ALLEN & OVERY

ACCC proposes extensive reform to Australia's merger regime

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On 27 August 2021, ACCC Chair Rod Sims announced extensive proposed reforms to Australia's merger review regime and relevant laws under the *Competition and Consumer Act* (**CCA**), including:

– The introduction of a single mandatory merger review process;

– Changes to the legal test for deciding whether a merger should receive clearance; and

– A bespoke merger review regime for acquisitions by large digital platforms.

At this stage, the ACCC is simply starting a debate about these proposals. The ACCC is yet to release all the details and Sims says any changes are unlikely to be put to Government until after next year's Federal election.

Three key changes

The ACCC proposes three key changes:

1. **A mandatory, suspensory merger review process:** Australia's current regime is relatively unique in that there is no positive obligation to notify a merger to the ACCC. The vast majority of mergers that are notified are reviewed under the voluntary informal merger review process, where a decision by the ACCC to oppose the merger does not prohibit the parties from completing.

   The ACCC proposes a single formal regime. Features of the regime would include:

   – **Notification thresholds** (e.g. having regard to the parties' turnover in Australia), stipulating when parties must seek ACCC clearance. If the thresholds are met, the relevant parties are prohibited from completing a transaction until clearance is obtained.

   – A form of the current **'pre-assessment' process**, to ensure deals that are unlikely to raise concerns are cleared expeditiously.

   – Detailed **ACCC reasons** for its decisions, which will be subject to limited **merits review by the Australian Competition Tribunal**.

2. **Changes to the substantive merger test:** Currently, a merger is prohibited if it would be "likely to substantially lessen competition" (the **SLC test**). While the SLC test would remain, the ACCC proposes to: (a) amend the merger factors (provided for under the CCA) that guide the application of the SLC test; (b) introduce a new definition of 'likely' as part of the test; (c) introduce a deeming provision for acquisitions where one party already has substantial market power; and (d) introduce an amendment allowing consideration of other agreements between the merger parties.

   – The new merger factors will focus on structural conditions for competition and the potential negative effects of an acquisition. These could include consideration of control and access to data, and potential loss of competitive rivalry.

   – The new definition of 'likely' will be 'a possibility that is not remote'.

   – Acquisitions where one party has substantial market power will be deemed to SLC where they are likely to entrench, materially increase or materially extend or cement that party's market power.

   – An amendment to the CCA will allow other agreements between merger parties to be taken into account as part of the SLC assessment. Currently, agreements between the merger parties outside of the proposed transaction cannot be considered in the merger review process, due to the anti-overlap provision in section 45 of the CCA.

3. **A bespoke merger regime for digital platforms:** According to Sims, special rules are required for acquisitions by certain digital platforms because these can have significant effects that are difficult to foresee and establish. The ACCC is still considering the detail of such a regime, but Sims indicated that it could include:
   - A threshold test to determine applicability of the regime to particular digital platforms (e.g, companies that have 'strategic market status').
   - Where the regime applies:
     - Lower notification thresholds; and
     - A lower threshold of competitive harm in order to block an acquisition.

The ACCC's case for change

Sims outlined four reasons why Australia's current regime is not fit for purpose.

1. **To prevent a merger, the ACCC must undertake enforcement action and prove that future anti-competitive effects are likely**

   To establish a contravention of the SLC test, the ACCC must prove in court the likely future state of competition with and without the proposed merger. This inherently involves uncertainty. However, the ACCC considers that this uncertainty should not make clearance the default position.

   Sims pointed to difficulties in obtaining evidence of future anticompetitive effects, including the reluctance of parties likely to be adversely affected by the merger (such as suppliers and customers) to provide testimony in this regard.

2. **There is insufficient focus on structural conditions of competition**

   According to Sims, Courts have failed to adequately consider how an acquisition would change structural conditions of competition, as well as its effect on the commercial ability and incentives of the merger parties to engage in harmful behaviour. This is particularly the case where the acquirer already has substantial market power.

3. **Australia's regime is not aligned with the merger regimes in comparable overseas jurisdictions**

   The voluntary and informal nature of Australia's merger review process is out of step with the mandatory and suspensory regimes in the US, Europe and Canada. While there is a high rate of voluntary notification in Australia, parties are not required to fulfil any upfront information production requirements. Further, while many companies wait for ACCC clearance before proceedings, there has been an increase in parties threatening to complete transactions before a decision is made.

4. **There is a gap in the law for acquisitions by digital platforms**

   According to Sims, in recent years large digital platforms have pursued a strategy of acquiring nascent competitors that has helped to entrench their market power. He believes there has been underenforcement by regulators in relation to these acquisitions.

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