InternetNZ

Submission to the Commerce Commission by InternetNZ in relation to Vodafone and Sky applications for clearance

10 October 2016

InternetNZ

Table of Contents

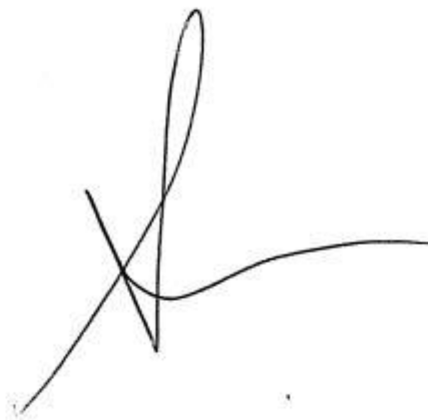
1.	Introduction and Summary	3
2.	Zero rating Vodafone’s own content over mobile highlights the deficiencies in this application	7
3.	What Vodafone doesn’t say	10
4.	Our submission was about the clearance not about new legislation	10
5.	FCC decisions show that zero rating and other net neutrality issues are a first order clearance issue	11
6.	The Canadian regulator’s decision as to zero rating by mobile network operators	12
7.	The fixed and mobile markets have reduced competition	14
8.	Prioritisation or throttling of content	14
9.	Upstream issues as to third party content	15
10.	Conclusions as to Factual, Counterfactual, and implications in the Pay TV and VOD markets	15
11.	Appendix A: Cost of Vodafone mobile data usage in Ireland and NZ	17

1. This second submission addresses in particular the response by Vodafone dated 11 September to our and other submissions. Our submission has implications for the Sky position too.

2. We are grateful for the opportunity to assist the Commission by way of this cross-submission. We suggest ways in which the Commission is able to focus on the key issues, and obtain information to enable its decision to be more aligned with the underlying facts.

3. The Vodafone submission raises some technical issues, for example, as to the way in which OTT providers encrypt their traffic when forwarding it to network operators such as Vodafone. This is an issue as to upstream technical and commercial aspects on which our people (staff and members) have particular expertise. We would be happy to assist the Commission in providing relevant information and support.

4. We would also be happy to discuss with the Commission any ways in which we can help with expediting this clearance review, while still achieving the right outcomes, on what is a critical clearance application for Internet stakeholders, whether consumers or providers.



Andrew Cushen
Deputy Chief Executive

1. Introduction and Summary

Zero rating of Vodafone/Sky own content

1.1 We deal first with zero-rating of Vodafone/Sky's own content over mobile, where its competitors' content requires the customer to pay high retail prices to receive that content., This is an issue in the "net neutrality" area, focussed however on SLC issues, to demonstrate the concerns arising out of the applicants' submissions.

1.2 By way of introduction, the applicants' ability and incentive to do that changes markedly after the merger. This is demonstrated by what Vodafone in fact does, which is contrary to its submissions. In addition to raising SLC concerns directly, this is an illustration of submissions made without evidential basis, contrary to evidence, and without addressing key issues and evidence. Therefore, at Para 1.13, we make some suggestions as to how the Commission might deal with those problems.

1.3 The applicant, Vodafone Europe BV Ltd, which is the owner of the Vodafone NZ business, uses its 11 September submission to reply to submissions, mainly by us but also by Freeview, that the merged entity has the ability and incentive to zero rate its own content while third party OTT content has customers incurring data charges beyond data caps. The applicant says, as to those submissions:

(i) "Submitters have raised concerns that the Combined Entity might "zero rate" SKY content so that streaming SKY content will not count towards their fixed or mobile broadband allowances. [T]his is entirely speculative."[1]

(ii) "Such strategies fly in the face of commercial sense". [2]

(iii) "[O]ne of Vodafone's core strategies is to provide the best possible customer experience. Pursuing such a strategy is the absolute antithesis of this core value". [3]

1.4 The applicant, Vodafone Europe BV Ltd, owns Vodafone's Irish business too. The applicant makes the above statements without dealing with the evidence in the submissions that there is such zero rating of Vodafone's own TV content in the applicant's Irish business (and elsewhere), over mobile services. Moreover, as the Freeview submission shows, the applicant's Irish business introduced zero rating specifically to cater for its "new TV service". In other words, getting the new TV service changed things, just as the NZ merger would change ability and incentive. (In Para 10 below, we deal with the NZ factual, counterfactual, and implications for the Pay TV and VOD markets, but, like all this submission, that is subject to external counsel's confidential review and submission on redacted material)

1.5 Contrary to the submissions being "entirely speculative", the applicant, and companies in its group, will have multiple relevant documents and views on this. The Vodafone Europe BV group of companies would not engage in strategies "that fly in the face of commercial sense".

1.6 What the applicant actually does is among the best evidence about ability and incentive. It does not distinguish what it does internationally from what it would or could do here, in the future world where, as it confirms, mobile downloads of content become a major market feature.

1.7 Consistent with its broader approach of not dealing with much of the evidence and submissions, the applicant does not at all address the mobile aspect of zero rating (again, squarely raised by submissions). It deals solely with fixed line zero rating, where there is less of an issue, when zero rating is a more acute issue in mobile because data caps are low and volume charges are high (including in Ireland and New Zealand).

