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## **OECD Global Forum on Competition**

### **CONTRIBUTION FROM AUSTRALIA**

**-- Merger Review - Cooperation in Transborder Transactions (Session V) --**

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## **CONTRIBUTION FROM AUSTRALIA**

### **MERGER REVIEW - COOPERATION IN TRANSBORDER TRANSACTIONS**

**-- (Session V) --**

#### **1. Introduction**

One of the most significant features of the world economy over the past decade has been the increasing liberalisation of trade and the consequent globalisation of industry. Worldwide integration of finance and investment continues as trade expands. An associated feature of these developments has been the growth of international mergers.

There are a number of issues which competition agencies are confronted with as a result of international mergers. It would seem that increased co-operation between the competition agencies of various countries affected by international mergers would be desirable. Already a range of mechanisms exists to facilitate co-operation and co-ordination between competition authorities.

Bilateral and multilateral arrangements are an increasingly important mechanism for co-operation between regulatory agencies seeking to combat emerging cross-border issues as a means of formalising co-operation, particularly to create a means for the exchange of confidential information. Bilateral agreements now tend to include not only a traditional comity provision, by which each party is required to consider the important interests of the other in certain circumstances, but also provision for positive comity, by which one party can request that the other initiate an investigation or enforcement proceedings for anti-competitive behaviour in the latter's territory that adversely affects the former's interests. Such a provision is particularly concerned with avoiding any disputes over the propriety under international law of assertions of extraterritorial jurisdiction. However often these co-operative agreements have limited or no application in respect of international mergers.

Sometimes competition agencies in smaller countries may feel that there is little they can do to stop the negative impact in their country of an international merger. It is important that each country be able to examine the impact of a merger in the context of its own market structure.

#### **2. Globalisation**

By world standards Australia is relatively small part of global markets. Yet the smallness of its economy and the already high levels of concentration in most markets may make international mergers more of a problem in relative terms.

Australia therefore has concerns about the potential for an international merger to be approved in other, larger jurisdictions, making it difficult for the merger to be blocked in Australia if it has anti-competitive consequences.

However, to date, few such problems have arisen. Firstly, most global mergers are not anti-competitive, but are a logical response to the process of globalisation, substantial international trade and low barriers to entry through imports. Secondly, anti-competitive mergers are likely to be blocked

overseas. Thirdly, where a merger is acceptable in other countries, but is anti-competitive in Australia, solutions have been found, for example, the Rothmans / British American Tobacco (BAT) merger (outlined below).

### ***Rothmans / British American Tobacco***

The acquisition of the Rothmans group by British American Tobacco provides a useful example of a number of issues in international mergers. In some countries the merger of these two cigarette companies did not generate competition concerns.

In Australia the market was highly concentrated. Three companies had 99 percent of the Australian cigarette market. The market share of the merged companies would have been around 65 per cent.

There was agreement that the boundaries of the market were manufactured cigarettes. Pipe tobacco, cigars and loose tobacco for roll-your-own cigarettes were not seen as close substitutes. While the major firms in the cigarette market were international, with operations in many countries, the market was not international. In the Australian market, imports accounted for less than one per cent of the market.

The Australian Competition and Consumer Commission (ACCC) took the view that in Australia the merger would lead to a substantial lessening of competition in the cigarette market. The merger parties were informed that the ACCC would oppose the merger.

While the merger went ahead in a number of countries, the merger parties entered into negotiations with the ACCC to undertake certain structural remedies. As is the case with competition authorities worldwide, the ACCC has a preference for structural remedies which might enable long term competitive outcomes rather than behavioural undertakings such as price controls.

The merger parties agreed to divest certain cigarette brands and production and distribution facilities to an amount equal to seventeen per cent of the total market. The major international tobacco company, Imperial Tobacco, purchased the assets, and has subsequently increased its market share. The merger went ahead while competition in the domestic market was retained.

Often the ACCC hears about major international mergers from the media. In some instances, the ACCC has contacted local subsidiaries of the merging parties and requested information relevant to the analysis.

It is also not uncommon for the parties to an international merger to seek approvals from competition authorities on a deliberately sequential basis. The sequence is not necessarily always the same. In some instances parties seek approvals from the Economic Union (EU) and United States (US) competition jurisdictions before approvals from agencies in smaller countries. In other instances the merger parties have begun to seek approval in those jurisdictions where the mergers appear to have the highest potential anti-competitive impact.

