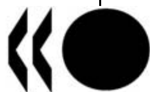
Unclassified **DAF/COMP/GF/WD(2011)31**



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **07-Feb-2011**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2011)31
Unclassified

Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Australia

-- Session I --

This contribution is submitted by Australia under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.

English - Or. English

JT03296023

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Australia --

1. Overview of Australia's merger control regime

1. The legal framework for Australia's merger control regime is contained in section 50 of the *Competition and Consumer Act 2010* (formerly known as the *Trade Practices Act 1974*) (the CCA). Section 50 prohibits mergers or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia. The Australian Competition and Consumer Commission (ACCC) is responsible for administering and enforcing the CCA.

2. Section 50 applies to acquisitions of property[1] within Australia, and acquisitions made outside Australia so long as the purchaser is incorporated in Australia, carries on business in Australia, is an Australian citizen, or is ordinarily resident in Australia.

3. There is no compulsory pre-notification requirement for mergers in Australia. However, the ACCC's merger guidelines[2] recommend that mergers that may potentially raise competition concerns and are subject to the CCA be voluntarily notified to the ACCC. Merger parties are encouraged to notify the ACCC (well in advance of completing a merger) where the products of the merger parties are either substitutes or complements, and the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market(s). Merger parties are also encouraged to approach the ACCC where the ACCC has indicated to a firm or industry that notification of mergers by that firm or in that industry would be advisable.

4. Merger parties are able to seek an informal view from the ACCC as to whether a merger raises competition concerns under section 50. While the ACCC's view does not provide parties with protection from legal action, it does provide merger parties with a reliable indication of whether the ACCC would seek an injunction under section 50 to prevent the merger from proceeding. Parties may seek an informal review either on a confidential[3] or public basis. In addition, the ACCC may initiate reviews of mergers that have not been notified to it.

5. When merger parties ask the ACCC to confidentially review a proposal, the ACCC will endeavour to provide, on a confidential basis, an interim view as to whether the proposal is or is not likely

---

1 Including but not limited to shares in Australian companies, domestic businesses, local intellectual property and local plant and equipment.

2 The *Merger Guidelines 2008* and the *Merger Review Process Guidelines 2006*. Copies of the guidelines are available here: http://www.accc.gov.au/mergerguidelines and http://www.accc.gov.au/processguidelines.

3 Merger parties can request the ACCC's indicative view of a proposed acquisition that is confidential—the ACCC will endeavour to provide, on a confidential basis, an interim qualified view as to whether the proposal is or is not likely to raise competition concerns, subject to information that arises when the matter is public and inquiries can be conducted.

to raise competition concerns. This view is necessarily qualified and in some cases no view will be able to be provided until the matter becomes public and market inquires have been conducted. The advantages to merger parties in seeking a confidential review include:

- the potential for truncation, and occasionally elimination, of the need for any significant subsequent assessment process once the matter becomes public, and

- the pre-emptive identification by the ACCC of key issues and potential competition concerns.

6. The key advantage of the ACCC's informal merger review process is that it provides flexibility in terms of timeframes, information requirements and confidentiality. Further details about this process are contained in the *Merger Review Process Guidelines 2006*[4].

7. Alternatively, the formal merger clearance process—introduced through legislation in 2007—provides an acquirer with the opportunity to obtain formal clearance, meaning that section 50 does not prevent the acquisition from proceeding in accordance with the clearance. Unlike the ACCC's informal merger review process described above, the formal merger clearance process requires payment of a fee, and has mandated timeframes as well as information and transparency requirements. To date, there have been no applications under the formal merger clearance process. Further details about the formal merger clearance process are contained in the *Formal Merger Review Process Guidelines 2008*[5].

