



Submission to ACCC

Inquiry into the Proposed Merger
of TPG with Vodafone

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Introduction

Commpete – Alliance for Competition in Digital Communications (**Commpete**) welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission's (**ACCC**) inquiry into TPG Telecom Limited's (**TPG**) proposed merger with Vodafone Hutchison Australia Pty Limited (**VHA**).

Commpete represents non-dominant telecommunication providers of retail and wholesale digital communications. Commpete aims to ensure that all technology platforms guarantee competition that will provide equal, timely and open access to consumers.

Commpete's members are mobile virtual network operators (**MVNOs**) that provide mobile services to its customers using wholesale services obtained through varying commercial relationships with mobile network operators (**MNOs**). MVNOs play an important role in the mobile ecosystem through strengthening and deepening the process of competition. Fundamental to the MVNO business model is the acquisition of wholesale services from MNOs.

Australia's mobile communications market has three MNOs, i.e., Telstra, SingTel Optus and VHA. TPG acquired 4G mobile spectrum via auction in April 2017 and subsequently announced its intention to launch its mobile network in the second half of 2018. Commpete and its members warmly welcomed TPG's plans to be Australia's fourth MNO. This is because a fourth MNO would provide an additional source of wholesale MVNO services and apply competitive pressure on existing suppliers.

Against this background, Commpete submits that the proposed merger of TPG with VHA should not proceed. This is because the merger will further constrain MVNO activity and will have detrimental impacts on competition and consumer interests. In addition, Commpete submits that recent MNO merger cases in Europe are particularly relevant to the ACCC's consideration of the TPG - VHA merger.

This submission expands upon the interrelated reasons that support the rejection of the proposed merger and is presented under the following headings:

- MVNO regulation;
- Competitive implications;
- Consumer implications;
- International precedents; and
- Summary of key points.



MVNO Regulation

MVNOs operate by acquiring wholesale mobile services from MNOs and repackaging and supplying these as retail or wholesale mobile services to their own customers. MVNOs have pioneered many important benefits to consumers particularly in regard to innovations in customer service (e.g., self-service portals and apps, and simplified and streamlined sign-up processes, innovations in pricing (e.g., voice and data bundles) and innovations in marketing (e.g., focussing on niche markets).

In Australia, MVNOs acquire relevant wholesale mobile services from MNOs through “commercial” negotiations. That is, there is no regulatory requirement that compels MNOs to provide wholesale mobile services to MVNOs. In effect, the MNOs are in a position to refuse to supply or to set unreasonable terms of supply for access to their wholesale services.

In the absence of any MVNO regulatory support and the need to rely on “commercial” negotiation where MNOs have a position of strength, MNOs have little incentive to engage with MVNOs. The extent to which MVNOs have access to the mobile technology stack is at the discretion of the MNOs.

Where access is limited this is known as “thin-MVNO”. In this case the MVNO essentially adds its brand and distribution channels to an MNO’s retail offering. This is opposed to “thick-MVNO” where an MVNO is allowed greater control over its retail offering in terms of tariffs, services, bundling and devices.

The thin-MVNO offerings that Australia’s MNOs typically provide is evidenced by the constraints that MNOs impose on MVNOs. Practices that MNOs have been known to adopt to constrain MVNO activity include the following:¹

- rate plan management, i.e., dictating the rate plans and tariffs that the MVNO is permitted to offer;
- network clipping, i.e., providing the MVNO with inferior network coverage compared to what the host MNOs provide to their own retail customers; and
- sandboxing, i.e., MVNO marketing material is subject to MNO approval.

Such practices are particularly concerning to Commpete given that 5G services are soon to be introduced. The advent of 5G provides new and exciting opportunities for MVNOs to continue to serve niche markets and to continue to develop and to offer consumers innovative prices, products and services.

