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18 November 2022

Telstra Corporation Limited
Andrew Low
Partner, Gilbert+Tobin

TPG Telecom Limited
Jodi Grey
Partner, Corrs Chambers Westgarth

Via email: [REDACTED]
Copy: [REDACTED]

[REDACTED]

Dear Andrew and Jodi,

Re: Telstra TPG merger authorisation application (MA1000021) – MOCN arrangements

We refer to the application for merger authorisation lodged by Telstra and TPG.

The Australian Competition and Consumer Commission (**ACCC**) has been comparing the terms of the MOCN Service Agreement (**MOCN Agreement**), the Spectrum Authorisation Agreement, and the Mobile Site Transition Agreement (together, the **Proposed Arrangements**) against other examples of MOCN arrangements, based on publicly available information.

This comparison and analysis is relevant to the ACCC's assessment of the Proposed Arrangements, because the term "MOCN arrangement" often carries with it certain assumptions about its nature and commercial terms. **Attachment A** to this letter summarises the ACCC's observations. Those observations should not be regarded as representing the ACCC's concluded views, or a statement of likely competitive effects.

If the observations in Attachment A raise any matters that your client has not been able to address in submissions to date and your client wishes to comment, please ensure that any response is provided by **4 pm on Wednesday 23 November 2022**.

We propose placing a version of this correspondence on the public register. Please identify any information contained in this letter or Attachment A that you consider to be confidential to Telstra or TPG.

If you have any queries in relation to this letter, please contact Mandy Bendelstein on 02 9102 4037 or Andrew Gun on 03 9290 1853.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'DMcCracken-Hewson', with a long horizontal flourish extending to the right.

Daniel McCracken-Hewson
General Manager
Mergers Investigation Branch

Attachment A

1. Overview

The ACCC has examined the terms of the Proposed Arrangements against publicly available information about the terms of other MOCN arrangements. It is apparent to the ACCC that MOCN arrangements vary, including because they are generally reached by way of commercial agreement (as opposed to being regulated on an ex ante basis). Accordingly, the terms of a MOCN arrangement will tend to reflect the strategic objectives of each party, their commercial structuring preferences, their relative bargaining positions, and the value that they are able to bring to the deal.

The ACCC understands that, where parties have similar bargaining power, they will typically both be 'willing' participants in the transaction, with each having similar bargaining 'inputs' to offer the other party and each receiving the broadly equivalent outputs of the sharing arrangement. Provisions for any future exit or unwinding of the transaction tend to place both parties in a similar commercial situation upon the wind-up of the transaction (without one party being substantially worse off commercially than the other).

The relationship established in the Proposed Arrangements, particularly the MOCN Agreement, differs from typical MOCN arrangements in that it has something of the character of a one-way wholesale supply of a 'network as a service' by a vertically integrated telecommunications operator (in this case, Telstra) to a wholesale customer (in this case, TPG), rather than an arrangement between two equal parties.

2. Common characteristics of MOCN arrangements

Based on the ACCC's review of publicly available material relating to the implementation of MOCN arrangements (see references in **Annexure A**), the ACCC notes common themes generally present in such agreements:

- (a) full access to the functionality offered by all 5G network slices and other 5G capabilities (e.g. 5G value-added services, 5G core network as a service, 5G in-building network service) on a non-discriminatory basis, with broadly comparable treatment of each party (i.e. the outcome for one party would be the same or similar for the other party – this might be documented for both parties, for example);
- (b) the use of a special purpose vehicle to hold the RAN assets of the parties and associated spectrum holdings, usually on a 50:50 basis (after appropriate adjustments to account for potential differences in network sizes that are "vended" into the SPV vehicle by each party), with equal governance arrangements as between those parties;
- (c) if there is a lead MOCN party:
 - (i) that party having some autonomy over the rollout of its network but having obligations to offer transparency about this rollout and with the MOCN customer having the ability to influence the rollout both initially and on an ongoing basis through rollout planning co-ordination with the lead MOCN party;
 - (ii) the establishment of product development committees so that the lead MOCN party offers full transparency over the process to support new products and the ability for the MOCN customer to be able to

independently develop products which are supported by the MOCN network;

- (iii) a balanced and neutral change management process, for example, requiring the lead MOCN party to consult with the MOCN customer in respect of changes proposed by the lead MOCN party to the technical details of a service, and a framework under which the MOCN customer can request such changes;
 - (iv) limitations on the ability of the lead MOCN party to be able to withdraw products;
- (d) service levels and other quality metrics, with rebates; and
- (e) exit provisions which would enable both parties to leave the arrangement smoothly and in a position no weaker than when they entered the transaction.

3. Characteristics of the Proposed Arrangements

Non-discrimination carve-outs

Under the MOCN Agreement, there are carve-outs in the non-discrimination obligations in relation to Telstra's supply to TPG of:

- (a) enterprise and special services products;
- (b) Narrowband Internet of Things and Fixed Wireless Access products; and
- (c) the rollout of 5G on the MOCN, in respect of which Telstra has a distinct 6-month "head start" over TPG.

