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FRAMEWORK FOR DISCUSSION PAPER

Merger Control Regimes

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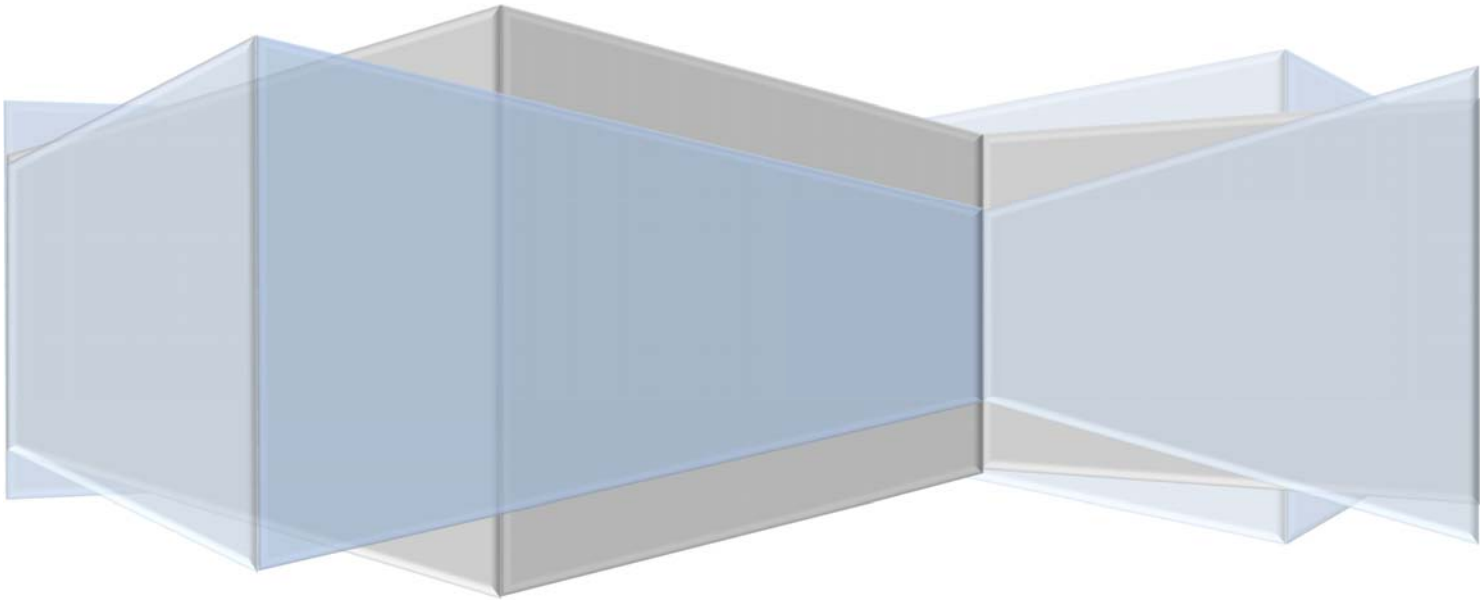

Framework for Discussion Paper: Merger Control Regimes

Introduction

1. This discussion paper attempts to outline the issues relating to Merger Control Regimes in the APEC context.

2. The objective for merger control is to identify and where possible, stop those mergers that would allow a firm to acquire excessive market power thereby adversely affecting the interests of consumers, other firms and the economy.

3. In practice most merger control regimes are based on very similar core principles. Basically it is the creation of a dominant position that would usually result in a substantial lessening of (SLC) *or* significant barrier to competition. In some jurisdictions the dominance test is generally regarded as a less stringent test than a substantial lessening of competition test.

4. Most competition issues related to mergers arise in horizontal mergers often between parties that are competitors at the same level of production or in the distribution of a good or service. (That is, in the same relevant market)

5. The test involved in whether or not a merger should be blocked varies from country to country. In some jurisdictions like the UK, the focus is on whether the merger will strengthen a dominant position and in others like Australia; it is whether there is substantial lessening of competition in the relevant market.

Mandatory and Voluntary Regimes

6. A merger control regime is described as *mandatory* when reporting of a transaction is compulsory. Mandatory regimes normally contain a legal provision, which provides that the parties to a transaction are temporarily prevented from closing the deal until they have received merger clearance. The majority of merger jurisdictions have mandatory merger control systems. An example of a mandatory system with this kind of provision is the European Union Merger Control. Examples of other countries with mandatory merger regimes are Mexico, USA, Canada and Japan.

7. A regime is described as *voluntary* when the parties are not prevented from closing the deal and implementing the transaction in advance of having applied for and received merger clearance. In these circumstances the merging parties are effectively taking the risk that the competition authority will require them to undo the deal, if in due course it is found that the transaction is likely to have an anti-competitive effect or result in dominance. Examples of countries with voluntary merger regimes are Australia, New Zealand and Singapore.

8. Mandatory regimes can be considered effective in preventing anticompetitive deals since it is often almost impossible to undo a merger once it has been executed. (For example because key staff have been made redundant, assets have been sold or destroyed and information has been exchanged). On the other hand, compulsory mergers can result in unnecessary work load, delay and cost for the companies as well as the competition authorities if too many non-anticompetitive mergers are reported. Countries with mandatory regimes either use *market shares* or *company turnover* as thresholds for notification. Countries such as Chinese Taipei use both market share and turnover. Some countries are going through a period of reform where they are amending their notification threshold from market shares to annual turnover.

