Public inquiry into the declaration of the domestic mobile terminating access service

TPG supplementary submission

April 2024

Public

Introduction

TPG Telecom (**TPG**) welcomes the opportunity to provide this supplementary submission in response to the ACCC's combined declaration inquiry – draft report (**Draft Report**).

TPG reiterates its feedback provided in its previous submission dated February 2024.

Specifically:

- The ACCC has not substantiated its position that declaring A2P SMS termination would promote competition.
- The ACCC has not adequately accounted for the substantial risk of a further increase in scam SMS traffic declaration would likely trigger.

TPG also provides additional information with regards to how the Final Access Determination (**FAD**) and other scam mitigation programs are unlikely to ameliorate the harms done by declaring A2P SMS termination.

Given the limited evidence of competitive benefits and substantial evidence of risk to consumers, declaration is clearly not in the long-term interests of end users.

The ACCC's evidence supports no declaration

TPG refers to its submission dated February 2024 which sets out how the evidence covered in its Draft Report supports a decision to not declare A2P SMS termination.

Substitutes are readily available

TPG will not cover the matters already covered in its submission dated February 2024. TPG adds the following observations:

- The ACMA acknowledges the substitutability of A2P SMS and proprietary bank apps. In a recent ABC news article, ACMA authority member Samantha Yorke said "*Some banks…are now only communicating with their customers through their banking app*".[1]
- Australia Post recently launched a consumer awareness campaign detailing its push to provide delivery updates to consumers via the AusPost app. This campaign can be found at: https://www.youtube.com/watch?v=jL2TSGurStM.

These two recent examples show an acceleration of the trend by businesses to bypass the SMS B2C communications channel. Relevantly, they highlight this trend in industries and use cases the ACCC focused on in the Draft Report as being particularly sensitive to A2P SMS

[1] See: https://www.abc.net.au/news/2024-04-08/what-is-being-done-to-combat-text-scammers-in-australia/103605166.

availability.

The ACCC cannot ignore the readily available evidence and find downstream alternatives to A2P SMS are unavailable, or that these alternatives would not act as competitive constraints.

As TPG detailed in its submission dated February 2024, because downstream alternatives are readily available, MNOs are unable to influence the retail price of A2P SMS.

Pricing evidence suggests the market is competitive without declaration

The ACCC should not declare A2P SMS termination in cases where it has found no evidence of a direct link between A2P SMS termination prices and retail A2P SMS prices.

The submission of Sinch, an aggregator in the A2P SMS market, is particularly interesting. Sinch stated Australia is in the cheapest 5 per cent of A2P SMS wholesale markets worldwide, and there has been a decrease in the retail price of A2P SMS following the end of declaration in 2019.[2] This suggests even more strongly market forces are working in the absence of declaration.

If the ACCC were to declare A2P SMS termination, it should have evidence retail A2P SMS pricing is directly subservient to termination costs. At minimum, TPG would expect the ACCC to have used its s155 powers to collect pricing information from retail providers spanning the two previous regulatory periods.

The two previous regulatory periods are relevant because SMS termination was regulated during the first period and was not regulated in the second period. Comparing pricing trends during these periods would provide direct and compelling evidence of the likely impact of declaration. It would affirm or disprove the ACCC's theory that, without declaration, MNOs could increase termination costs so high retail costs will increase because there are no retail substitutes to A2P SMS.

Based on the Draft Report, it appears the ACCC has not undertaken any substantive investigation as to retail or wholesale pricing impacts in forming its preliminary view. Even more troubling, the ACCC accepted the evidence showed the wholesale market is competitive in the absence of declaration and "*there is no obvious indication that competitive environment in the retail A2P SMS market has materially changed since declaration of SMS termination was removed in 2019*".[3]

In other words, the ACCC:

- believes both the wholesale and retail markets are competitive without declaration;

[2] See Sinch submission, dated 16 February 2024, to the Draft Report.
[3] See Draft Report p70.

- has found no evidence A2P SMS termination costs have an impact on retail A2P SMS prices, and
- failed to consider the obvious evidence of A2P SMS substitutes that already exist in market, and which are already widely used by businesses.

It is clear the Draft Report lacks the requisite evidence to form a view declaration of the A2P SMS termination service would promote competition.

Declaration is likely to destroy the wholesale market

The impact of declaration of A2P SMS termination service in the manner proposed by the ACCC is unlikely to improve competition in relevant retail markets but would destroy the wholesale market.