8. Not all mergers that lessen competition are prohibited by section 50; only those that lessen competition 'substantially' are prohibited. The term 'substantial' has been variously interpreted as meaning real or of substance[6], not merely discernible but material in a relative sense[7] and meaningful.[8] Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.[9]

9. In assessing whether a merger is likely to result in a significant and sustainable increase in market power, the ACCC must consider the 'merger factors'—a non-exhaustive list of factors set out in section 50(3). The merger factors provide insight as to the likely competitive pressure the merged firm will face following the merger and consideration of these factors facilitates an assessment of the likely competitive effects of the merger. The factors in section 50(3) are:

- the actual and potential level of import competition in the market

- the height of barriers to entry to the market

- the level of concentration in the market

- the degree of countervailing power in the market

---

4 A copy of the guidelines is available here: http://www.accc.gov.au/processguidelines.

5 A copy of the guidelines is available here: http://www.accc.gov.au/formalprocessguidelines.

6 *Trade Practices Legislation Amendment Bill 1992*, explanatory memorandum, paragraph 12.

7 Australia, Senate 1992, *Debates*, vol. S157, p4776.

8 *RuralPress Limited v Australian Competition and Consumer Commission* [2003] HCA 75 at 41.

9 *Merger Guidelines 2008*, p 11.

- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins
- the extent to which substitutes are available in the market or are likely to be available in the market
- the dynamic characteristics of the market, including growth, innovation and product differentiation
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor
- the nature and extent of vertical integration in the market.

10. The analytical framework applied by the ACCC in assessing mergers under section 50 is explained in the *Merger Guidelines 2008*[10].

11. A third option available to merger parties under Australia's merger control regime is to seek authorisation from the Australian Competition Tribunal (Tribunal). If a proposed merger is likely to fail the substantial lessening of competition test but the parties consider there are public benefits that outweigh any anti-competitive effects, application may be made for authorisation. The CCA provides that the Tribunal may authorise a proposed merger under section 50 if it is satisfied that the merger would result, or would be likely to result, in such a benefit to the public that the merger should be allowed to occur.[11] Like the formal merger clearance process, applications for merger authorisation must be accompanied by a fee. Once authorisation is granted, neither the ACCC nor any other party may take legal action under section 50 in respect of the merger for the period for which authorisation is granted.

2. Participation in international organisations in the area of merger control

12. Australia participates in a number of international organisations in the area of merger control, including the International Competition Network (ICN) and the Organisation for Economic and Cooperation Development (OECD). Involvement in these forums presents valuable opportunities for Australia to exchange knowledge and experience with counterparts, and to learn from and contribute to the development of international best practice in multijurisdictional merger review.

13. Over the last decade Australia's merger control regime has undergone some significant changes. These include modifications to the merger review process, the introduction of a formal merger clearance process and the continued evolution of the ACCC's analytical approach. These changes have been developed in line with international best practice, contemporary views on antitrust analysis and the ACCC's own experience.

14. In the ICN, the ACCC is an active member of the Merger Working Group. The ACCC is currently involved in both of the Group's Subgroups which deal with 'Notifications and Procedures' and 'Investigation and Analysis'. The ACCC participates in the Subgroups' teleconferences, annual Merger Workshops and the preparation of new work products. Some of the work products which the ACCC has drawn upon in developing Australia's merger regime are the *Recommended Practices for Merger Analysis* and

[10] A copy of the guidelines is available here: http://www.accc.gov.au/mergerguidelines.

[11] See sections 95AT to 95AZH of the CCA: http://www.comlaw.gov.au.

Recommended Practices for Merger Notification and Review Procedures, as well as the *Merger Guidelines Workbook (April 2006)* and *Investigative Techniques Handbook for Merger Review (June 2005)*.[12]

15. Australia is a long-time member of the OECD and a regular participant in its competition committees, groups and working parties. Like the ICN, OECD work products relating to merger control have assisted in the development of Australia's merger regime and its approach to multijurisdictional merger review.

3. Cooperation between Australia and other jurisdictions in cross-border merger control

3.1 Framework for cooperation

16. In recent years, cooperation between the ACCC and its counterparts in cross-border merger reviews has increased significantly. This has been due, in part, to the growing number of international merger transactions and associated requests for merger clearance, and to more frequent dialogue and interactions between competition regulators in the area of multijurisdictional merger review.

17. As noted already, the ACCC regularly discusses developments in cross-border merger control with counterparts at international forums organised by groupings such as the ICN and OECD. In addition, the ACCC has entered into a number of bilateral agreements which contain provisions dealing with cooperation and coordination in merger investigations and enforcement.