¹ See presentation by Rene Sugo at CommsDay Melbourne Congress, July 2018, <https://www.linkedin.com/pulse/teico-de-ja-vuos-5g-same-destructive-path-nbn-rene-sugo/>



The absence of MVNO regulatory support in Australia plays out in its relatively low MVNO market share. Australia's MVNO market share is 11 *per cent*.² In Europe, where MVNO competition is encouraged by regulators, MVNO market shares in selected markets in 2014 were reported to be Netherlands 38 *per cent*, Germany 35 *per cent*, the United Kingdom 18 *per cent* and Spain 16 *per cent*.³ In Japan, the MVNO market share is estimated to be approximately 28 *per cent*.⁴

Commpete is concerned that should the TPG - VHA merger proceed, the MVNOs' already constrained market position will be further weakened. That is, the merger would narrow the available options from which MVNOs can seek wholesale mobile services. In the absence of any regulatory requirement for MNOs to supply such services to MVNOs, MVNOs will be faced with fewer supply options and will face the prospect of higher prices as supply is constrained. Moreover, MVNOs are more likely to be denied access to 5G services.

These added constraints on MVNO activity in turn impacts on end-users. That is, if MVNOs have limited wholesale inputs they are denied the opportunity to develop new and innovative service and price offerings for their retail customers. As such, Commpete submits that the merger of TPG with VHA is detrimental to the interests of consumers.

Commpete contends that the ACCC should deny authorisation for the proposed merger in order to ensure that there is a market structure conducive to protecting and promoting MVNO activity and consequently serving the interests of end-users. That is, a four-player MNO market would be more likely to result in improved MVNO service offerings and lower prices than a three-player MNO market. This is because in a four-player market, MNO market power would be lower and MNOs would be more likely to seek and consider new business opportunities with MVNOs.

Moreover, a four-player MNO market would reduce the risk that MNOs may engage in anti-competitive behaviour such as refusing to supply or setting unreasonable terms of supply for access to their wholesale services. By denying the proposed merger, the ACCC would support and promote competition and reduce the risk of anti-competitive behaviour occurring.

Commpete notes that supporters of the TPG - VHA merger argue that the merger would allow the necessary scale to apply competitive pressure on market leader Telstra and that this would be good for consumers. However, Commpete considers that competition in the mobile ecosystem would not be well served by a three-player market in which MNOs are focussed on capturing and controlling retail customers.

² ACCC, *Competition and price changes in telecommunications services in Australia 2016-2017*, February 2018, page 25

³ NEREO, *MVNOs in Europe*, October 2015

⁴ WPC analysis based on ITU and Digitimes Research data. See:

<https://www.digitimes.com/news/a20161218PD202.html?mod=3&q=MVNO&chid=9>



Such an outcome does not address fundamental market failure at the wholesale level. Wholesale market failure already constrains MVNO activity denying customers access to innovations in service and pricing. This will be exacerbated if MVNOs are denied access to the rich opportunities that 5G services can provide.

Should the ACCC be minded to grant authorisation for the TPG - VHA merger, Commpete submits that the ACCC should grant authorisation subject to the condition that the merged entity must supply wholesale mobile services. The practice of setting such conditions in the context of MNO mergers has been well established by the European Commission (**EC**). For example, “four-to-three” mergers were permitted by the EC in Austria (2012), Germany (2014) and Ireland (2014) on the condition that the merged entity provide 30 *per cent* of its network capacity for wholesale access.

In fact, since October 2014, only one ‘four-to-three’ MNO consolidation has been cleared by the EC. In this 2016 case the EC conditionally cleared a proposed joint venture that would combine the Italian mobile network operating businesses of VimpelCom and CK Hutchison Holdings. The EC’s clearance was, however, conditional on the divestment of sufficient assets that will allow Iliad SA to enter the market as a new mobile network operator.⁵ Iliad consequently did so with great fanfare and well received low cost retail offering in May 2018. In other EU markets, such as Belgium there is currently a government proposal to reserve spectrum for a new fourth mobile operator in the 2019 spectrum auction following a review of its merits.⁶

It should also be noted that regionally in Singapore the Info-communications Media Development Authority (**IMDA**) explicitly licensed a fourth operator to promote competition in Singapore (which was subsequently won by TPG). Such is its importance to sector competition that it is understood that the IMDA needs to give its approval to the proposed separation of TPG’s mobile business in Singapore from this proposed merger of TPG with VHA.⁷ It is further noted that other regional markets have four or more mobile operators, e.g., Indonesia (5), Malaysia (4), and Vietnam (4).