1.8 The price difference to the consumer, as between zero rated Vodafone content and third OTT content, is considerable, and well beyond what could be seen as pro-competitive differentiation. The Irish service

1 Vodafone submission dated 11 September 2016 at [6.14]
2 Vodafone submission dated 11 September 2016 at [6.6]
3 Vodafone submission dated 11 September 2016 at [6.3]

includes HD downloads in the zero rated service. To download just one two-hour, third-party HD movie in Ireland, after exceeding low data caps, would cost NZD $45 on the cheapest mobile plan (NZD $270 on the most expensive). In NZ, the equivalent would be NZD $108 to NZD $3,000 respectively.[4]

1.9 On normal viewing, low mobile data caps would quickly be exceeded each month.

1.10 Relative to free downloads over a Sky service (Sky TV, Neon, Fanpass and successors), supplying third party OTT over the Vodafone mobile service is prohibitive for existing third party providers such as Lightbox and Netflix, and also prohibitive for new entrants.

1.11 These outcomes are also an example of the effect of this statement by Vodafone, which it incorrectly tries to distinguish from NZ circumstances:[5]

> 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. [highlighting added]

1.12 Vodafone's submission on zero rating is an example of a broader concern around:

(a) Insufficient disclosure to the Commission (for example, Vodafone Europe BV has relevant evidence as to zero rating its own TV content, but indicates otherwise, by stating that our submission is "entirely speculative". Similarly, the applicant's statement that "Such strategies fly in the face of commercial sense" indicates the applicant has knowledge and a position that is contrary to what in fact it does);

(b) Submissions contrary to the evidence and what in fact is happening;

(c) Not addressing the substantive evidence and submissions against Vodafone;

(d) Broadly based submissions, often focussing only on low hanging fruit (eg fixed line zero rating, ignoring mobile zero rating).

1.13 This is therefore an example of why the following is appropriate:

(a) The Commission should treat with real reservation any assertion by Vodafone and Sky that is not supported clearly by firm evidence, particularly where it has not been tested by submissions.

(b) Where the applicants do not deal with substantive submissions, the Commission should assume there is no answer; the applicants have not dealt with those submissions for a reason.

(c) The Commission should make information requests and undertake interviews, including of Vodafone Europe BV personnel, not just Vodafone NZ staff, to verify assertions (for example, as to zero rating (said to be "entirely speculative")).

(d) The best evidence of what the applicants may do in the future, as to the New Zealand business, will often be what Vodafone actually does internationally, unless it can demonstrate clearly, and tested by cross-submission, that the position in New Zealand is different. That does not necessarily apply to status quo considerations (eg before mobile plays become a major feature). Vodafone Ireland's introduction of zero rating some months ago is an example.

---

4 The sheer scale of the effect of zero rating Vodafone's own content is demonstrated by the mobile data retail pricing, set out in Appendix A.

5 Vodafone response to Ofcom's consultation: Strategic Review of Digital Communications discussion document (8 October 2015), at pp 8-9 (available at http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/responses/Vodafone.pdf).

1.14 We close this overview of zero rating with the following unsustainable submission by the applicant, Vodafone Europe BV, which is firmly contrary to what its Irish business is doing:[6]

> "… while [zero rating] would be of benefit to consumers, it would be unlikely to lead to substantial switching away from other OTT providers' content to SKY zero rated content."

1.15 It would be surprising if the documents in the Vodafone Europe BV group supported that submission, and it is difficult to understand how the applicant can make this submission to the Commission when it is contrary to what it does in at least Ireland, and we expect that it will be contrary to what it says in the internal documents it has including in the group that it controls.

Zero rating and telecommunications markets

1.16 Zero rating is not just an issue as to market failure between Vodafone/Sky's content and third party OTT content.

1.17 Vodafone say that other telecommunications providers could elect to zero-rate. Those providers can thereby seek "a competitive edge in the highly competitive telecommunications markets".[7]

1.18 That does not address the "must have" nature of the SKY content.

1.19 Zero-rating does have implications for telecommunications markets, contrary to the Vodafone submissions:

(a) Where the content is "must have" or equivalent, as SKY has outlined in submissions and experts' reports, zero-rating provides greater incentives for customers of Vodafone/SKY's competitors to move to Vodafone/SKY (and it provides greater incentives to Vodafone/SKY's existing customers to remain with that supplier, so it is harder to churn customers away from SKY).

(b) In other words, zero-rating is a source of, and magnifies, the anti-competitive effects of the "must have" content, as outlined in other parties' submissions and experts' reports. It substantially increases the lessening of competition.

The FCC experience

1.20 Vodafone maintains that the FCC's clearance of the New Charter merger is irrelevant as it involves only cable companies merging (i.e. a horizontal merger).

1.21 While we do not agree, in light of that submission, we outline below the FCC's clearance last year in the acquisition by fixed and mobile Telco, AT&T, of satellite pay TV provider, DIRECTTV. The acquisition was cleared only on the basis that the parties gave behavioural undertakings not to discriminate as to data caps and data charges between own and third party content (and undertakings as to non-discrimination of upstream third party content providers). Such undertakings of course are not available here.

1.22 We also touch on an overlapping Canadian decision.

1.23 While overseas decisions must be read in light of NZ facts, a key takeaway from those regulatory decisions is that "net neutrality" issues such as zero rating own content (as applied specifically to clearances) is a first order issue. It is neither an outlier, nor is it novel.

6 Vodafone submission dated 11 September 2016 at [6.14(b)]. In the same para, Vodafone also argues that zero rating increases the data effectively available in the cap. But mobile caps are so small that this is largely immaterial.
7 Vodafone submission dated 11 September 2016 at [6.14(b)].

Our submission on "net neutrality" is about the SLC test, not about *ex ante* regulation

1.24 Vodafone says our submission is a plea for *ex ante* regulation, not suited to this application. But we were explicit about that not being so, a point that Vodafone does not deal with. In particular, we explained the dangers in this context of using "net neutrality" to describe this area. We were then, and we are now, especially careful to frame our submissions in the context of the specific SLC circumstances here.