18. For example, in 2006 the ACCC entered into a *Cooperation Protocol for Merger Review* with the New Zealand Commerce Commission to help streamline transactions in the trans-Tasman business environment. The Protocol may apply where the regulators are reviewing the same merger transaction or where they exchange information in respect of a specific merger review or in respect of their merger review processes and functions. Objectives of the Protocol include reducing compliance costs for businesses and transaction costs for both regulators, as well as to increase the effectiveness of competition laws.[13]

19. The ACCC also maintains close relationships with its counterparts through informal bilateral discussions, often by telephone, regarding particular merger reviews. These discussions provide an opportunity to exchange information about current matters (to the extent permitted by confidentiality requirements), including details about the merger parties, the relevant markets, the status of the investigation and analytical approaches to transactions, and about general developments in merger policy.

20. The benefits of cooperation in cross-border merger control are considerable. In the ACCC's experience, working with counterparts, especially in the early stages of an international merger review, can enhance the efficiency and effectiveness of the review and help to achieve more effective outcomes.

21. For instance, receiving prompt notification of a multijurisdictional transaction from a counterpart may alert the ACCC to transactions earlier than would otherwise have occurred. This is particularly valuable where the focus of the parties is directed towards notifying and responding to the requirements of regulators operating within a compulsory notification framework.

22. The coordination of review timelines and procedural steps may be extremely helpful in cross-border merger reviews. For example, coordinating the timing of information requests between jurisdictions may help to ensure that all relevant information is obtained and provided to regulators in a timely manner. This also has the benefit of reducing transaction and compliance costs for the merger parties.

---

[12] These documents are available from the Merger Working Group webpage on the ICN website: http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx.

[13] A copy of the Protocol and the ACCC's cooperation agreements are available here: http://www.accc.gov.au/content/index.phtml/itemId/564911.

23. Further, the ability to share substantive merger information with counterparts early on in a review may increase other regulators' knowledge of how particular industries operate and provide insight into how markets have been defined and which markets are likely to raise competition concerns. Sharing such information may also be important throughout a review to help avoid inconsistent outcomes, or the imposition of remedies which could be inconsistent, duplicative or ineffective.

24. The ACCC has been involved in a number of cross-border merger reviews where close cooperation was vital to ensuring all regulators were able to address competition concerns resulting from a merger. This has often been the case in matters where key plant or assets of one of the merger parties is located outside Australia. By liaising with counterparts on proposed remedies and outcomes, the ACCC is able to ascertain whether the other regulators' proposals are likely to have any adverse competitive effects in Australia, or preclude a satisfactory outcome, before commitments are signed by the parties. Examples of four such cases are set out below (including cases where the ACCC agreed to accept remedies which involve commitments to regulators in other jurisdictions).[14]

3.2 Case examples of cooperation in cross-border merger control

3.2.1 Scandinavian Tobacco Group A/S - proposed acquisition of Swedish Match AB (2010)

25. On 30 September 2010 the ACCC accepted an undertaking from Swedish Match AB (SM) and Scandinavian Tobacco Group A/S (STG) in relation to the ACCC's decision not to oppose STG's proposed acquisition of SM.

26. The undertaking required STG to divest a number of cigar brands to a purchaser approved by the ACCC. The objective of the undertaking was to address the ACCC's competition concerns by creating or strengthening a viable, effective, stand-alone, independent and long term competitor for the supply of the divested products.

27. The acquisition was considered by a number of international competition agencies and the ACCC consulted closely with the New Zealand Commerce Commission regarding the acquisition and the divestitures occurring at the international level.

3.2.2 Agilent Technologies Inc - proposed acquisition of Varian Inc (2010)

28. On 31 March 2010 the ACCC accepted an undertaking from Agilent Technologies Inc and Agilent Technologies Australia Pty Ltd (together Agilent) in relation to the ACCC's decision not to oppose Agilent's proposed acquisition of Varian Inc.

29. The undertaking required Agilent to comply with its commitments to the European Commission to divest a number of businesses.

30. The ACCC liaised closely with other competition regulators in other jurisdictions during the course of its review, in particular the European Commission and the US Federal Trade Commission.