Commpete submits that the ACCC could set a condition that would require the merged TPG - VHA entity to supply relevant wholesale mobile services on fair and reasonable terms. For example, this could be in the form of a requirement to publish a “reference offer” which would be subject to ACCC approval. Such a reference offer would specify the terms (including cost-based pricing) on which relevant MVNO services would be offered. This approach would enable Australia’s MVNOs to move toward thick-MVNO access and as such would lead to competition that will provide

⁵ Case M.7758, Hutchison 3G Italy / WIND / JV, Commission Decision of 1 September 2016.

⁶ See for example, Belgian Institute for Postal Services and Telecommunications (BIPT), *Impact study of 26 June 2018 regarding a fourth mobile network operator on the Belgian mobile market*

⁷ See <https://asia.nikkei.com/Business/Companies/TPG-Telecom-plans-to-spin-off-Singapore-s-fourth-telco>



equal, timely and open access to consumers. In addition, this might also ensure MVNO access to 5G services, including to industry verticals.

Commpete, and many of its members, have long advocated the need for wholesale mobile services to be declared under Part XIC of the *Competition and Consumer Act 2010*.⁸ Commpete considers that the declaration of wholesale MVNO services (and the subsequent setting of regulated prices) would be conducive to the promotion of competition and would be in the long-term interests of consumers. Commpete submits that such declaration is justified on the following grounds:

- regulation would overcome the market power imbalance which constrains “commercial” negotiations between MVNOs and MNOs;
- regulation would ensure that the terms and conditions of wholesale mobile service supply are reasonable and would allow flexibility for retail service differentiation; and
- regulation would create an environment of confidence and certainty conducive to sustainable business investment.

Competitive Implications

MVNOs play an important role in the mobile ecosystem through strengthening and deepening the process of competition. MVNOs do this by serving the needs of niche markets through pricing, product and service innovation.

Commpete submits that competition means choice. That is, giving consumers the option to choose a retail service provider (**RSP**) from multiple competing RSPs and providing consumers a wide choice of service and pricing offerings. Competition also means giving access seekers the option to choose an access provider from multiple access providers and providing a wide choice of wholesale services. Such consumer choices will soon be facilitated by the widespread adoption of eSIMs with the inclusion of an eSIM in the latest iPhone XS/XS Max and Google Pixel 3 if the MVNOs are able to secure viable wholesale offerings. Commpete submits that the proposed TPG - VHA merger will be detrimental to competition at the wholesale and retail levels.

With regard to the wholesale level, the merger will narrow the choice of MNOs or access providers from which MVNOs can seek to acquire wholesale mobile services. That is, the merger will ensure that the number of MNOs in Australia will be limited to

⁸ See for example, Presentation by Matt Healy at CommsDay, Melbourne Congress 2013, www.slideshare.net/CommsDay/macquarie-telecoms-matt-healy, presentation by Rene Sugo at CommsDay Melbourne Congress, July 2018, <https://www.linkedin.com/pulse/telco-de-ja-vuos-5g-same-destructive-path-nbn-rene-sugo/> and Macquarie Telecom Group's submission to the ACCC's communications sector market study 2017 <https://www.accc.gov.au/system/files/Submission%206%20-%20Macquarie%20Telecom.pdf>



three. Commpete submits that in a small market, the removal or addition of a market participant has a significant impact on the market in terms of pricing, service differentiation and innovation.

Commpete submits that the additional constraint on MVNOs which would arise from the TPG - VHA merger at the wholesale level will flow through to the retail level. That is, additional constraints on MVNO access to wholesale services will limit the capability of MVNOs to offer consumers innovative services and prices. MVNOs cannot develop innovative retail services if they are denied the necessary wholesale inputs. Commpete submits that if the TPG - VHA merger proceeds, the ACCC will constrain mobile industry activity, lock MVNOs out of 5G services and as such will stifle the process of competition for the foreseeable future.

Consumer Implications

Commpete considers that promoting and protecting the interests of consumers is the ultimate aim of the ACCC. Commpete submits that the merger of TPG and VHA will be detrimental to the interests of consumers including retail pricing.⁹ The reasons that support this view draw on the discussion in the previous sections. Such reasons include the following:

- the merger will deny MVNO access to the wholesale inputs which are necessary for MVNOs to develop innovative retail service and pricing packages;
- the merger will effectively deny MVNO full access to 5G services; and
- the merger will ensure that MNOs maintain and strengthen their market power which will enable MNOs to keep wholesale prices high and as such, MVNOs' retail prices will also remain high.