While parties will generally include contractual protections against risk, such as insurance provisions, liability and indemnity provisions and termination for fault, the ACCC observes that the carve-outs in respect of Telstra's non-discrimination obligations (**NDO**) appear to be different to the typical carve-outs in MOCN arrangements.

Carve-outs to Telstra's Non-Discrimination Obligation: Enterprise and Special Services products

Whether the carve-out of Telstra's Special Service and enterprise-grade products from the application of the NDO will affect TPG's ability to compete over the term of the MOCN Agreement will depend to a significant extent on the business case for these types of services during the term of the agreement and TPG's ability to take advantage of these opportunities.

The ACCC understands that the 5G business case for enterprise-grade applications is in its nascency. While 5G NSA (being the most prevalent 5G network configuration currently) enables the supply of retail segment-focused services such as enhanced mobile broadband (including FWA), the ACCC understands that most enterprise-grade applications rely on a 5G SA architecture, including:

- (a) Internet of Things use cases across a wide range of industry verticals, which will typically be supplied using a Machine Type Communications (mMTC) network slice; and

- (b) industry automation, autonomous vehicles and mission critical services (e.g. e-health), which will typically be supplied using an ultra-reliable and Low Latency Communications (uRLLC) network slice.

It appears likely that, at least in the immediate term, the business case for MNOs and industry for enterprise-grade and other higher quality of service (QoS) 5G applications will remain relatively narrow, as the end-to-end 5G ecosystem (including 5G network architecture and device readiness) matures.

However, recent studies anticipate the growth of the 5G enterprise segment from US\$2.1 billion in 2021 to US\$10.9 billion by 2027, a compound annual growth rate of over 30%.¹ While these projections are not determinative, the ACCC considers that they are instructive in informing the degree of advantage that Telstra would enjoy over TPG in carving out enterprise-grade and Special Service services from the NDO during the term of the MOCN Agreement.

Carve-outs to Telstra's Non-Discrimination Obligation – Narrowband Internet of Things and Fixed Wireless Access

Narrowband Internet of Things (**NBIOT**) capability is carved out from the application of the NDO under clause 1(d) of Annexure B to Schedule 2. While there is no equivalent carve-out, the basis on which TPG can supply Fixed Wireless Access (**FWA**) services to end users under the MOCN Agreement (over 3.6GHz spectrum on a 5G SA basis) is narrower than the configuration under which Telstra can itself supply these services to Telstra Comparison Customers (over any spectrum and on a 5G NSA or 5G SA basis).

FWA in a 5G NSA configuration has been described as one of the most commercially available use cases for 5G technology at present.² Although Telstra operates a 5G SA-capable network, the supply of 5G SA services is dependent on a range of factors, including the availability of 5G SA-compatible end user devices and CPE, which is still maturing.³ Accordingly, as noted in the application for authorisation, Telstra continues to deploy 5G NSA services and is in the “process of upgrading” to 5G SA architecture.⁴

Over the longer term, TPG could commence offering FWA services as Telstra's 5G SA architecture matures and 5G SA sites become available. However, it is not clear (including from the application for authorisation) when or over which period this would occur, especially given TPG would also be reliant on the availability of sufficient 3.6 GHz spectrum (being the only spectrum available to TPG for FWA under the MOCN Agreement).

Similarly, the NBIOT capability – which will typically be supplied using the massive mMTC network slice in a 5G SA configuration – is expected to be an early enterprise use case for 5G technology, with manufacturing, transport, smart cities and ports being amongst the most commonly targeted industries.⁵ The NBIOT carve-out from the application of the NDO may allow Telstra to prioritise enterprise customers over TPG's NBIOT customers. This may compound any restraints on TPG offering a “true” enterprise grade NBIOT product, for the same reasons described above. Importantly, the fact that each party will continue to operate its own core network will not be relevant.

¹ Business Wire, 'Global 5G Business Service Markets, 2022-2027 by Fixed Wireless, eMBB, mMTC and URLLC Applications', 31 March 2022, available at <https://www.businesswire.com/news/home/20220331005596/en/Global-5G-Business-Service-Markets-2022-2027-by-Fixed-Wireless-eMBB-mMTC-and-URLLC-Applications---ResearchAndMarkets.com>.

² 75% of service providers are offering FWA services, with the “overwhelming majority” being in a 5G NSA configuration. See Ericsson, 'Ericsson Mobility Report', June 2022, pp. 10 and 20.

³ Ibid, p. 20.

⁴ Authorisation Application, at [99].

⁵ Ericsson, 'Ericsson Mobility Report', June 2022, p. 4.

Exception to provision of 5G – Telstra’s 6-month advantage

Clause 3(a) of Schedule 2 to the MOCN Agreement establishes a “limited first-mover advantage” for Telstra for 6 months.⁶ This 6-month advantage provision is not typical of the publicly available MOCN arrangements that have been considered by the ACCC.

