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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**The Relationship between FDI Screening and Merger Control Reviews – Note by
Australia**

30 November 2022

This document reproduces a written contribution from Australia submitted for Item 13 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at
www.oecd.org/competition/the-relationship-between-fdi-screening-and-merger-control-reviews.htm

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Australia

1. Australia's foreign investment review framework

1. Australia's foreign investment review framework is set by the *Foreign Acquisitions and Takeovers Act 1975* and the *Foreign Acquisitions and Takeovers Fees Impositions Act 2015*, along with their associated regulations. The *Foreign Acquisitions and Takeovers Act 1975* requires foreign investors to notify the Treasurer of proposed foreign investments that meet certain criteria and completion of such investments are suspended while the Treasurer's review is conducted.
2. The Treasurer has powers to apply conditions to investment proposals and, in exceptional circumstances, prohibit investments to ensure they will not be contrary to the national interest or national security (as applicable). There are a range of safeguards built into the legislation, including an obligation to work with the investor to find a way to address any national security risks. The overwhelming majority of proposed investments are approved.
3. Responsibility for making decisions rests with the Treasurer, although he may delegate certain decision-making to other ministers and to officials. When making foreign investment decisions, the Treasurer is supported by the Foreign Investment Division in the Department of Treasury (Treasury), the Australian Taxation Office (ATO), and the Foreign Investment Review Board (FIRB, a non-statutory advisory body).

2. Factors considered in foreign investment proposal assessment

4. Australia's foreign investment review framework balances attracting foreign investment, protecting the national interest, and maintaining public confidence in foreign investment. Under Australia's Foreign Investment Policy (available at https://firb.gov.au/sites/firb.gov.au/files/2021-01/Australias_foreign_investment_policy.pdf), the Government typically considers the following factors when assessing foreign investment proposals:
 - National security
 - **Competition**
 - Other government policies (including tax)
 - Impact on the economy and the community
 - The character of the investor
5. Treasury reviews proposed investments on a case-by-case and risk-based basis. Central to Australia's foreign investment framework is the 'negative' test, that is investment must not be contrary to Australia's national interest or national security. This is underpinned by the general presumption that foreign investment is beneficial, given the important role it plays in Australia's economy.
6. A proposed investment can proceed with no objections from the Treasurer; proceed subject to conditions to address national interest or national security risks; or be prohibited (rare).

1. The Australian Government favours diversity of ownership within Australian industries and sectors to promote healthy competition. The Government considers whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia. For example, the Government will consider a proposal that involves a customer of a product gaining control over an existing Australian producer of the product, particularly if it involves a significant producer.
2. The Government may also consider the impact that a proposed investment has on the make-up of the relevant global industry, particularly where concentration could lead to distortions to competitive market outcomes. A particular concern is the extent to which an investment may allow an investor to control the global supply of a product or service.
7. In addition, Treasury undertakes extensive consultation with other agencies to identify risks arising from foreign investment proposals. The ACCC is a key consultation partner in the foreign investment review process. Investors are made aware through Treasury's guidance information that their proposals may be referred to other consult partners for comment, including the ACCC.

3. Role of the Australian Competition and Consumer Commission (ACCC) in foreign investment proposals

8. The ACCC is responsible for administering and enforcing Australia's competition law, which is set out in the *Competition and Consumer Act 2010* (Cth) (the CCA). In the case of mergers and acquisitions, the ACCC assesses whether it is likely to contravene section 50 of the CCA which prohibits acquisitions that would result in a substantial lessening of competition in any market in Australia.
9. Merger notification under Australian competition law is voluntary and mergers that are reviewed by the ACCC are not prevented or suspended from completing while the review is conducted. Decisions by the ACCC under the informal merger process provide merger parties with the ACCC's view as to whether an acquisition is likely to contravene section 50 and therefore whether it will take legal action in the Federal Court to block a merger if the parties proceed.
10. The ACCC is made aware of mergers through a number of avenues including: merger parties notifying the ACCC directly, referrals from Treasury, complaints, and the ACCC's monitoring and surveillance activities.
11. In the context of Treasury referrals to the ACCC on foreign investment proposals:
 - Existing consultation parameters determine whether Treasury decides to consult with the ACCC about a foreign investment proposal. For example, Treasury is likely to consult with the ACCC where vertical or horizontal integration issues are involved.
 - In practice, a proportion of investors (and their agents) seeking foreign investment approval notify the ACCC independently of the foreign investment review process if they consider that their proposed investment may raise potential competition issues in Australian markets and/or to provide additional information on competition issues to assist the ACCC's consideration of a referral from the Treasury.

- The ACCC's assessment of mergers is conducted independently of the foreign investment framework. The ACCC provides its view to Treasury on whether the acquisition is likely to contravene section 50 of the CCA and Treasury takes this into account in its consideration of the national interest test.
 - The majority of transactions referred to the ACCC as part of the foreign investment review process do not raise significant competition concerns and are dealt with expeditiously if sufficient information is provided in the foreign investment proposal. These assessments are not subject to an ACCC public informal merger review and are made largely on the information provided by the investor. In a small number of cases, the ACCC will conduct targeted inquiries with certain industry participants to confirm certain information, if the transaction is not confidential.
 - Where a more detailed review is necessary, the ACCC may commence a public informal merger review to determine whether the proposed investment is likely to have the effect of substantially lessening competition in breach of Australia's merger law. Should the ACCC choose to conduct such a review, it will conduct market inquiries and publish its findings. At the conclusion of a public review, the ACCC will decide to: not oppose the proposed investment, not oppose subject to a court enforceable undertaking to remedy competition concerns (for example to divest a business or certain assets); or oppose the proposed investment.
12. Once the ACCC concludes its review Treasury reflects the ACCC's view in its advice to the Treasurer for consideration. In cases where the ACCC publicises its findings, this would include a copy of the ACCC media release with its public findings.

4. Conclusion and further information

13. Comprehensive guidance on Australia's foreign investment framework is publicly available to help foreign investors and their representatives understand their obligations and requirements for investing in Australia.
14. Further information on Australia's foreign investment framework is available at www.firb.gov.au, and information on the merger review process can be found at <https://www.accc.gov.au/business/mergers/informal-merger-review>.