

Commpete's submission in response to the Market Inquiry Letter regarding Optus and TPG's proposed network and spectrum sharing arrangements

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Introduction

Commpete – an industry alliance for competition in the digital communications sector (**Commpete**) – welcomes this opportunity to make a submission to the Australian Competition and Consumer Commission (**ACCC**) about the proposed arrangement for network and spectrum sharing from Optus Mobile Pty Ltd (**Optus**) and TPG Telecom Limited (**TPG**) (**Proposed Arrangement**). Commpete represents non-dominant telecommunications providers of retail and wholesale digital communications, and aims to ensure that regulatory settings facilitate fair and vibrant competition in the sector. As Commpete's members include challenger mobile network operators, mobile virtual network operators (**MVNOs**) and neutral host mobile network infrastructure providers (**MNIPs**), Commpete is well-placed to understand and comment on the implications of the Proposed Arrangement for the mobile services competitive landscape.

Overview

Commpete understands that the Proposed Arrangement is being considered using the ACCC's informal merger pre-assessment review process, and so the parties to the Proposed Arrangement have been free to provide as much or as little information to the ACCC as they wish to. Scarce detail has been provided about the agreements that the parties will enter into to give effect to the Proposed Arrangement, particularly compared to the detail publicly provided by the ACCC during the review of similar arrangements proposed by Telstra and TPG in 2022, where a more detailed summary of that proposed arrangement, including detailed summaries of each legal agreement, were provided. The lack of detail in relation to this Proposed Arrangement, and the short time to respond (in contrast to the long time between announcement of the Proposed Arrangement by the parties and the ACCC's inquiry of market views) results in a real constraint in respondents' ability to assess its effect on competition.

We believe this information asymmetry reveals a flaw in the current merger review process as the onus is on the ACCC and interested third parties to demonstrate the competition impacts on themselves, market structure and end users with potentially incomplete information. Commpete believes a rebalance of this information asymmetry will greatly increase third party involvement in merger assessment to help better inform merger clearance processes in the future.

Despite these limitations, we have noted below what Commpete consider to be the detriments to competition raised by the Proposed Arrangement, based on what has been disclosed, and how these risks might be remedied if the ACCC were minded to seek undertakings from the parties under section 87B of the *Competition & Consumer Act 2010 (Cth)* (the **Act**).

However, Commpete notes that these detriments are of a lesser magnitude than the concerns we raised in relation to the 2022 Telstra/TPG network and spectrum sharing arrangements,

because, absent the involvement of Telstra, they do not entrench the market position of a dominant mobile infrastructure or retail market participant.

Commpete acknowledges the many challenges faced by Government and industry in deploying infrastructure across regional Australia. On the surface, the Proposed Arrangement seems to reflect a genuine intent of utilising infrastructure sharing models which more closely resembles efficient use of infrastructure. As the ACCC will be aware, Commpete and its members actively advocate and seek more innovative ways to deploy mobile infrastructure in wholesale arrangements to best deliver more choice and less concentration in retail markets.

Commpete also recognises that some benefits for retail competition, choice and services would arise from implementing the Proposed Arrangement, delivering benefits for society and the economy without further entrenching the dominance of Telstra.

While it is for the ACCC to balance these benefits and detriments, on balance Commpete considers that it is open to the ACCC to find that the Proposed Arrangement would not have the effect of substantially lessening competition in a market and so may decide not to oppose the Proposed Arrangement.

We first set out below the potential detriments with the Proposed Arrangement, before turning to the ACCC's specific questions.

Potential issues and detriments with the Proposed Arrangement

The Proposed Arrangement may give MNOs a stronger incentive to restrict terms of wholesale access for MVNOs and challenger mobile networks

A number of Commpete's members are MVNOs that provide mobile services to their customers using wholesale services obtained through varying commercial relationships with mobile network operators. Our members also include challenger MNOs that operate smaller mobile networks which rely on national MNOs for coverage. MVNOs and smaller MNO operators play an important role in the mobile market through strengthening and deepening competition for end-users, and currently serve approximately 11% of the retail market for mobile services.¹

These service providers have the potential to bring superior levels of innovation, faster time to market, different competitive offerings and ultimately better outcomes for end-users. Internationally, MVNOs have led the marketplace in developing market-leading service features for consumers (e.g. integrated fintech and lifestyle services).