1.25 This is one of the reasons why we focus on one facet of net neutrality, namely zero rating of own content. It is an example of other ways in which there can be SLC concerns in this area (others include throttling or prioritisation of traffic to consumers; another is discrimination upstream against third party OTT providers).

1.26 As to throttling and prioritisation, we agree with Vodafone that it is not likely to throttle third party content for the reasons they give. But, carrying on the theme of Vodafone dealing only with low hanging fruit, it does not deal with the converse – the prioritisation of Vodafone content – when that does not have the same problems identified by Vodafone.

1.27 Therefore, the focus on zero-rating, which is the most likely problem given that is what the applicant already does, is as an example of wider concerns.

What Vodafone doesn't say

1.28 The submissions by Vodafone and Sky are particularly notable for what they don't say, and for their focus away from points they do not and cannot answer. We will identify a number of these below, in the Vodafone submissions as to net neutrality, in addition to the zero rating points above.

It is the future that is relevant, not the status quo

1.29 The Vodafone and Sky submissions are heavily focussed on the history so far, when it is the changed conditions in the future that is relevant to the Commission's assessment. Often the status quo is submitted on when submissions by objectors have correctly focussed on what will happen in the different future circumstances.

1.30 The market is changing greatly, as the applicants agree, and the ability and the incentives of the merged entities are substantially different.

Applicants' redactions

1.31 It is difficult to submit on some issues, in light of redactions in the net neutrality part of the Vodafone submission.

1.32 We turn now to the body of our submissions. Like other parties responding to the applicants, there is some detail. In all cases, that seems to us to flow from the lack of detail in the original applications, and that much detail is introduced only in the applicants' later submissions, calling for a more comprehensive submission now.

2. Zero rating Vodafone's own content over mobile highlights the deficiencies in this application

2.1 Zero rating of Vodafone's own content, while third party content faces data caps and usage charges, is a central feature of InternetNZ's initial submission under the general heading of net neutrality (although our submission identifies concerns with the "net neutrality" descriptor in this and other contexts). Given concerns as to Vodafone's 11 September response to those submissions, we start with that topic to illustrate substantial problems with the applications, ranging from the absence of disclosure by the applicants, and submissions that are contrary to the actual position, through to substantial lessening of competition arising out of zero rating. Our primary submission on zero rating is in this introduction.

What Vodafone Europe BV states to the Commission about zero rating

2.2 Of submitters' claims that the New Zealand business of the applicant, Vodafone Europe BV, would zero rate over fixed and mobile the merged entities' own content (leaving competing content within data caps and usage charges), Vodafone Europe BV said in its 11 September submission:

(a) The submitters' claims on zero rating are "entirely speculative".

(b) "Such strategies fly in the face of commercial sense".

(c) "[O]ne of Vodafone's core strategies is to provide the best possible customer experience. Pursuing such a strategy is the absolute antithesis of this core value".

What Vodafone Europe BV in fact does about zero rating

2.3 But how can those claims by our submissions be "entirely speculative" or "fly in the face of commercial sense", when that is exactly what Vodafone Europe BV's Irish business is doing, as are other Vodafone companies, in relation to mobile downloads? The applicant's Irish business zero rates its own content over mobile and imposes data charges and data caps for third party competing OTT content.

2.4 Vodafone Europe BV is the 100% owner of both Vodafone NZ and Vodafone Ireland.[8]

What we and Freeview said about Vodafone Europe BV's zero rating

2.5 Further, the evidence of that, including what the applicant's Irish business is doing on mobile zero rating, is in the submitters' submissions (both ours and Freeview,[9] with the latter setting out the position in some detail).

2.6 That evidence is simply not dealt with by the applicant when replying to the submissions, saying the zero rating claims are "entirely speculative" and "fly in the face of commercial sense".

Best evidence of what the applicant's NZ business may do

2.7 What the applicant in fact does, as a rational supplier, as it describes itself repeatedly in its submissions, is among the strongest evidence on ability and incentive (assuming the activity is relevant to a forward looking assessment and not to an historic status quo). The applicant has not, and cannot, provide evidence and reason why its New Zealand business would be an outlier, relative to what it does overseas.

2.8 Framed another way, absent compelling evidence to the contrary, tested by submissions, the Commission should assume that the merged entity has the ability and incentive to zero rate its own content.

---

8 If it assists the Commission, we have the Irish company search information to confirm this, and the NZ ownership is confirmed in the application.

9 Freeview submission dated 12 August 2016 at [6.11]

Vodafone also does not deal with submissions against it on mobile zero rating

2.9 The applicant also solely deals with fixed line data caps and data charges, when the issue of much lower mobile data caps and much higher data usage charges was squarely raised. For example, as we said in our submission:

> "… while available data caps are high or unlimited for fixed line, mobile data caps where there is zero rating would be strong incentives for viewers to favour the Sky TV products ahead of OTT."
>
> "Data caps for fixed line are relatively high or unlimited, although that does not take away scope for fixed line differential pricing for Sky TV as against OTT content. However, the position as to mobile, a platform to which video and TV is moving, is more apparently critical."

Calculating the impact of zero rating over mobile, own content v data caps and usage charges for third party content

2.10 The sheer scale of the effect of zero rating Vodafone's own content is demonstrated by the mobile data retail pricing, set out in Appendix A. This is well past pro-competitive differentiation of service products.