Sequential notification can be of concern to smaller countries. Quite often the large economies with extensive international trade do not have the concentrated market structures which are characteristic of smaller economies or those in the early stages of liberalisation. There may be attempts by the merger parties to establish a momentum of approvals from larger economies before approaching the regulatory agencies of the smaller economies and those who are fairly new to competition and merger law and policy.

In these circumstances international co-operation between competition agencies can be particularly valuable. Agencies can 'compare notes' on matters such as market definition and barriers to entry in the industry under investigation. They can also assist each other with basic information collection from domestic public sources. For many smaller competition authorities resource constraints and the increasing technological complexity of some industries mean this is a valuable tool. However, the insights of investigations and decision makers in other jurisdictions are merely a point of reference given local market circumstances, judicial precedents and legislation.

Differences in merger legislation in various countries may lead to different conclusions as to whether the merger should be opposed, even when the key elements of the market definition are similar. For example Australia has a 'substantial lessening of competition' test for mergers while until a few months ago, New Zealand, our nearest neighbour, and a country with many of the same international firms operating in its economy, had a test of 'market dominance'. Consequently, even if both countries adopted identical views on market definition and barriers to entry, an international merger would have been more likely to be approved in New Zealand than in Australia, given their less stringent competition test.

Addressing this issue from another angle, countries do not need to have the same or similar merger tests in order to gain substantially from co-operation on international merger matters.

Geography may also play a significant part in bringing about a different result in different countries, even when they adopt a similar approach to market definition. In particular, imports may often prove to be a more important competitive constraint on merger parties in one country which is contiguous with another, compared to the situation in Australia and New Zealand where imports are sourced from relatively distant markets.

It is also relevant to note that co-operation in the analysis phase will assist with co-operation in the remedial phase. If there has been a consistent view developed between competition agencies as to the nature of the problems that the merger might generate, it is more likely that consistent remedies will be applied.

Apparent differences between countries' market structure and/or legislative requirements are sometimes acknowledged by companies structuring transnational mergers to operate in some jurisdictions but not in others. An example of this was the Coca-Cola/Schweppes merger in 1999 which was generally not well received in the jurisdictions in which it was proposed, and not attempted in others (outlined below).

### ***Coca-Cola / Cadbury Schweppes***

A proposal by the Coca-Cola Company to acquire the international soft drink brands of Cadbury Schweppes was not attempted in those countries where the merger parties considered that the merger would breach the local competition law.

Australia was a country where the two firms did propose to merge. In Australia, Coca-Cola was the largest soft drink company with a market share in excess of sixty per cent. It had the most extensive distribution network via supermarkets and non-supermarket outlets such as clubs, hotels, small convenience stores, vending machines, and fast food outlets. The Schweppes soft drink brands were the second largest with a market share of around fifteen per cent. Pepsi Cola was a distant third with around seven per cent of the market.

The initial merger proposal was rejected by the ACCC. Coca-Cola then attempted two variations of the merger proposal, involving divestiture of local brands owned by the merging parties. However the principal concern was the acquisition by Coca-Cola of the international Schweppes brands. Coca-Cola was unwilling to divest the very assets which were the purpose of the acquisition. Consequently, despite extended negotiations between the ACCC and the parent companies of Coca-Cola and Cadbury Schweppes, it was not possible to achieve a satisfactory outcome and the acquisition was abandoned.

### **3. Australia's co-operation arrangements**

Australia's most significant co-operative arrangement is the Treaty that exists between the Government of Australia and the Government of the United States of America (US) on mutual antitrust enforcement assistance. The agreement imposes legal obligations to assist each other in the conduct of competition law investigations through the exchange of evidence on a reciprocal and confidential basis. Its application to mergers, however, is very limited due to constraints on the disclosure of commercial information provided by the merging parties.

The assistance available under the Treaty includes:

- obtaining antitrust evidence on behalf of the other agency (including taking witness statements); obtaining records, documents and other evidence; locating or identifying persons or things; and executing searches and seizures;
- disclosing, providing, exchanging, or discussing antitrust evidence; and
- providing copies of publicly available records or information in the possession of government departments or agencies.