International Precedents

A number of proposed MNO mergers have recently been considered by the EC. These have involved major global industry players and have been widely analysed and reported. Commpete submits that recent cases involving proposed mergers in the United Kingdom (2016) and Germany (2014) are particularly relevant to the ACCC's consideration of the proposed TPG - VHA merger.

⁹ See BEREC. *Report on Post-Merger Market Developments - Price Effects of Mobile Mergers in Austria, Ireland and Germany*, BoR (18) 119, 15 June 2018. The Report found there is at least some evidence that retail prices for new customers increased due to the merger compared to the situation without the merger (the counterfactual).



In the case in the United Kingdom the EC blocked the proposed merger of Hutchison with Telefonica. The EC was concerned that the merger would result in a market leader with a 40 *per cent* market share in a three-player MNO market.¹⁰ The EC's rationale for its decision included the following:

- the significantly reduced competition in the market would likely have resulted in higher prices for mobile services in the UK and less choice for consumers;
- the takeover would also likely have had a negative impact on quality of service for UK consumers; and
- the takeover would have reduced the number of mobile network operators willing to host other mobile operators on their networks.

Commpete submits that these concerns would be significantly amplified in respect of the proposed TPG - VHA merger. This is because the outcome of the merger will be a market leader, i.e., Telstra with a 50 *per cent* market share in a three-player MNO market.¹¹ Accordingly, Commpete urges the ACCC to carefully consider the EC's decision in this case.

In the case in Germany, the EC approved the merger of Telefonica (the third largest MNO) with KPN (fourth largest player) subject to a range of conditions¹². Citing concern that the merger would decrease the competitive pressure that MVNOs could exercise on MNOs, the merger was conditional on the merged entity providing 30 *per cent* of its network capacity for wholesale access. This measure was designed to facilitate the entry of three MVNOs. Accordingly, Commpete considers that if the ACCC was to grant authorisation for the proposed TPG - VHA merger in spite of the EC's decision in the UK as discussed above, the ACCC should impose wholesale access conditions on the merged entity.

Commpete would also highlight that in the United States, in the case of the proposed merger between the third largest player T-Mobile and fourth largest player US Sprint which is still pending, the Federal Communications Commission (**FCC**) has spent considerable effort examining the issue of MVNOs during its assessment.¹³ Given the strong objections raised to the merger because of the possible adverse impact on MVNOs this issue may be critical to whether the merger receives approval and/or any conditions which may be placed on it.

¹⁰ See http://europa.eu/rapid/press-release_IP-16-1704_en.htm

¹¹ MNO market share is based on mobile market share reported by the ACCC in its Communications Sector Market Study, Final Report, April 2018

¹² See http://europa.eu/rapid/press-release_IP-14-771_en.htm

¹³ See for example, www.fiercewireless.com/wireless/doj-reaching-out-to-mvnos-amid-proposed-t-mobile-sprint-combination



Summary of Key Points

Commpete welcomes the opportunity to make this submission to the ACCC's inquiry into TPG's proposed merger with VHA. Commpete submits that the ACCC should not grant authorisation for the proposed merger. This is because the merger will further constrain MVNO activity and will have detrimental impacts on competition and consumer interests. However, if the ACCC is minded to grant authorisation, such authorisation should be subject to the condition that the merged entity must supply wholesale mobile services subject to ACCC approval.

Other key points in this submission that Commpete wishes to emphasise are the following:

- should the TPG - VHA merger proceed, the MVNOs' already constrained market position will be further weakened;
- by denying the proposed merger, the ACCC would support and promote competition and reduce the risk of anti-competitive behaviour occurring;
- the ACCC should deny authorisation for the proposed merger in order to ensure that there is a market structure conducive to protecting and promoting MVNO activity and facilitating competition that will provide equal, timely and open access to consumers.;
- constraints on MVNOs which would arise from the TPG - VHA merger at the wholesale level will flow through to the retail level;
- if the merger proceeds, the ACCC will constrain mobile industry activity and will deny MVNO full access to 5G services which will stifle the process of competition for the foreseeable future;
- the ACCC should commence a public inquiry to consider whether to declare wholesale mobile services; and
- the EC's rationale for blocking a four-to-three merger in the UK is particularly relevant to the ACCC's consideration of the proposed TPG - VHA merger.

Commpete would be pleased to address any queries that the ACCC may have arising from this submission.

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