2.11 The cheapest cost on the cheapest plan, to download a two-hour movie over mobile, over the lowest quality (SD), once relatively low data caps are reached, is NZD $11 in Ireland and NZD $25 in NZ. (The highest cost is NZD $65 in Ireland, and NZD $700 in NZ, respectively). Data caps are quickly exceeded on normal multiple film and episode downloads.[10]

2.12 That is for SD. In Ireland, Vodafone includes HD in the zero-rated provision of its own content. The cheapest cost of downloading a two-hour HD movie in Ireland, outside zero rating, once data caps are exceeded, is NZD $45 (in NZ it is NZD $108). The cost of the most expensive plan would be, per HD movie, NZD $270 in Ireland (and NZD $3,000 in NZ).

Effects

2.13 Downloading multiple non-Vodafone sourced TV episodes and films over mobile on a normal usage basis is clearly prohibitive for most consumers, forcing them to the zero-rated Vodafone content, if they remain as Vodafone mobile customers. It is clear, including from what the applicants have told the Commission, that mobile video downloads, as well as triple and quad plays involving content and mobile, are a major market feature going forward.

2.14 That impacts existing VOD providers such as Netflix, Lightbox, and TVNZ on demand, and appears to be a complete or major barrier. It also impacts future OTT providers which cannot realistically gain/sustain access to the Vodafone service, given the Vodafone content is zero rated.

2.15 This has the effect of limiting development of OTT content as a competitor for the sort of content provided by the merged entity. As noted in the Canadian CRTC regulatory decision below,[11] actions such as unmetering the MNO's own TV content, but not that of third party competitors "may end up inhibiting the introduction and growth of other mobile TV services accessed over the Internet, which reduces innovation and consumer choice."

2.16 We return to the SLC assessment below when dealing with the FCC decisions.

---

10 Data caps in Ireland depend on plan and range from 3Gb to 17 Gb, and in NZ from 1 Gb to 15Gb. A film uses 1.4 Gb for SD and 6Gb for HD. See Appendix A below.

11 Broadcasting and Telecom Decision CRTC 2015-26, http://www.crtc.gc.ca/eng/archive/2015/2015-26.htm

Treatment of zero rating illustrates that applicants are not answering submissions and evidence or dealing with it correctly

2.17 Not answering the submitters' evidence and submissions, answering one point (the low hanging fruit) but not another, making assertions without supporting evidence, and making submissions contrary to the known evidence (such as in relation to the applicant's Irish business), is a particularly widely occurring feature of the approach by Vodafone and Sky.

2.18 Spark submits, in its 5 October submission, that submitters' concerns *"go unanswered and unaddressed, other than by way of glib, unsubstantiated and generic statements of principle",* and that they consider that submissions are *"deliberately disingenuous", "deliberately misleading", "incorrect, disingenuous, or deliberately obscure".*

2.19 It is submitted that, given no response to multiple substantial points and evidence by submitters, the Commission can assume there is no answer on those points, which ought to be decided against the applicants. The applicants have chosen not to respond to such substantive points for a reason.

2.20 Vodafone Europe BV, when making statements that the claims are "entirely speculative" and "fly in the face of commercial sense" will certainly have, in its group,[12] substantial documentation such as business cases, financial forecasts and modelling, and strategies relevant to the ability and the incentive to zero rate own content.

2.21 Given that the applicant's businesses are rolling out the zero rating of own content strategy, and what the applicant actually does is the best evidence of ability and incentive, the applicants' own documents can be expected to be far removed from those statements made to the Commission.

2.22 Its NZ subsidiary and/or other group companies, including itself, can be expected to have documents relevant to a zero rating strategy for its NZ business.

2.23 We question how the applicant can reconcile what it is saying to the Commission, as outlined above, with what it in fact is doing, and what is in its internal documents. Vodafone Europe BV should be asked to explain this and other points, in the context of s103 of the Commerce Act.

Vodafone's position on the importance of content

2.24 In our submission, we noted that Vodafone had stated this:[13]

> 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. [highlighting added]

2.25 In its 11 September submission, Vodafone claims that this is not applicable here as that submission to Ofcom was focussed on content rights held by the incumbent UK Telco, BT.

2.26 That is not correct and misstates the clear position at multiple points in both the Ofcom consultation paper being submitted on, and the Vodafone submission itself.

Broader conclusions as to the applicants' evidence and submissions

2.27 Along with other reasons in submissions by submitters, the above implies that:

---

12 Including from its subsidiaries

13 Vodafone response to Ofcom's consultation: Strategic Review of Digital Communications discussion document (8 October 2015), at pp 8-9 (available at http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/responses/Vodafone.pdf).

(a) The Commission should treat with considerable reservation any assertion by Vodafone and Sky that is not supported clearly by firm evidence, particularly where it has not been tested by submissions, a point that has already been made by other submitters, such as Blue Reach.

(b) As noted above, where the applicants do not deal with substantive submissions, the Commission should assume there is no answer.

(c) The Commission should make information requests and undertake interviews, including of Vodafone Europe BV personnel, not just Vodafone NZ staff, to verify assertions. For example, to obtain copies of documents as to zero rating internationally, from Vodafone Europe BV (including as to its subsidiaries).

(d) The best evidence of what the applicants may do in the future, as to the New Zealand business, will often be what Vodafone actually does internationally, unless it can demonstrate clearly, and tested by cross-submission, that the position in New Zealand is different. That does not necessarily apply to status quo considerations (eg before mobile plays become a major feature). Vodafone Ireland's introduction of zero rating some months ago is an example.

3. What Vodafone doesn't say

3.1 The submissions by Vodafone and Sky are particularly notable for what they don't say, and for their focus away from points they do not and cannot answer. We will identify a number of these in this submission, as to net neutrality.

3.2 Where a significant issue has been squarely raised by us and other parties, and the point is not dealt with by Vodafone or Sky, the Commission should assume that there is no answer on the point. There has been no answer by the applicants for a reason.

