

Public register submission

11 August 2022

Ellie Dwyer and Gemma Smith
Competition Exemptions
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By email: exemptions@accc.gov.au

Dear Ms Dwyer and Ms Smith,

RE: AA1000607 – Telstra Corporation Limited, Telstra Limited and NBN Co Limited – submission

We refer to the ACCC's draft determination in relation to an application for authorisation by Telstra Corporation Limited, Telstra Limited and NBN Co Limited (together, **the Applicants**). We appreciate the ACCC's consideration of the matters raised in our previous submission dated 29 April 2022.

We note the ACCC proposes to grant authorisation to related entities of the Applicants, including current and future hypothetical and unknown related entities.¹ If granted, TPG Telecom remains concerned this would result in an unreasonably broad authorisation, which is not necessary in the circumstances.

Given the ACCC acknowledges the definition of related entities put forward by the Applicants is broader than necessary,² the ACCC ought to refuse this request. If the ACCC grants authorisation to all current related entities, in the case of Telstra (for example), the ACCC could be granting authorisation to some 150 subsidiaries and entities in the Telstra Group, including international entities, who may or may not be subject to the Definitive Agreements and Amending Agreement.³

Where the Applicants are seeking authorisation for conduct which may give rise to competition concerns, such as cartel conduct, we consider it is important from a policy perspective any grant of authorisation is specific and appropriately confined. This is particularly important where the ACCC

¹ Specifically, this includes related bodies corporate within the meaning of s 4A of the *Competition and Consumer Act 2010* (CCA) and entities within the meaning of 'Related Entity' in the Implementation and Interpretation Deed, essentially being (with some exceptions) each related body corporate of the relevant person and any entity which is Controlled by that person (as set out in section 50AA of the *Corporations Act 2001*) from time to time. See Telstra Corporation Limited and Telstra Limited's response to ACCC's requests for clarification dated 17 and 22 June 2022.

² ACCC Draft Determination, para 4.47.

³ See Telstra Annual Report 2021, page 147, "Telstra Group has a direct or indirect interest in over 150 subsidiaries with our international presence spanning over 20 countries", and Telstra 2021 Group structure, available at <https://www.telstra.com.au/content/dam/tcom/about-us/investors/pdf-g/0621-Telstra-Group-Structure.pdf>

proposes to grant authorisation for a long period of 12 years (until 30 June 2034) and there is no review point for the authorisation.

The Applicants have submitted extending the authorisation to related entities is appropriate because related entities *may* be required to assist the parties to the Definitive Agreements (as amended by the Amending Agreement) to give effect to the agreements, and therefore it is appropriate they are also authorised to engage in the relevant conduct.

The Applicants should be able to identify which current related entities are and will be required to perform the obligations under the Definitive Agreements. We expect this information would be known to the Applicants to provide for contractual certainty, such as with respect to the performance and implementation of obligations under the Definitive Agreements and Amending Agreement. These related entities should and ought to be named and identified in the authorisation.

We believe the inclusion of future unknown and hypothetical related entities to the authorisation should be tested by the ACCC through another authorisation process when the identity of the related entity is known. Without knowing the identity of the future related entities, it is impossible to determine whether the inclusion of any future related entity will impact competition. An assessment of the public benefits and public detriments of including the related entity in the authorisation also cannot be conducted.

A narrower authorisation would allow the ACCC to review the inclusion of future related entities using the most appropriate test. This is relevant where the Applicants' application includes authorisation for conduct which may breach the anti-cartel laws and is *per se* prohibited, regardless of the impact on competition. The ACCC assesses authorisation for cartel conduct by weighing public benefits versus public detriments. In comparison, merger reviews involve an assessment of competitive effects. Further, notification of mergers to the ACCC is voluntary. We believe reliance on the merger regime in this context is not appropriate, particularly given the length of authorisation being sought and the significant restraints contained in the Definitive Agreements.

Should you have any further questions on any of these matters, please feel free to contact Stephanie Phan, Industry Strategy Manager TPG Telecom, at [REDACTED].

Yours sincerely,

A grey rectangular box redacting the signature of James Rickards.

James Rickards
General Manager – External Affairs
TPG Telecom Limited