The Treaty was signed on 29 April 1999 and built upon an earlier agreement between Australia and the US, of 29 June 1982, and deals with notification requirements, consultations, confidentiality and cooperation in antitrust enforcement. The 1999 Agreement is consistent with existing Australian legislation that governs the provision of assistance by Australian authorities to overseas authorities, for example, the *Mutual Assistance in Criminal Matters Act 1987* and the *Mutual Assistance in Business Regulation Act 1992*. However, the development of a Treaty between our two Governments was necessary for the US to provide enforcement assistance to Australia as a result of requirements in the US *International Antitrust Enforcement Assistance Act 1994*.

The ACCC has a tripartite co-operation arrangement in place with the New Zealand Commerce Commission and the Canadian Competition Bureau to promote co-operation and co-ordination in the application of each agency's respective competition and consumer laws. It also has bilateral agency based arrangements with the Taiwan Fair Trade Commission and the Consumer Affairs Council of Papua New Guinea, also covering both competition and consumer protection regulation. Unlike the substantive agreement with the US, these bilateral agency based agreements provide for co-operation, including on mergers, but do not provide for the exchange of confidential information and have other safeguards in place.

In relation to consumer protection matters, the ACCC signed an agency-based co-operation arrangement with the US Federal Trade Commission on 17 July 2000 to address consumer protection issues such as cross border Internet fraud.

#### **4. Australia's experience of co-operation in the context of transnational mergers**

In recent years there has been a growing level of co-operation between Australia and foreign competition agencies on antitrust and consumer issues. This has assisted in competition law enforcement, including for example, a successful action against collusion in the vitamins industry and in concerted action on matters involving the Internet.

Since 1995-96 there has been a steady annual increase in the number of mergers as a whole considered by the ACCC from 117 to 265 in 2000-01. The ACCC has only recently begun statistical analysis of mergers with international aspects, but clearly there has been an increase in transnational mergers particularly in the pharmaceuticals, media, mining and finance industries.

Requests for information have also included information about foreign merger law and decision making, particularly on market definition issues. Of particular value to the ACCC in this regard has been information regarding the deregulation of energy industries in the United Kingdom and US.

There are a number of ways in which mergers involving offshore companies can have an effect in Australia. In one scenario, there may be anti-competitive consequences in Australia by bringing together two entities offshore which have Australian subsidiaries. Such mergers may be reviewed under section 50 or section 50A of the *Trade Practices Act 1974* (TPA), the merger provisions of Australia's competition law.

In other situations, acquisitions may occur which are beyond Australian jurisdiction, but have effects which would otherwise raise issues under the TPA. For example, an overseas entity may own a company which is the dominant producer in a market of a product and that entity may then acquire the major source of imports of that product – a foreign company. Such a transaction may be beyond the jurisdiction of the country in which it has an effect on competition and also not offend the competition laws in the country in which the transaction occurs.

The result of these issues is that the ACCC makes contact with overseas agencies on mergers on a fairly regular basis. Essentially this is to 'compare notes' on matters such as market definition and barriers to entry in the industry under investigation. While circumstances may differ from country to country, the insights of investigations and decision-makers in other jurisdictions give a point of reference for work done in Australia. It is very useful to know what action other jurisdictions are taking on the same merger, and valuable to test any differences in approach or findings. Much of this contact is currently undertaken on a relatively informal, officer to officer, basis.

There are a variety of possibilities for further enhancing international co-operation between agencies in the consideration of mergers, including:

- the sharing of confidential information;
- the provision of technical assistance;
- increased exchange of views on the same or similar issues;
- increased notification between agencies of cases which are of concern to other agencies; and
- implementing mechanisms whereby authorities can agree on jurisdiction.

The types of information usually exchanged include:

- information about market definition;
- information regarding whether any serious issues appear to be arising in the matter; and
- information as to the timing of investigations and the final decision.

In the ACCC's experience, its counterparts have not expressed many inhibitions about disclosing this sort of information to other competition agencies. Outlined below are details of a number of cases where the ACCC has co-operated with its international counterparts.