3.3 This is illustrated by Vodafone's frequently repeated focus in its latest submission on only throttling third party OTT content relative to its own content,[14] when we squarely raised the other way of achieving a similar outcome: prioritisation of its own content relative to third party OTT content. It is the first in our list of 4 material ways in which there can be net neutrality problems.

3.4 We agree with Vodafone that throttling third party OTT content has some market problems. What Vodafone does not address is that there is the prioritisation option; that is the more likely path, as it does not carry the sort of problems identified by Vodafone.

4. Our submission was about the clearance not about new legislation

4.1 Vodafone says, without giving reasons, that the majority of the submissions on net neutrality are no more than pleas for *ex ante* regulation.[15] We submitted on net neutrality in much more detail than others (who only briefly touched on the issue).

4.2 That is not what we submitted. And we were explicit on the point.

4.3 We expressly recognised in our submission that the area of net neutrality generally can be controversial, and that there are law reform issues,[16] which are irrelevant to a clearance application.[17] Therefore, we were careful to focus on the immediate concerns relevant to clearance applications (that is, the test under the Commerce Act for clearances). We also carefully stated that using the "net neutrality" tag is no more than a convenient descriptor, given, for example, the US and Canadian regulator's rejection of use of the words.

14 See for example Paras 6.7, 6.9, 6.12, 6.16, 6.19, 6.20 and 6.26
15 Vodafone submission dated 11 September 2016 at [6.2] and [6.3]
16 For example, we have submitted on net neutrality in the Telecommunications Act review by MBIE. As we explain at [6] of our submission dated 12 August 2016, potential statutory change is outside the period relevant to the clearance, and is therefore irrelevant to what the Commission is considering here.
17 We dealt with the issues in this sub-paragraph at [2.3]- [2.7], and [3] in our submission dated 12 August 2016

4.4 As we note in the summary above, this is one of the reasons we have focussed on zero rating, a net neutrality variant.

5. FCC decisions show that zero rating and other net neutrality issues are a first order clearance issue

5.1 In our submission, we relied on the FCC's May 2016 decision to clear the New Charter merger only if behavioural undertakings were given to avoid the problems as to the "net neutrality" variants, zero rating (or similar) and discriminating upstream against third party content providers.[18] Vodafone however says that decision is irrelevant, largely as it involves only horizontal aggregation.[19]

5.2 We do not agree it is irrelevant. However, given Vodafone has raised that point, we outline below another FCC clearance application – in July 2015 – where, as here, the merging parties are (i) a fixed and mobile provider (AT&T) with a small online TV footprint and (ii) a Pay TV satellite provider (DIRECTV) – so this is similar to the Vodafone and Sky merger.

5.3 FCC only cleared[20] the transaction based on behavioural undertakings that avoided the net neutrality variants, zero rating and upstream discrimination against OTT content providers. (The US has regulation covering throttling and prioritisation – the fast and slow lane issues – and so this did not have to be dealt with on the clearance.)

5.4 What these FCC decisions show is that net neutrality issues are not just a matter for *ex ante* legislative or regulatory law reform. They are first order concerns for clearances of transactions. They are neither outliers, nor are they novel.

5.5 We now turn to an overview of the AT&T/DIRECTV clearance.

5.6 Notably, like the New Charter clearance, this clearance did not involve "must have" content.

Market definition

5.7 The decision has some useful insights, in deciding there is a separate market for each of (a) Pay TV such as linear TV whether online or by wireless (called "multichannel video programming service" or MVPD) and (b) online content such as SVOD and TVOD (called "OVD" content). The latter would include Netflix, Lightbox, Neon and FanPass (ie DIRECTTV, the equivalent of SKY NZ, supplies into the two markets).

5.8 As the FCC said:[21]

> "[W]e find that, for most consumers today, OVD services are not substitutes for MVPD services. Rather, as we note in our description of current industry conditions discussed above, OVDs typically offer consumers choices that may either complement their MVPD services or compete with some portion of the services MVPDs offer, such as VOD. Indeed, despite the increased number of OVDs and increased use by consumers of OVD services, we do not have evidence on the record that any OVD would be, in the near term, a disciplining force if the combined entity were to increase price or decrease quality. However, given the development of additional and new OVD services and the proliferation of new technologies and devices that allow consumers to view video programming sold by OVDs on their computers, phones, and televisions, we acknowledge that OVDs have the potential to become substitutes for MVPD services with a market presence that is sufficient to counter effectively an increase in price or decrease in quality by the combined entity. Therefore, as we analyse the competitive effects of the transaction, we consider any potential competitive harms that may arise from the transaction that would delay or minimize entry of OVDs into the market.

18 InternetNZ submission dated 12 August 2016 at [2.19]- [2.21]
19 Vodafone submission dated 11 September 2016 at [4.3]
20 FCC 15-94, https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-94A1.pdf
21 At [68], footnotes omitted.

5.9 The submissions and evidence thus far indicate that, in New Zealand, SVOD/TVOD/OTT content (OVD) is also largely a complement not a substitute for Pay TV (MVPD). (The applicants make no submissions disagreeing with the statements of the SKY CEO, quoted in submissions, indicating OTT is not a substitute, nor do they disagree with the supporting evidence that was produced.)

5.10 As in the Canadian decision dealt with in the next paragraph, FCC note: "we consider any potential competitive harms that may arise from the transaction that would delay or minimize entry of OVDs into the market." The services of Vodafone/SKY both as Pay TV provider and as SVOD/TVOD provider are provided in 2 markets, but action by the merged entity in say the Pay TV market can cause SLC in the SVOD/TVOD/OTT market. For example, zero rating of Pay TV can negatively impact, anti-competitively, current and new entrant OTT providers. As the Canadian regulator points out (as cited in the next paragraph), unmetering own content, can "end up inhibiting the introduction and growth of other mobile TV services accessed over the Internet, which reduces innovation and consumer choice."