However, by their nature, negotiations between MVNOs and MNOs that also service the retail market involve negotiations with a provider that is also a retail level competitor, and MNOs hold significant commercial bargaining power in these discussions. In Australia this has tended to result in restrictive and limited terms of access provided by MNOs to wholesale mobile services and a MVNO sector that is comparatively smaller than in other markets.

Commpete considers that a reduction in infrastructure competition, and an increase in market concentration through the exit of the TPG network in the coverage area as defined in the ACCC's

¹ ACCC Communications Market Report 2022-2023, p26

market inquiry letter (**Coverage Area**), may further incentivise MNOs to restrict downstream wholesale offerings, with a flow on detriment to end users through a loss of the opportunity to receive enhanced innovative technical and product features that MVNOs and challenger MNOs would otherwise be well-placed to offer.

This issue could, however, be addressed through an undertaking from the parties to supply fair and non-discriminatory access to their networks, or equivalent regulation on all MNOs making wholesale mobile network access a declared service under Part XIC of the Act. Similar regulatory models have worked well in other jurisdictions which recognise the competition merits which MVNOs provide in the market.

In the past, the ACCC has tended to not utilise such tools in merger process. Commpete urges the ACCC to consider such path, which could provide timeliness and certainty for merging parties, downstream markets and end users. This might assist in providing economic benefits in productivity across the industry. In contrast it may reduce requirements for protracted legal processes which typically - by their nature - do not encourage third party participation in the merger review process.

There is no guarantee that TPG wholesale customers will benefit from extended geographical reach on fair terms

The ACCC's summary of the Proposed Arrangement states that "*TPG will have the ability to resupply the MOCN services to its retail and wholesale customers, and once implemented, TPG's...and wholesale customers will use Optus' 4G and 5G regional network*".

While this makes it clear that the contractual arrangements between the parties will not bar TPG from resupplying access to the shared network to MVNOs, it does not, of course, ensure that TPG will offer fair and reasonable wholesale access to the shared network or ensure that it will not impose terms that favour its own downstream retail offerings.

While access to an extended regional footprint will make TPG a stronger retail competitor to Telstra and Optus, whether these competitive benefits flow down to MVNO customers through access to this extended footprint will remain a matter of future negotiation between MVNOs and TPG unless it is already guaranteed in existing contractual arrangements. Absent a commitment from TPG to offer access on fair and reasonable terms (such as through an enforceable undertaking), MVNOs will remain at a strong disadvantage in these discussions.

Potential loss of coverage at decommissioned TPG sites

Commpete understands that TPG will transfer about 129 sites in the Coverage Area to Optus, subject to due diligence yet to be completed, and decommission a further approximately 626 sites in the Coverage Area. While we expect that the selection of sites for transfer to Optus will be focussed on areas where the TPG sites offer superior coverage or fill gaps not covered by the Optus network, this is not stated in the Market Inquiry Letter and so is not guaranteed. Accordingly, there may be partial or full loss of mobile coverage for TPG users at the sites where TPG base stations are decommissioned, which would weaken the positive impact on competition of TPG extending its network reach in the Coverage Area. This may include reducing coverage at sites funded by taxpayers through Mobile Blackspot Funding.

If the ACCC was minded to seek undertakings from the parties as a condition of approving the Proposed Arrangement, a ‘no location worse off’ principle could be applied to mitigate this risk.

Spectrum

We understand that TPG will authorise Optus to use parts of the spectrum it holds licences for in 700MHz, 1800MHz, 3600MHz and 3700Mhz bands in the Coverage Area, with this spectrum being pooled with Optus’s existing spectrum in these areas. The Market Inquiry Letter specifies that not all TPG spectrum will be shared with Optus in these areas, but provides no further information about what spectrum will in fact be shared.

This scant detail is insufficient for Commpete and its members to assess whether the spectrum sharing arrangements will give Optus a significant market advantage over others who have sought spectrum in these areas (who may have lost to either TPG or Optus in the spectrum allocation process, where market limits were imposed by Ministerial determination following recommendation from the ACCC). In Commpete’s view the ACCC should give strong consideration to whether the spectrum sharing arrangements create a market power concern and, if so, should require one or both parties to divest some spectrum as a condition of the Proposed Arrangement proceeding.

Response to the ACCC’s questions

We set out below our response to the ACCC’s specific questions in the Market Inquiry Letter.

