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ACCC decides not to grant authorisation for Telstra and TPG regional network deal

The ACCC has decided not to authorise proposed regional mobile network arrangements between Telstra Corporation Limited (ASX:TLS and ASX:TL1) and TPG Telecom Limited (ASX:TPG).

Under the statutory test, the ACCC must not grant authorisation unless it is satisfied the proposed arrangements would not be likely to substantially lessen competition, or that the likely public benefits from the arrangements would outweigh the likely public detriments.

After an extensive public consultation and investigatory process, the ACCC is not satisfied under either of these tests and therefore cannot grant authorisation.

“We examined the proposed arrangements in considerable detail. While there are some benefits, it is our view that the proposed arrangements will likely lead to less competition in the longer term and leave Australian mobile users worse off over time, in terms of price and regional coverage,” ACCC Commissioner Liza Carver said.

“Mobile networks are of critical importance to many aspects of our lives, including our livelihood, our wellbeing and our ability to keep in touch with friends and family. Any reduction in competition will have very wide-ranging impacts on customers, including higher prices and reduced quality and coverage,” Ms Carver said.

“Mobile network operators compete on price and a user’s package inclusions, but importantly, they also compete on coverage, speed and other quality dimensions that are directly influenced by the nature and extent of their underlying network infrastructure,”

“Entering into the arrangements proposed by Telstra and TPG will represent a significant change to the structure of the market that would have long-term consequences.”

The ACCC today released its determination and an executive summary of its reasons. The full reasons will be released tomorrow following confidentiality checks with relevant parties.

Negative impact on coverage, network quality and innovation likely

Under their proposed arrangements, TPG would decommission or transfer its mobile sites in regional and urban fringe areas to Telstra. TPG would then acquire mobile network services from Telstra. TPG would give Telstra access to most of its regional spectrum. By using part of the Telstra network, TPG’s coverage would increase from 96 per cent to 98.8 per cent of the population.

“The proposed arrangements would lead to some short-term benefits from an improvement in TPG’s network coverage, and some cost savings and efficiencies for TPG and Telstra. However, the enduring and more substantial impact of the proposed arrangements would be to lessen infrastructure-based competition which would make consumers, including those in regional areas, worse off over time,” Ms Carver said.

“Competition between separate mobile networks drives companies to improve coverage for mobile users and to offer new technologies to more areas. For example, when Optus improves its regional network, Telstra responds by improving its network to maintain its market position,” Ms Carver said.

“Infrastructure competition is what drives investments by mobile companies in broader, deeper and faster mobile coverage. We have looked beyond the potential short-term effects to consider the long-term impact from the reduced incentive to innovate and improve

networks. We have concluded the proposed arrangements would likely significantly weaken this competitive process,”

Telstra submitted that the increased spectrum it would obtain from TPG as part of the arrangements would enable it to reduce congestion in regional areas. The ACCC carefully investigated these claims.

“It is unclear the extent to which the additional spectrum would assist Telstra with alleviating congestion in regional areas, as the ACCC found that without the proposed arrangements Telstra has alternative ways to alleviate that congestion. It is unlikely that the proposed arrangements would materially improve Telstra’s ability to serve regional Australia. Instead, it would likely reduce the incentive for mobile companies to improve their service and coverage in regional areas.”

Entrenching Telstra’s dominant position in the mobile market

The ACCC also considered the competitive impact of Telstra controlling more spectrum, a critical input for mobile networks. There is limited spectrum suitable for carrying mobile signals so mobile companies pay high prices for spectrum licences.

The proposed agreements would result in Telstra gaining access to most of TPG’s spectrum in regional areas and urban fringe areas, meaning Telstra would have a high proportion of key spectrum in those areas.

“Telstra is already the strongest mobile network operator in Australia and has a very high share of regional customers. We consider that the proposed arrangements would lock up valuable spectrum with Telstra, raising barriers to entry and expansion and reducing the incentives and ability of rivals to compete,” Ms Carver said.