FCC conclusion on zero rating and other unmetering of own content

5.11 FCC concluded:[22]

> "[W]e find that the transaction may increase the Applicants' incentive and ability to use data allowances to discriminate in favor of their own, affiliated online offerings, and we impose a condition to prevent the combined entity from discriminatory data practices….
>
> We conclude that post-transaction AT&T has an increased incentive to discriminate against unaffiliated OVDs. As we have found in other proceedings, "broadband providers have incentives to interfere with and disadvantage the operation of third-party Internet-based services that compete with their own services." We disagree that the Applicants' incentive to attract and retain broadband subscribers precludes any incentives to engage in conduct that hinders consumers' access to unaffiliated OVDs. While we acknowledge that the documentary evidence supports the Applicants' position that AT&T has traditionally viewed its video product as ancillary to its more profitable broadband services, post-transaction AT&T would have different incentives to use strategies that limit consumers' access to OVD services in order to favor the DIRECTV video product or the combined entity's online video products. Again, as we stated in prior proceedings, many end users may have limited choice among broadband…
>
> We find that as the combined entity expands its online offerings, it will have an increased incentive to limit subscriber demand for competitors' online video content, including through data caps that discriminate against third-party content by exempting its own content from the data cap."

5.12 A similar analysis was undertaken as to discrimination upstream against competing content providers, with behavioural undertakings also required.

5.13 Notably, "must have" content was not a factor (and it is not a factor either in the Canadian case that follows).

5.14 We return to the NZ position at Para 9 below.

6. The Canadian regulator's decision as to zero rating by mobile network operators

6.1 On 29 January 2015, the Canadian Radio-Television and Telecommunications Commission (CRTC) determined that two major mobile network operators (MNOs) were in breach of regulations due to charging a low fixed fee for unlimited access to their own content, when third party content providers

22 At [200] [205] and [210]; footnotes omitted.

could access the MNOs' customers only via the customer paying high data usage charges above data caps.[23]

6.2 Neither MNO had "must have" content (in other words, the decision was not dependent on that).

6.3 The situation did not involve a clearance and, moreover, the test under the regulation was based instead on there being an undue or unreasonable preference or disadvantage. The decision therefore has less relevance but the circumstances and conclusions overlap, and can be applied in an SLC context, as does the conclusion again that, for regulators, issues such as zero rating and other "net neutrality" issues are first order and mainstream issues.

6.4 The CRTC concluded, as to the 2 MNOs, Bell Mobility and Videotron:[24]

> "…given that access to the [MNOs'] mobile TV services is exempt from the standard data plans, and given the minimal charge imposed to access the services, the charge to consumers to access content from other audiovisual content services on their mobile devices is significantly higher than the charge to access their respective mobile TV services. As a result, Bell Mobility and Videotron consumers have a significant economic incentive to access content through the mobile TV services rather than through other content services. Conversely, Bell Mobility and Videotron consumers of other data services are subject to a corresponding disadvantage by having to pay more to access content on their mobile devices and by facing a data cap. This incentive also provides the mobile TV services with an advantage and other data services a corresponding disadvantage.
>
> 48. The Commission therefore finds that in providing the data connectivity and transport required for consumers to access their respective mobile TV services on their mobile devices, Bell Mobility and Videotron have given a preference in favour of subscribers of their respective mobile TV services, as well as in favour of their own services, and have subjected consumers of other audiovisual content services, and other services, to a corresponding disadvantage…
>
> 53.According to Videotron, the charges allow providers to better know the market and to find new ways to make attractive offers to consumers. In its view, should Canadians get used to consuming television content on their mobile devices, this could only have a positive impact on all service providers of such content.
>
> 54. The Commission considers, however, that encouraging customers to access these data-intensive services is inconsistent with the carriers' approach in regard to other data services, which is to impose data caps in order to optimize the efficiency of these networks. If access to mobile TV services continues to grow, which is a reasonable expectation, the data charges for these mobile TV services, the disproportionately high data limits, and the encouragement for subscribers to use these services, might result in a degradation of other services by contributing to network congestion…
>
> 58.In light of the above, the Commission finds that the preference given in relation to the transport of Bell Mobility's and Videotron's mobile TV services to subscribers' mobile devices, and the corresponding disadvantage in relation to the transport of other audiovisual content services available over the Internet, will grow and will have a material impact on consumers, and other audiovisual content services in particular. As an example, it may end up inhibiting the introduction and growth of other mobile TV services accessed over the Internet, which reduces innovation and consumer choice.
>
> 59. The Commission also considers it significant that Bell Mobility and Videotron are in a position to treat the transport of their mobile TV services in such a significantly different fashion

23 http://www.crtc.gc.ca/eng/archive/2015/2015-26.htm
24 At [47]

when compared to other audiovisual content services, given the leverage that comes from owning both the means of transport and the rights to the content."

7. The fixed and mobile markets have reduced competition

7.1 Contrary to what is said in the SKY and Vodafone submissions, and the NERA report, the fixed and mobile telecommunications markets are not "highly competitive". That is submitted, with evidence, in much detail in the Trustpower and Blue Reach submissions, and in our own submission.

7.2 Throughout the Vodafone, SKY and NERA submissions, it is simply accepted that there is strong competition in those telecommunications markets, with no reason given. The Blue Reach and InternetNZ submissions to the contrary are not even referred to.

7.3 The Blue Reach submission deals with the problems with competition in the fixed and mobile telecommunications markets over 8 pages at [6] to [10], for example.