1. How mobile service providers currently compete in the mobile services market and other relevant markets, including whether they seek to differentiate on price, network coverage and quality, product and service offerings and inclusions, and whether the Proposed Arrangement will impact on this competition

Network coverage in regional and remote areas is undoubtedly a feature that attracts mobile customers who live or work in regional Australia or travel to regional areas. By immediately and significantly increasing the network coverage of TPG, and likely providing some increase in coverage for the Optus network in locations it acquires TPG sites, the Proposed Arrangement will go some way to allowing Optus and TPG’s retail offerings to compete better with those of Telstra, which has a very strong advantage over the parties in regional areas. However, the mobile market is already highly concentrated, as the ACCC has recognised², and the transaction will further concentrate competition at the infrastructure level by guaranteeing that TPG will cease all network investment in the Coverage Area. The detriments of decreased infrastructure competition, and its offset by the benefit of some increase in competition at the retail level, are finely balanced.

However, as noted earlier in our response, Commpete considers that while MVNOs and other wholesale customers of MNOs could potentially bring superior levels of innovation, faster time to market, different competitive offerings and ultimately better outcomes for end-users, including market-leading service features for consumers as have been seen in overseas markets, this is currently hampered by the restrictive terms on which MNOs negotiate

² Outline to Treasury; ACCC’s proposals for merger reform, March 2023, p4.

wholesale access with these companies. The Proposed Arrangement will potentially exacerbate these issues.

2. *The likely impact of the Proposed Arrangement on price competition for mobile services*

Commpete considers that the Proposed Arrangement may have an impact on price competition, as a result of TPG (presumably) increasing its infrastructure cost-base through needing to pay Optus to share its network under the Proposed Arrangement. This increase in TPG's cost base may flow on to its retail pricing through increases in prices paid by end consumers. TPG has been a price leader in the Australian market for some years because of its inferior network coverage. This change in coverage and cost base will be in addition to the concerted effort by the MNOs to increase mobile pricing over the past 12 months or more, with end users paying considerably more for their retail mobile plans. The ACCC will no doubt have insight into these price changes in the market. Despite this change in market structure, Telstra is likely to still be able to command a premium given its greater network reach.

3. *The likely impact of the Proposed Arrangement on non-price aspects of competition, including network coverage, speed, network capacity, customer service, types of product and service offerings, bundling options, and contracts*

The Proposed Arrangement will clearly increase TPG's (and potentially TPG's downstream wholesale customers') ability to compete with Optus and Telstra's superior network coverage. However, as we note above, Australia currently has limited retail offerings from MVNOs or small challenger MNOs that significantly differentiate from the main MNOs' retail offerings. We consider that ensuring fair, reasonable and non-discriminatory wholesale-level access to the MNO networks would result in more vibrant non-price competition for service and product offerings.

4. *How closely Optus and TPG currently compete, or would be likely to compete in the future, absent the Proposed Arrangement*

Given the high concentration in the Australian mobile services market at both the infrastructure and wholesale level, all of the 3 main MNOs in Australia compete closely with each other, and an exit of infrastructure competition by one of them within the Coverage Area will inevitably impact these already problematic competitive dynamics. In our view the close competition between Optus and TPG, being by far the largest alternative options to Telstra, would continue absent the Proposed Arrangement.

5. *The likelihood of other competitors expanding their network coverage and quality to compete with the services provided by Optus and TPG under the Proposed Arrangement*

Commpete considers that small challenger MNOs and neutral host MNIPs will continue to offer innovative infrastructure solutions in some regional areas. The incentive to do so may, however, be reduced, as in the Coverage Area there will be two large potential MNO customers, rather than three.

6. *Any other competition issues relevant to the ACCC's consideration of the Proposed Arrangement*

The Telstra and TPG arrangements considered in 2022, and now Optus and TPG's Proposed Arrangements, show an increasing appetite and willingness to participate in 'active sharing' models. Commpete considers that shared network models will become more economically attractive as time goes on.

The deployment of neutral host active sharing models, which are those operated independently of any MNO, and which are genuinely available for access by all MNOs and other third parties such as fixed-wireless service providers and emergency services networks without any incentive for the neutral host operator to favour one provider over another, has the potential to bring substantial benefits to unserved and underserved regional areas. However, current regulatory settings, particularly the design of Mobile Blackspot Program grants, is not conducive to encouraging such investment. Commpete is happy to discuss these issues further.

If you would like to discuss matters raised in our submissions, please do not hesitate to contact us.