

UPDATE

Court clears VHA/TPG Merger

At 10:30 am on 13 February 2020, in the Federal Court in Melbourne, Mr Justice Middleton decided to clear the merger of Vodafone Hutchison Australia and TPG Telecom. The ACCC has 30 days from the date of judgment to appeal.

To succeed the ACCC needed to show that the merger was likely to result in a substantial lessening of competition. The ACCC argued that the merger would prevent TPG from rolling out its own mobile network. This view was based on public statements made by Mr Teoh regarding TPG's intentions (subsequently withdrawn), TPG's history as an aggressive competitor and significant relevant spectrum acquired and held by TPG.

Vodafone and TPG argued that a fourth mobile network could not be made viable and that the combined entity would not reduce competition in any market. In broadband, the market is 85% Telstra, Optus and TPG and in the mobile market 87% Telstra, Optus and Vodafone. A Vodafone/TPG entity would not have a material impact on market share in these markets but, it was argued by Vodafone/TPG, would make a stronger competitor in each.

Justice Middleton:

- considered "It is extremely unlikely and there is no real chance that TPG will roll-out a retail mobile network or become an effective fourth mobile network operator ('MNO') in Australia in the relevant future".
- concluded that by preventing the merger "Vodafone would be left as it is and TPG would have a Lack-lustre presence in the retail mobile market... It is not necessarily the number of competitors that are in the relevant market, but the quality of competition that must be assessed. Further, it is not for the ACCC or this Court to engineer a competitive outcome."
- acknowledges that both TPG and Vodafone "put their best foot forward" in favour of the merger, noted that Mr Teoh's decision making style is "more informal and fluid" than based on "rigorous financial modelling" but also said that "no attack was made on his credibility and , and none was warranted" and "I have accepted Mr Teoh's evidence and his reasons for his views".
- observed that TPG had at a point in time intended to build a fourth network but considered that past behaviour and conduct should be considered in context and that the experience seemed to provide support for Mr Teoh's current position.
- at paragraph 23, the judge puts weight on the will of Mr Teoh and financial resources of Mr Teoh as a key factor enabling TPG to proceed to build a fourth network saying "that will and incentive have now gone...".
- took into account the evidence of TPG and Vodafone personnel noting that there was no attempt to discredit any of the lay witnesses head-on in relation to plans and expectations regarding the future market including the possibility that Mr Teoh and the TPG board might change its mind regarding the role of a fourth network.
- appears to have discounted evidence of the potential market efficiencies that might result from the merged entity saying "it should be recognised that there will be difficulties in proving and exactly quantifying benefits of efficiency with the coming into existence of a merged entity".

Interestingly the decision appears to be more based on the assessment of the likely behaviour of the merging entities if the merger did not proceed than Monday's decision of the US District Court on the merger of T-Mobile and Sprint. In the US decision District Court Judge Hon Victor Marrero tended to discount conflicting complex and learned expert evidence regarding the potential conduct of the parties grounding his decision on an expectation that a third large competitor (the result of the merger) is likely to increase competition in a market whereas smaller fourth player (if the merger is blocked) is less likely to compete effectively.

These observations are based on the summary judgement made available on the day of judgement. It is understood that the parties a 300 page judgement not yet available because it may contain commercially sensitive information.

Please contact me if you have any questions regarding these developments

patrick@patrickfair.com 0411361534