7.4 Not responding to those submissions on such a central issue (it is a central issue too in various parts of the Vodafone and SKY submissions and NERA report) cannot be an oversight. As noted above, the pattern in the Vodafone and SKY submissions (reflected also in the NERA report) is to simply not deal with some key evidence and submissions put forward. It appears SKY and Vodafone have no answer to the submission that there is hampered competition in fixed and mobile telecommunications markets, and that the Commission can and should accept that is so in its assessment.

7.5 Take for example the mobile telecommunications markets where there is constrained competition. The effect of zero-rating Vodafone/Sky's own content, in the future period material to the SLC assessment where mobile video downloads and quad/triple plays involving content and mobile are a major factor, provides even greater incentive for customers to move to Vodafone/Sky in order to get the zero-rated must have content (and for its existing customers to remain).

7.6 Essentially, as to the submissions by other opposing parties, and their experts' reports (particularly TVNZ, 2degrees and Spark), the degree of SLC is magnified by the zero-rating of Vodafone/Sky's own content to its customer base.

8. Prioritisation or throttling of content

8.1 As outlined above, and for the reasons Vodafone gives:

(a) throttling is less likely than prioritisation to achieve fast lanes (own content) v slow lanes (third party content); and

(b) the Vodafone submission largely ignores the submissions on prioritisation, focussing instead on throttling which does have the problems that Vodafone indicates.[25]

8.2 The absence of submission on prioritisation, when it has been squarely raised, should be treated as evidence that there is an SLC issue. Prioritisation was the first on the list of our net neutrality concerns stated in our submission.

8.3 This "fast lane" and "slow lane" issue, whether by way of prioritisation or throttling, is a core feature of *ex ante* regulatory focus, such as by the FCC and by the European Union. The FCC, for example, introduced rules that do not permit a fast lane and slow lane approach (the EU has taken a different approach, permitting differentiation in some circumstances).

8.4 The point is that regulators have recognised that there is a market failure problem in the status quo, relating to prioritisation.

---

25 See for example, Vodafone submission dated 11 September 2016 at [6.20]

9. Upstream issues as to third party content

9.1 Vodafone, in response to submissions as to discrimination against upstream competing content providers, submits:

> "6.26 Indeed, the practice of RSPs in New Zealand is that no differentiation is made between content originating from different sources. Vodafone's consistent practice is that it does not discriminate against or prioritise any source of content. In addition, content providers are increasingly moving towards end-to-end SSL encryption for media delivery. Vodafone does not manage, control or modify the encryption of any other providers content. In reality, such encryption would limit the ability of any network operator to implement traffic management (even if it did wish to do so)."

9.2 This submission is not correct:

(a) The merged entities' incentives are substantially different from the status quo, and that is largely irrelevant to the assessment. Sky currently cannot differentiate as it has no RSP functionality. Vodafone does not have a relevant content play creating incentives to differentiate. The position markedly changes after the merger.

(b) The suggestion that end-to-end encryption stops differentiation shows a misunderstanding, as the source of the third party OTT content is known, from the usual data associated with the transmission, even though the content itself is encrypted.

(c) In any event, Vodafone is required by statute to be able to single out the third party content, and would not be able to comply with its obligations under the Telecommunications (Interception Capability and Security) Act 2013 (TICSA).

(d) Like other "network operators", Vodafone must provide technical capacity to intercept the traffic of particular users, as required by TICSA. Section 10(1)(a) of TICSA requires the capacity to "identify and intercept telecommunications without intercepting telecommunications that are not authorised to be intercepted under the warrant or lawful authority". This involves distinguishing traffic which relates to users of interest, from traffic which is not so related.

(e) We add also that services, of which Skinny is an example, are moving to customers being able to choose to categorise and prioritise particular classes of traffic: for example, to prioritise gaming or TV content ahead of other traffic to that customer. It can be expected that Vodafone has, and will want to use in this way, the capability to separate content and treat it differently.

10. Conclusions as to Factual, Counterfactual, and implications in the Pay TV and VOD markets

10.1 We will use zero rating own content over mobile to illustrate the broader issues, which also include differential retail pricing variants beyond zero rating.

10.2 Our conclusions are preliminary, pending external Counsel's confidential review of, and submission on, redacted material.

Counterfactual

10.3 In the counterfactual, each of Vodafone and Sky have neither the ability nor the incentive to zero rate own mobile content while imposing data charges on third party content:

10.4 Sky will not be an RSP and so cannot do so.26

10.5 Vodafone will not have the Sky content to do so, save in the limited cable online footprint, the more so if, as the applicants claim, the status quo remains (namely, satellite linear TV with some Sky OTT sold via RSPs). For example, if linear Sky TV remains (over satellite in the status quo so zero rating online is not possible) online offerings such as Neon, FanPass and successors will be available to all, not just Vodafone. That is what Sky says. Vodafone may have the ability to zero rate that content, but not the same incentive.

10.6 In both the factual and the counterfactual, Sky has “must have” content. There is substantial lessening of competition whether or not the Sky content is “must have” (but the “must have” aspect increases the lessening of competition).

Factual

10.7 In the factual, the merged entity has the ability to zero rate online content over mobile. We have demonstrated above that it not only has the incentive to do so but that this in fact is what is does internationally. The circumstances have markedly changed, along with the major move, acknowledged by the applicants, to plays involving content and mobile.

10.8 For example, when the applicant’s Irish business rolled out its new TV network in January 2016, it zero rated that content over mobile, while leaving third party content still subject to data usage charges payable by Vodafone customers.

