



17 December 2021

Ed Seymour
Director
Communications Competition
Australian Competition & Consumer Commission
By email: telcoseparationrules@acc.gov.au

Dear Mr Seymour,

TPG joint functional separation undertaking consultation paper

nbn welcomes the opportunity to comment on the ACCC's Consultation Paper 'TPG joint functional separation undertaking' (**TPG Undertaking**).

nbn supports measures that will promote competition and incentivise investment in superfast broadband infrastructure, in particular where this is achieved by ensuring a level regulatory playing field. The legislative changes introduced by the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* provide a framework in which superfast network operators can invest in infrastructure-based competition with confidence around the regulatory obligations that will apply. **nbn** considers this approach, if properly administered by the ACCC, will generally promote the Long-Term Interest of End Users (**LTIE**). Accordingly, the ACCC needs to be mindful of the differences in how wholesale only and vertically integrated infrastructure providers are able to compete.

Further, **nbn** supports the approach whereby smaller infrastructure operators can utilise a single undertaking (the ACCC Deemed Functional Separation Undertaking (**Deemed Undertaking**)). This approach minimises the potential industry and ACCC burden involved in running consultations on individual undertakings, whilst ensuring appropriate functional separation is achieved by the organisations adopting it. As the ACCC notes, this approach reduces the disproportionate regulatory cost burden on these smaller providers. Whilst noting TPG is not a smaller provider intended to be covered by the Deemed Undertaking, we have used the Deemed Undertaking as the benchmark for assessing the appropriateness of the TPG Undertaking.

TPG Undertaking – areas of concern

The effectiveness of this regulatory framework lies in the strength of, commitment to, and enforcement of undertakings accepted by the ACCC. To this end, **nbn** considers the undertaking submitted by TPG is broadly appropriate, however we note there are a few areas requiring further clarification compared with the Deemed Undertaking published by the ACCC.

1. **Business Planning and investment approval.**

The Deemed Undertaking requires separate business planning and investment approval processes for the functionally separated business units. The TPG Undertaking does not appear to have a clearly stated direct obligation in this regard, noting that the Deemed Undertaking is designed for a smaller provider that isn't operating separate corporate groups.



nbn considers an explicit obligation is required within the TPG Undertaking to remove the opportunity for TPG's retailers to have inappropriate access to sensitive wholesale / network build information. Such an obligations should not be particularly onerous on a larger provider such as TPG, who may already be running separate business planning and investment approval processes within each of the TPG Retailers and Wholesalers.

2. Shared Staff and Compliance Training

The Deemed Undertaking requires that all staff undertake compliance training and does not set a test or limit on the requirement. In the TPG Undertaking however, compliance training is only required (cl 24) to be undertaken *'by all staff whose duties could result in them being **at material risk** of contravening this Undertaking and TPG's obligations under Part 8 of the Act'*. Material risk is arguably a high threshold. Any risk should be reduced where possible given the impacts on competition that could result from inadvertent disclosures of Protected Information.

All staff should understand TPG's compliance obligations so that they understand how to appropriately act if they become privy to information that should not be shared with either a Retail or Wholesale business. The incremental cost of providing such training to all staff should not be significant.

In addition, notwithstanding the restrictions applicable to Shared Staff and Staff providing Network Engineering Services outlined in cl 22.4 of the TPG Undertaking, it is unclear whether these staff will receive compliance training. **nbn** considers clause 22.4(c) of the TPG Undertaking should be clarified so that it is clearer these staff have an explicit obligation to receive compliance training. This is particularly important for Staff providing Network Engineering Services who will almost certainly come to understand confidential network information that properly functionally separate business units would not be privy to.

General competition concerns

nbn notes that the TPG Undertaking and future functional separation undertakings enable such telecommunications providers to operate in a significantly vertically integrated capacity. The ACCC will no doubt be alive to the incentive, ability and potential of vertically integrated operators to engage in anti-competitive conduct, notwithstanding implementation of functional separation. In the retail market, an integrated operator's retail brands can be more competitive than RSPs acquiring that operator's wholesale products as inputs. This could occur either because of deeper discounting leading to a vertical price squeeze, horizontal bundling or by leveraging across a corporate group including in respect of non-fixed line assets that remain relatively less regulated (e.g. mobile networks).

Further, despite the non-discrimination obligations (**NDOs**) that apply to providers operating under a functional separation undertaking, these providers have an advantage in the wholesale market compared with **nbn**. This is because **nbn** is bound by NDOs that apply to every product or service we supply, whereas other infrastructure providers are only restricted to non-discrimination in relation to the supply of eligible fixed line services. In practice, this means vertically integrated providers may be able to offer discounts on other wholesale services such as mobiles, business services or content in exchange for commitments on fixed services, whereas **nbn** is unable to be commercially flexible in this way.

nbn suggests the ACCC monitor functionally separated telecommunications operators closely in respect of their impact in both the retail and wholesale markets.



Finally, **nbn** notes the recent announcement of structural change in the TPG group¹. Of particular interest is the combination of the Wholesale function under the same management line as the Enterprise and Government function. Whilst this isn't necessarily problematic in and of itself, it does raise questions of appropriate staff separation, especially considering the multi-retail brand strategy that TPG operates. At a minimum **nbn** considers the ACCC should seek clarity from TPG on these organisational changes and whether they impact TPG's ability to comply with the TPG Undertaking.

To discuss further, please contact Matthew Scott, Principal Regulatory Advisor - Consumer & Network at

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Yours sincerely

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¹ [Media release - TPG Telecom announces streamlined group structure.pdf](#)