“Telstra and TPG are proposing the arrangements at a time when each of Telstra, TPG and Optus are competing in the roll-out of 5G infrastructure including in regional areas. After careful consideration of all the information available to us, including internal confidential information from the carriers, we consider that there is a real risk that TPG and Optus will invest less in critical infrastructure than they would if the proposed arrangements do not proceed.”

Thorough review with many conflicting submissions received

The ACCC engaged in an extensive public consultation and investigatory process, considering a substantial volume of internal documents, more than 170 submissions, and 40 witness statements and expert reports. There were strongly competing views expressed by interested parties.

“When assessing the proposed arrangements, we are principally concerned with the impact on the competitiveness of the market overall, not the impact on any individual firm. It is the overall competitive process which protects the interests of consumers,” Ms Carver said.

“While Telstra and TPG have claimed the agreements will immediately lead to more choice for customers and better coverage for TPG customers, this misses the more significant impact on consumers which is that the reduction in competition in the longer-term will likely lead to higher prices, less innovation and quality of service, and less competitive pressure to expand and improve networks.”

Undertakings did not address concerns or improve public benefits

During the ACCC’s consideration of the application, Telstra and TPG offered court-enforceable undertakings intended to address the ACCC’s preliminary concerns.

The undertakings proposed that the ACCC could reassess the competitive effects of the proposed arrangements within eight years, and that TPG would not terminate leases or licences for 300 mobile sites in the relevant regional area.

“After careful consideration, we determined that these undertakings did not change whether the ACCC was satisfied of the relevant competition or public benefit tests against which the ACCC must assess a proposed merger authorisation,” Ms Carver said.

“The proposed arrangements would have an immediate impact on infrastructure competition in Australia and that impact would endure. Even if the arrangements were terminated after eight years, it would be too late to unwind the negative competitive impact.”

Further details are available at: [Telstra Corporation Limited and TPG Telecom Limited proposed spectrum sharing](#)

Background

This application was made on 23 May 2022 under section 88(1) of the Competition and Consumer Act 2010 (Cth) (the Act).

The Applicants seek merger authorisation for the contractual authorisation of Telstra (pursuant to the Spectrum Authorisation Agreement) to operate radiocommunications devices under TPG’s spectrum licences. Such a contractual authorisation is deemed by section 68A of the Radiocommunications Act 1992 (Cth) to be an acquisition for the purposes of section 50 of the Act.

The Spectrum Authorisation Agreement is interrelated with two other agreements: the MOCN Service Agreement and the Mobile Site Transition Agreement. As the agreements are interrelated and linked, they were considered together.

Under the agreements, TPG will authorise Telstra to use spectrum held by TPG, and Telstra provides TPG with active mobile network services in the Regional Coverage Zone. The Regional Coverage Zone is made up of certain regional and urban fringe areas in which approximately 17 per cent of the Australian population resides and corresponds to the 81.4 per cent to 98.8 per cent population coverage area. TPG currently provides its customers with coverage of 96 per cent of the population, meaning its coverage would increase by about 2.8 per cent to 98.8 per cent.

TPG will decommission its network in the Regional Coverage Zone, other than 169 of its existing mobile sites which will be taken up by Telstra.

The initial term is 10 years and TPG has two options to extend the agreement by five years, and an option for a transition period of three years.

Section 88(1) of the CCA confers on the ACCC a discretionary power to authorise conduct: Subject to this Part [Part VII], the Commission may, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply.

That discretion is enlivened when either of the necessary conditions or ‘statutory preconditions’ in section 90(7) are met. Section 90(7) relevantly provides:

The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless:

- (a) the Commission is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
- (b) the Commission is satisfied in all the circumstances that:
 - (i) the conduct would result, or be likely to result, in a benefit to the public; and
 - (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct; or [...]

Media enquiries: 1300 138 917
Email: media@acc.gov.au
acc.gov.au/media