10.9 We have shown that the retail price of downloading a single movie from a third party such as Netflix is very high, and well beyond pro-competitive service/price differentiation, when the retail price of downloading a Vodafone- sourced movie is zero (assuming zero rating). That is particularly so when normal video viewing over a month is considered.

10.10 The current position (and possibly the position in the counterfactual too) is that data charges over mobile are high (and prohibitive for third party suppliers (currently including Sky VOD)). But the difference is the zero rated retail pricing of Vodafone/Sky’s own content.

Implications in the VOD and Pay TV markets

10.11 As above, this will be submitted upon following review of redacted material, confidentially by external counsel.

26 If, contrary to the view of the applicants, it acquires or builds an RSP, the footprint and therefore the impact will be minimal in the period under review for clearance purposes.

11. Appendix A: Cost of Vodafone mobile data usage in Ireland and NZ

Data used for online content

Data used in 1 hour of Netflix SD video downloads	0.7 GB approx[27]
Data used in 1 hour of Netflix HD video downloads	3 GB approx[28]

(a) A typical 2-hour movie uses 1.4 Gb for SD and 6Gb for HD; and

(b) Data caps in NZ and Ireland are 1 to 15 Gb and 3 to 17 Gb respectively depending on plan and price (see below), so that the data cap is quickly exceeded on typical mobile viewing.

To download a two-hour film over Vodafone mobile in Ireland costs, depending on the plan (as below), beyond small data caps, around:

(a) For a Vodafone own content movie, zero; and

(b) For non-Vodafone content, €7 to €42 (NZD $11 to $65) for SD and €30 to €180 (NZD $45 to $270) for HD.

The equivalent for a two-hour film over Vodafone mobile in New Zealand is $25 to $700 for SD, and $108 to $3,000 for HD.

That is for just one two-hour film. What is clear is that:

(a) mobile downloading is prohibitive for normal use over a month of third party OTT services; and

(b) zero rating Vodafone's competing product (Vodafone/Sky in NZ and Vodafone TV in Ireland) provides a considerable competitive advantage.

Vodafone NZ data add-ons

	SD quality 1 hour	**SD quality 2 hours**	**HD quality 1 hour**	**HD quality 2 hours**
Vodafone NZ Prepay $19 and $29 Boosts ($45 for 2.5GB)[29]	$12.60	$25.20	$54	$108
Vodafone NZ Add Ons to existing plans ($20 for 1GB of data)[30]	$14	$28	$60	$120
Vodafone NZ Prepay Carry Over $29 Prepay Plan (add on $1 for 25MB)[31]	$28	$56	$120	$240

27 http://help.vodafone.co.nz/app/answers/detail/a_id/23721/~/how-can-i-control-how-much-data-netflix-uses%3F
28 http://help.vodafone.co.nz/app/answers/detail/a_id/23721/~/how-can-i-control-how-much-data-netflix-uses%3F
29 http://www.vodafone.co.nz/prepay-boosts/
30 http://www.vodafone.co.nz/mobile-plans/sim-only/
31 http://www.vodafone.co.nz/prepay/

Vodafone NZ Prepay $9 Prepay Plan (no data included, add on is 0.50c per MB)[32]	$350	$700	$1500	$3000

Vodafone Ireland data add-ons

	SD quality 1 hour	SD quality 2 hours	HD quality 1 hour	HD quality 2 hours
Vodafone Ireland 30 Day Instant Data (add on €15 for 3GB)[33]	€3.50	€7	€15	€30
Vodafone Ireland 30 Day Instant Data (add on €8 per 1GB)[34]	€5.60	€11.20	€24	€48
Vodafone Ireland Red Connect Plus Plan (add on €2 per 200MB)[35]	€7	€14	€30	€60
Vodafone Ireland Red Extra Plan (add on 1.5c per MB)[36]	€10.50	€21	€45	€90
Vodafone Ireland Red Plan (add on 3c per MB)[37]	€21	€42	€90	€180

Data Caps on Vodafone NZ and Ireland retail mobile services

Vodafone NZ

Open-term plans (SIM only) (http://www.vodafone.co.nz/mobile-plans/sim-only/)

- Advantage Lite: 1GB ($39.99)
- Red+Lite: 4GB ($59.99)
- Red+Essentials: 7.5GB ($79.99)

Minimum-term Red+ plans (with a phone) (http://www.vodafone.co.nz/red-plus/)

- Red+Essentials: 7.5GB ($99.99)
- Red+: 12.5GB ($129.99)
- Red+Super: 15GB ($149.99)

Pre-pay plans here: http://www.vodafone.co.nz/prepay/ (including, for example, $29 for 1GB of carry-over data).

Data add-on pack information here: http://www.vodafone.co.nz/mobile-plans/add-ons/

Vodafone Ireland

Sim only plans (http://www.vodafone.ie/bill-pay-plans/)

32 http://www.vodafone.co.nz/prepay/
33 http://www.vodafone.ie/pay-as-you-go-plans/charges/add-ons/?icmp=payasyougoplans-more-about-add-ons
34 http://www.vodafone.ie/bill-pay-plans/add-ons/
35 https://www.vodafone.ie/bill-pay-plans/out-of-plan-charges/
36 https://www.vodafone.ie/bill-pay-plans/out-of-plan-charges/
37 https://www.vodafone.ie/bill-pay-plans/out-of-plan-charges/

- RED 30 day: 3GB (€30)
- RED Connect sim only 12 months: 5GB (€35)

RED plans (with a phone) (http://www.vodafone.ie/bill-pay-plans/)

- RED Connect Essentials: 3GB (€40)
- RED Connect: 7GB (€60)
- RED Connect Super: 17GB (€80)

Data add-on pack information here: (http://www.vodafone.ie/pay-as-you-go-plans/)