3.2.3 Pfizer Inc - proposed acquisition of Wyeth Corp (2009)

31. On 30 September 2009 the ACCC accepted an undertaking from Pfizer Inc (Pfizer) in relation to Pfizer's proposed acquisition of Wyeth Corp.

---

[14] A summary of the ACCC's decision in each matter is available here: http://www.accc.gov.au/content/index.phtml/itemId/501191.

32. The undertaking required Pfizer to divest a companion animal vaccine business in Australia to the approved purchaser Boehringer Ingelheim Vetmedica Inc and to divest a livestock vaccine business in Australia to a purchaser to be approved by the ACCC.

33. In conducting its review the ACCC coordinated closely with agencies in other countries which were also reviewing the transaction, including the European Commission and the US Federal Trade Commission.

3.2.4 WPP Group - proposed acquisition of Taylor Nelson Sofres plc (2008)

34. On 8 October 2008 the ACCC accepted an undertaking from WPP Group plc (WPP) in relation to the ACCC's decision not to oppose WPP's proposed acquisition of Taylor Nelson Sofres plc.

35. The previous month, WPP had given an undertaking to the European Commission to resolve competition concerns in Europe.

36. The undertaking to the ACCC required WPP to comply with its obligations under the EU undertaking, and to carry out a number of additional obligations. The ACCC considered that the two undertakings would address the ACCC's competition concerns.

37. The ACCC conducted market inquiries with a range of industry participants, including competition authorities in other jurisdictions.

3.2.5 Challenges to cooperation in cross-border merger control

38. Although cooperation between the ACCC and its counterparts has become a mainstay of cross-border merger reviews in Australia, some challenges to achieving a fully effective cooperation framework remain.

39. Being a smaller jurisdiction, Australia is often one of the last (if not the last) jurisdictions to receive notification from the parties in cross-border merger matters. Delays in notification make it more difficult for the ACCC to conduct efficient and effective reviews and can increase the risk of inconsistent analyses and remedies across jurisdictions. The ACCC has responded to this challenge by encouraging regular liaison with key counterparts on relevant transactions, and close monitoring of markets to identify new merger activity.

40. Another challenge exists where information is given by a party to a regulator either in confidence or with specific restrictions which limit the regulator's ability to share the information with other regulators. Restrictions on a particular regulator's ability to access relevant information may reduce the potential for analytical and procedural convergence between regulators, and increase the risk of inconsistent/ineffective/duplicative outcomes and remedies.

41. Legislative provisions in some countries allow regulators to disclose information obtained in the course of a merger investigation to other competition regulators. For example, in Australia the ACCC is permitted under section 155AAA of the CCA to disclose 'protected information' to a foreign government body if it decides that such disclosure will enable or assist the body to perform its functions, or exercise its powers, and if it is considered appropriate to disclose the information in the circumstances.[15]

---

[15] See section 155AAA of the CCA: http://www.comlaw.gov.au.

42. Information may also be shared between regulators through the use of confidentiality waivers provided by the merger (and other) parties. The ACCC's practice is to seek waivers from relevant parties to permit the exchange of information that may be of a confidential nature with other regulators. The ACCC's experience has been that at times, particularly when the parties are not familiar with dealing with the ACCC on such processes, or when waivers are required in relation to multiple jurisdictions, the process of obtaining waivers can be somewhat onerous. To assist in remedying this issue the ACCC has introduced a standard form confidentiality waiver.

4. Conclusion

43. Australia is an active participant and contributor to international organisations in the area of merger control and has benefited from the work undertaken by these organisations. Australia's merger review processes and the ACCC's analytical approach to conducting merger reviews are consistent with international best practice.

44. As a small country with a voluntary merger notification regime, Australia faces some practical challenges in cross-border merger reviews. The early notification of merger transactions, cooperation by merger parties during investigations and greater dialogue between competition regulators will continue to assist in helping to address these challenges. Given the prevalence of increasingly globalised transactions, close cooperation between regulators is vital, particularly to ensure that remedies adopted in one jurisdiction are effective and do not adversely affect remedy outcomes in other jurisdictions.