: *"Throughout the world, the increased number 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 in turn has resulted in increased mobile data usage and higher data spend by mobile users. This trend is expected to present revenue synergies 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."*

[4] Confidential but can be supplied to the Commission on request.

[5] As noted by AT&T's CEO, Randall Stephenson, when announcing his company's proposed takeover of Time Warner, *"The future of mobile is video, and the future of video is mobile*". This view is also supported by Simon Khalaf in the article "Apps to Cable: "Three Strikes and You're Out!"" where he comments that *"Sports Apps Fans want to consumer their sports content wherever they go – be it at work, while traveling, in front of the living room TV, or even at the game. The tripling of time spent in sports apps is tough to ignore for teams, content providers and advertisers. Netflix CEO Reed Hastings believes the Internet is replacing traditional television, apps are replacing channels, and screens are proliferating"* (Flurry Analytics, 21 October 2014 available at http://flurrymobile.tumblr.com/post/115193377195/apps-to-cable-three-strikes-and-youre-out).

[6] Letter of 9 September from Sky's advisors Simpson Grierson to TVNZ's advisors Hudson, Gavin Martin.

*Moreover, TVNZ appears to deliberately set out to compete with Sky's own programming."*

3.10 This is highly relevant in the context of the proposed merger. The Explanatory Memorandum to Sky shareholders identifies "significant opportunities for the Combined Group to generate additional revenue synergies through the monetisation of entertainment content on mobile devices."[7] Recent events show that as part of this strategy Sky is seeking to diminish the quality of free-to-viewer content which is available on mobile devices online, in the same way that it has diminished the quality of content available on linear FTA television.

3.11 The Commission has previously acknowledged that in the context of traditional Pay TV services, *"the number of viewers choosing to purchase Pay TV will be impacted by the price of Pay TV relative to the quality of that product and the quality of free-to-air product offerings."*[8] The same will be true in the context of free versus paid mobile content.

3.12 TVNZ is committed to covering the sports news that matters to New Zealanders – and no sport is more newsworthy in New Zealand than rugby. In commencing these copyright infringement proceedings, Sky is seeking to dictate what is newsworthy and to restrict New Zealanders' free access to news coverage of sporting events.

3.13 As a content rights holder itself, TVNZ appreciates that Sky is entitled to a return on its significant content investment. However, Sky's conduct goes far beyond seeking to protect its legitimate business interests. Sky is seeking to leverage its market power over premium sports content, by restricting fair use of sports video content in online news coverage, in order to benefit the merged entity's proposed strategy of increasing the monetisation of content on mobile devices.

3.14 TVNZ is concerned by what it sees as a challenge to the democratic freedoms and the rights of all New Zealanders to access the news, and it will continue to champion the rights of every New Zealander in this regard.

3.15 TVNZ reiterates its position that if the Commission were otherwise minded to clear the proposed merger it should only do so on the basis that Sky's FTA channel Prime is required to be divested by the merged entity.

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[7] Sky Network Television Limited, *Notice of Meeting and Explanatory Memorandum* (June 2016) at page 23.

[8] Commerce Commission, *Igloo Investigation Report* (16 May 2012) at 12.