### ***Grand Metropolitan / Guinness***

The ACCC held a number of telephone conferences with regulators in the EU, US, Canada and Mexico. There was particularly useful discussion on the 'product aspect' of market definition which included alcoholic beverages, spirits and individual categories of spirit as possible options. There was also useful discussion about the timing of the investigations and when decisions were proposed to be made in the different jurisdictions.

### ***De Beers / Ashton Mining Limited***

In assessing this proposed acquisition the ACCC liaised with the Canadian, United States', and European authorities. Liaison with the European Commission (EC) was particularly extensive and useful, allowing the ACCC to develop a better understanding of the global trade in diamonds, most of which takes place in Belgium.

### ***Metso / Svedala***

Contact with overseas jurisdictions was also used extensively in the assessment of the global rock and mineral processing equipment merger between Metso and Svedala. In this case, the EU obtained divestiture orders from the parties which greatly reduced the anti-competitive impact of the transaction upon Australian markets. Liaison between competition agencies therefore resulted in the expeditious consideration of this matter by the ACCC.

### ***Alcoa / Reynolds***

The ACCC liaised extensively with the EU and US competition authorities in respect of the global aluminium merger of *Alcoa* and *Reynolds*. This case raised competition concerns with the ACCC, the European Commission and the US Department of Justice (DoJ). To satisfy concerns, Alcoa offered undertakings to the DoJ and the EC in this case to divest itself of its interest in an alumina refinery in Australia. These undertakings were also sufficient to allay the concerns of the ACCC. The ACCC's recognition of undertakings given to other competition authorities by merger parties as an effective remedy shows that cooperation between competition authorities can lead to very effective outcomes.

### ***Gillette / Wilkinson Sword***

In 1990 this acquisition was considered by fourteen competition agencies around the world, including Australia. The merger had a different impact in each of the various jurisdictions, largely due to differences in the economic structure and merger laws of the various countries. The ACCC found it very useful to be able to discuss market issues and exchange views with its counterparts during the course of its investigation of this merger.

In Australia the merger would breach the competition law. While the merger went ahead in a number of other countries, Australia required the Wilkinson Sword razor brands to be divested to a non-related party.

The longer term outcome has not been particularly successful. The Wilkinson Sword brands have declined in popularity as Gillette technology, branding and advertising has increased the Gillette market share. It would seem that divestiture in one market after a global merger may not achieve the desired competitive outcome unless, as in the Rothmans / BAT cigarette example, the divested assets can be sold to a major market participant. Of course this is not unique to divestitures resulting from international mergers. The same is true of domestic mergers. However in the case of international mergers it is not possible for one country to block the merger in all possible markets. So the bargaining power of a single competition agency in a smaller country may be more limited than in domestic merger cases.

## **5. Confidentiality considerations**

In Australia, information gathered from industry participants through market inquiries is crucial to the consideration of merger proposals and is held in the strictest confidence by the ACCC. The ACCC relies extensively on this information and recognises that there is a need to protect the confidentiality of information provided by organisations and individuals. This confidential relationship needs to be considered whenever an agreement for the sharing of confidential information is implemented across jurisdictions.

Waiver of confidentiality by the parties to a merger to enable competition agencies to share information, and therefore facilitate the merger approval processes around the world, would be a positive and constructive step toward streamlining global merger processes. Further, willingness by the merger parties to allow their confidential submissions to be shared with other competition agencies may create some scope to reduce their administrative and processing costs.

In the Alcoa / Reynolds merger discussed above, the parties provided a confidentiality waiver so that the Australian, US, Canadian and EU competition authorities could consult with each other.

## **6. Concluding remarks**

With the emerging trend toward globalisation, competition regulators are increasingly faced with borderless competition and enforcement issues. As such, competition authorities must progressively deal more and more with the complex enforcement issues associated with international cartels and global mergers.

In an effort to combat and seek solutions to these new issues, the ACCC is liaising to a greater degree with its international counterparts and formalising its relations with a number of its counterparts

through entering into co-operation arrangements. The ACCC will continue to seek to enter further similar arrangements with other competition regulators in the future.

At this stage Australia has not formed conclusions about more ambitious possibilities for the co-ordinated treatment of mergers on a global scale. It believes there is a case for greater co-ordinated treatment of mergers on a global scale. It is important however, that particular circumstances and the impact of a particular merger in smaller economies such as Australia need to be taken into account in any co-operative arrangement that may emerge in coming years.