Lack of express exit provisions

While under the Transition Plan the parties are required to negotiate “to effect a smooth and orderly end to the provision of the MOCN Services”, it is unclear the extent to which Telstra is obliged to co-operate with TPG to migrate to an alternative MOCN platform or other arrangement.

⁶ Authorisation Application, at [139].

Annexure A: MOCN References

Daniel Leza, 'Mobile Infrastructure Sharing: Trends in Latin America' (Seminar, ITU Regional Economic and Financial Forum of Telecommunication/ICTs for Latin America and the Caribbean, San Jose, Costa Rica', (12 March 2014) p. 10, available at: https://www.itu.int/en/ITU-D/Regulatory-Market/Documents/CostaRica/Presentations/Session8_Daniel%20Leza%20-%20Mobile%20Infrastructure%20Sharing%20-%2012%20March%202014.pdf

Digital Nasional Berhad, 'Reference Access Offer', (31 March 2022) sections 3.2 (Non-discrimination), 7.3 (Continuous Improvement), 7.4 (Product Committee), 7.5 (Co-operation), 12 (Network Rollout), 13 (Network Change), 19 (Service Levels), 19.3 (Service Credits), 35.1 (Termination by DNB), 35.2 (Termination by the Access Seeker), 35.5 (Notice prior to termination or suspension), 35.6 (Consequences of termination), 36 (Changes to the Services), 36.4 (Removal of a Service), Schedule 1 (DNB 5G Access Network products and Services Catalogue), Schedule 3 (Service Levels and KPIs), available at: https://www.digital-nasional.com.my/sites/default/files/2022-05/DNB_Reference_Access_Offer_Version.pdf

Ian Corden et al (Plum Consulting), 'Review of efficiencies with Multi-Operator Core Network (MOCN) technology: A Report by Plum Consulting', (2 November 2016) pp. 10, 11, 14, available at: <https://plumconsulting.co.uk/review-efficiencies-multi-operator-core-network-mocn-technology/>

Ilsa Godlovitch et al (WIK-Consult), 'Competition and investment in the Danish mobile market [non-confidential version]', (24 May 2019), available at: https://ens.dk/sites/ens.dk/files/Tele/final_mobile_report_denmark_clean_non-confidential.pdf

Infocomm Media Development Authority, 'Consultation Paper issued by the Info-Communications Media Development Authority: Second Consultation on 5G Mobile Services and Networks', (17 October 2019) (see paragraphs 133-137 regarding the MOCN arrangement), available at: <https://www.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Consultations/Consultation-Papers/Second-Public-Consultation-on-5G-Mobile-Services-and-Networks/5G-Second-Consultation-Decision.pdf>

Karim Taga et al, 'Network Cooperation: Making it Work and Creating Value', (2013) pp. 12-13, available at: <https://www.adlittle.com/en/insights/viewpoints/network-cooperation>

Karim Taga, G. Peres and V. Dimitrov (Arthur D. Little), 'Network sharing in the 5G era: Choosing the right sharing model to maximize efficiency of 5G rollout', (November 2020) p. 10, available at: <https://www.adlittle.com/en/insights/report/network-sharing-5g-era>

Malaysian Communications and Multimedia Commission, 'Commission Determination on Access List', (Determination no. 6 of 2021) sections 5(18) and 5(19) for 5G regulated services, available at: <https://www.mcmc.gov.my/skmmgovmy/media/General/registers/Determination-No-6-of-2021-Access-List.pdf>

Malaysian Communications and Multimedia Commission, 'Commission Determination on the Mandatory Standard on Access', (Determination No. 1 of 2022), particularly section 6.15 which focuses on 5G terms and conditions and the 5G MOCN access arrangements. See sections 6.15.9 (Non-discrimination), 6.15.12 (Deployment Schedule), 6.15.13 (Planning Committee), 6.15.22 (Product Committee), 6.15.23 (Change to the technical details of a Service), 6.15.24 (Introduction of a new Service), 6.15.25 (Removal of a Service), 6.15.27 (Quality of Service), 6.15.28 (Amount of Rebate), available at: <https://www.mcmc.gov.my/skmmgovmy/media/General/pdf2/Commission-Determination-on-the-Mandatory-Standard-on-Access-Determination-No-1-of-2022.pdf>

Malaysian Communications and Multimedia Commission, 'Public Inquiry Report on Review of Mandatory Standard on Access', (7 September 2022) section 31 (5G Services), available at: <https://www.mcmc.gov.my/en/media/announcements/notification-public-inquiry-report-on-review-of-ma>

StarHub, '2Q/1H2020 Results', (7 August 2020) (from slide 15 onwards), available at https://ir.starhub.com/newsroom/20200807_072032_CC3_QPN7POT6W1YZ3Z19.3.pdf (note: this details the active sharing joint venture (called Antina) struck between Singapore telecom operators StarHub and M1, which includes a 5G MOCN arrangement)