The ACCC's proposal, as described in the Draft Report, seeks to change the termination service so it does not require the access seeker to have the relevant mobile network elements in order to acquire A2P SMS termination. What this means in practice is retail A2P SMS providers can theoretically acquire A2P SMS termination from MNOs.

The implications of this proposal are:

- Retail A2P SMS providers will likely go direct to MNOs to access subscribers.
- Operators like Pivotel will no longer have material value within the supply chain.
- Wholesale-only aggregators will no longer have material value within the supply chain.
- Value will accrue to retail providers, who are typically businesses that operate globally with self-serve business models that are, at best, agnostic as to the quality of traffic sent to Australian consumers and would profit from sending scam/spam traffic.

Access terms will not ameliorate harms caused by declaration

TPG Telecom will always support effective measures to address scam traffic over mobile networks. However, the ACCC's proposal to address minimising scam traffic in a future access determination inquiry fails to acknowledge the significant size of the harm caused by declaration in the first instance.

Fundamentally, the ACCC is proposing a 'behavioral remedy' to address a 'structural problem'.[4] The only realistic solution is to not create the problem in the first place.

The effect of declaration is MNOs will be required to provide access to their networks under the standard access obligations in section 152AR of Part XIC of the *Competition and*

[4] The ACCC would not accept behavioural undertakings to address structural issues in the context of a merger assessment as it does not believe behavioural undertakings to be effective. It is inconsistent for the ACCC to believe such an approach would be effective in the MTAS context.

Consumer Act 2010. If the ACCC includes terms under section 152BC, the onus will likely be on access providers to justify why the traffic should not be allowed (i.e. to justify how blocking scam traffic would be in compliance with the legal terms of the access determination). Failing to comply with the access obligation would amount to a breach of a carrier licence condition.

The onus must on a problematic access seeker to demonstrate its traffic is clean

Any term that would theoretically have impact would need to empower access providers to cut off problematic access seekers on an *ex ante* basis if they are found to continuously send scam traffic. Such a term cannot be static and must be open-end because it is impossible to set a list of conditions that could capture all current SMS scam activity, let alone <u>future</u> scam activity. It is apparent no one can predict how scammers will evolve their operations in the future.

The complexity of what the ACCC is proposing is demonstrated in the fact the ACCC has never described a behavioral exception in a FAD. The ACCC has only ever set exceptions based on easy to measure variables. For example, the FAD for the wholesale ADSL service applies only to Telstra, and the Superfast Broadband Access Service did not apply to small providers (which is determined by the number of active premises an operator serves). There is no sensible analogy we can draw to the MTAS context where the ACCC is attempting to impose a qualitative exception.

Finally, there is a philosophical question of whether MNOs should have quasi-enforcement powers derived from a legislative instrument. TPG is of the view that MNOs should not be put in such a position. However, the scale of the scam problem is so material, there may be no other choice if the ACCC declares A2P SMS termination.

This philosophical question leads to a real practical problem – how would disputes be resolved? Should an access provider continue to terminate traffic during a dispute? Or should an access provider be allowed to block traffic during a dispute? If an access provider cannot block traffic during a dispute, then scam traffic will likely continue to be sent to consumers.

In order to have any chance of limiting the increase in SMS scam traffic in a scenario where A2P SMS termination is declared, the ACCC would have to describe terms that would enable an access provider to take action on an *ex ante* basis against a problematic access seeker. In effect, the ACCC would have to explicitly state the onus is on an access seeker to demonstrate its traffic is clean.

Voice termination is different to A2P SMS termination

TPG does not believe the situation is similar between voice termination and A2P SMS termination in respect to limiting scam traffic.

The key difference is to make a call, the originating network must use a valid phone number, whereas a SMS can be sent without a phone number. The use of phone numbers is regulated in Australia. CSPs have obligations under the *Telecommunications Act* and the IPND code[5] to provide certain information into the IPND database. CSPs must ensure Australian numbers are not misused. The ACMA is the relevant regulator with respect to enforcement.

It is unfortunate that certain CSPs are consistently sending TPG call traffic from phone numbers they do not hold. In our view, these CSPs are not compliant with the IPND Code and other relevant regulations relating to the use of Australian numbers as they do not provide information to the IPND. Furthermore, there is no existing right to allow use of a number on a network other than that of the CSP that issued the number to the customer.

An underappreciated aspect of the IPND is if a number is associated with sending scam traffic to Australian consumers, there is a clear trail as to which CSP holds that number, and an avenue for regulators to hold that CSP to account.

Therefore, one of the most effective actions available to reducing scam call traffic is for the ACMA to explicitly prohibit CSPs from originating phone calls from a number they do not hold (sometimes referred to as 'spoofing'). The ACMA should also take increased enforcement action against CSPs that are currently failing to meet their obligations under the IPND code. TPG notes the ACMA recently fined Optus $1.5 million for failing to meet those obligations.[6]

The reason why this would likely reduce scam call traffic is because the majority of scam calls TPG detects and blocks are being delivered into our network by spoofed calls. A number of those stakeholders who are strong advocates for declaring A2P SMS termination are consistently flagged in TPG's internal fraud detection systems as being the most problematic CSPs in sending spoofed call traffic.

As SMS can be sent without a phone number, the situations are not directly comparable.

SMS Sender ID Registry and other 'targeted measures' will not ameliorate harms caused by declaration

TPG is a strong supporter of requiring SMS Sender ID Registry to be mandatory. However, it is currently not mandatory and only in a trial phase. Indeed, some market participants are strongly opposed to making it mandatory. Given the existing uncertainties about this program, it would be inappropriate for the ACCC to rely on it in its consideration of A2P SMS termination.

In the Draft Report, the ACCC also referred to the *Scam Code C661:2022*. While the Code has its uses, its biggest flaw is that MNOs can only block traffic upon confirmation of a scam

[5] See: Communications Alliance - C555:2020 Integrated Public Number Database (IPND) (commsalliance.com.au)
[6] We are also aware the ACMA recently took action against five SMS aggregators for breaching both anti-scam and IPND obligations.

call or SMS. This means, action can only be taken *ex post*, once a scammer has already sent scam traffic to consumers. Once an avenue is blocked, a scammer will simply move on to the next. Scammers are adept at identifying and bypassing restrictions as they arise.

There is a significant scale problem. It is impossible for TPG to 'confirm' whether every single SMS sent into TPG's network is scam traffic. On average, TPG receives approximately **[C-I-C] [C-I-C]** SMS per day into its mobile network from external sources. The resources required to 'confirm' even a fraction of this volume as being scam or not would be unrealistically high. Scam traffic is also increasingly sophisticated, which negates attempts to identify it using automated systems as scammers continue to evolve their operations to avoid detection. The best and only sensible approach is for the ACCC to not declare A2P SMS termination in the first place and allow the market to discipline the bad actors.

The unfortunate reality is the current approach available to MNOs in blocking scam traffic is a never-ending cycle of whack-a-mole that does not address the core issue. That is, some CSPs are not stopping their customers from sending scam traffic in the first place.

We provide a recent example in the section below.

There is a significant consumer cost if the ACCC gets it wrong, as demonstrated by the existing disfunction due to declared voice termination and certain CSPs originating spoofed calls

Scam traffic (both calls and SMS) tends to come in rapid bursts, therefore taking action after the fact is of limited utility with respect to the scam traffic that's already been sent. Furthermore, the current system of blocking scam traffic relies on an access provider identifying suspicious traffic, then making an assessment as to the likelihood the traffic is scam traffic before any actions can be taken. In practice, where an avenue is blocked, scammers would often quickly change their behavior to send scam traffic via another avenue.

MNOs invest significant efforts and resources into combating scam traffic. However, given the sheer volume of traffic passing through the public mobile networks, the existing regulatory frameworks are unsustainable.

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Certain CSPs are known to exploit use of numbers to simply move traffic to alternate numbers to stop TPG from blocking their highly suspicious call traffic. If TPG blocks a number, the problematic traffic would often start appearing from a different number or numbers. This becomes a game of whack-a-mole.

The interaction between our termination obligations and the way the scam code operates means it is incredibly difficult for TPG staff to make an instantaneous decision to shut off suspicious traffic. There must be an investigation, and sometimes it is difficult to confirm immediately if a call or SMS is scam traffic. Certain CSPs are known to exploit these uncertainties to stop TPG from blocking their highly suspicious traffic.

Conclusion

Based on the materials provided in the Draft Report, it is clear the ACCC should not declare A2P SMS termination as:

- the ACCC lacks the evidence to support is theory that declaration would promote competition;
- the ACCC has not adequately considered the consumer harms and network inefficiencies that declaration would cause, and
- declaration A2P SMS termination would not promote the long-term interests of the end-user.

Furthermore, the ACCC's belief FAD terms could ameliorate harms caused by declaration is unfounded. It has provided limited information as to how it believes such a term could be described. Any term that has a chance of limiting an increase in SMS scam traffic would have to explicitly state the onus is on an access seeker to demonstrate its traffic is clean.