9. Voluntary regimes are seen as creating less of a burden for merging firms and competition authorities as there are no merger notification thresholds. In such countries as New Zealand and Australia, the competition authorities have established guidelines that identify notification guidance based on post-merger market shares. Although none is better than the other, a survey by OECD of its member countries indicated that mandatory notification systems are prevalent. Voluntary notification systems are adopted by only a few countries such as Australia, Chile and New Zealand.

10. In Australia there is an informal clearance process that has been in operation for many years. Parties proposing to undertake a merger or acquisition normally approach the ACCC in advance. These include not only mergers that may have competition implications but also those that have important national implications. The sooner parties approach the ACCC to discuss a proposed merger, the sooner the ACCC will be able to provide its view. These discussions may be held either when the merger proposal is confidential and/or after the merger proposal becomes public. The Commission's views do not bind third parties.

Consequences of Failing to Notify

11. In a jurisdiction where merger notification is *voluntary,* the parties choose whether to notify the authorities of a merger or not, even if the merger qualifies for being reviewed by meeting their jurisdictional thresholds. There is also no prohibition on companies completing transactions without clearance from the relevant agency, although doing so may give rise to certain risks.

12. There are 2 main benefits of getting approval before your merger goes ahead are:

•You are given legal certainty

•You end up saving a lot of time and resources

13. If your merger is completed without approval, the relevant authority can investigate your merger after it is completed and has certain of powers which it can use to:

- prevent the merged businesses from taking actions if it thinks that they might pre-empt its eventual decision
- order that pre-emptive action that has already taken place is reversed
- force the disposal of a business if the merger is prohibited

14. In certain jurisdictions, a party that fails to comply with legislation may be liable to pay up to certain monies per day that they are deemed to be in violation. The amount can also be some percentage of annual turn-over if they negligently fail to notify. An order may be given to cease the implementation of the merger. All penalties are monetary in nature.

15. There are also instances where submission of an incorrect or incomplete notification occurs. Parties also can fail to meet the mandatory filing requirements.

Compliance

16. Compliance with competition law is an important aspect of any merger transaction.

17. The purpose of merger control should be to allow competition authorities to consider in advance if mergers will have or may have a detrimental effect on competition result in dominance. Where it is considered to have unlawful effects, the merging parties will be required to agree upon remedies that address those effects or otherwise stop the transaction altogether.

18. Levels of compliance with laws in Papua New Guinea are often quite low. Companies from developed countries operating here may not comply with our competition laws even though they are well aware of them and that may also be the case in other developing countries. This is of great concern. We therefore will require knowledge sharing in SOM1 regarding this.

Notification Threshold that Merging Parties should advise

19. All notification criteria in which a merger should be notified in countries without mandatory requirements should be clear and objective.

20. APEC economies should also assert jurisdiction and review only those mergers that have an appropriate link with their jurisdiction only over those mergers that could raise competition concerns within the region. In some cases where there is

no proper definition of what constitutes an appropriate nexus with the jurisdiction, member economies are left to adopt different jurisdictional criteria.

21. In order to strengthen the need for notifiable transactions, it is of crucial importance to adopt some of the world's best practice standards such as ICN Recommended Practices and OECD recommended practices.

Information Included in Notification

22. There has been considerable uncertainty and debate about how jurisdictions can establish thresholds that incorporate appropriate material to be submitted for initial merger notifications.

23. A typical notification should include; size of relevant market, market share of acquirer, description of transaction and its objectives, market definition for affected markets, information on competitors activities in affected markets, information on supply and demand and barriers to entry or expansion and recent new entry, corporate information on all parties ownership and control structure and activities in jurisdiction.

Jurisdiction over International Mergers

24. Jurisdictions should strengthen merger laws that encourage fairness. Foreign firms should be subject to the same procedural rights as domestic firms and mergers in which foreign firms participate in should be subject to the same standard of review as purely domestic firms.

25. APEC member economies should cooperate and co-ordinate their reviews of transnational mergers. They should aim at a resolution of domestic competitive concerns and avoid inconsistencies with remedies sought in other jurisdictions.
In order to facilitate an effective co-operation and co-ordination of transnational merger review, all APEC economies should consider adopting or amending their competition laws to promote bilateral and multilateral agreements with competition authorities in the region.

26. Furthermore, merging parties should also be encouraged to facilitate co-operation between competition authorities, in particular with respect to timing of notifications and provision of confidentiality waivers.

Finally all APEC member economies should establish safeguards concerning the treatment of confidential information obtained from other competition jurisdictions.

27. In Papua New Guinea Competition Law, there are no special rules concerning foreign firms. As a measure of aligning its merger review process, the competition authority is currently in the process of introducing a merger review guideline that will be used when reviewing merger applications.

28. It would be interesting to note how many member economies have bilateral agreements or MOU's in place that facilitate improved co-operation for the review of mergers.

Advantages and Disadvantages of Both Regimes

29. In compulsory notification, one consequence would be that all proposed mergers and acquisitions will come before the competition authority. Firms will still seek clearance even if the merger or acquisition doesn't substantially lessen competition or result in dominance. From the regulator's perspective there will be no need to pursue business for information when assessing and they will be certain that they are aware of all mergers. This assumes there are adequate deterrents and provisions in place to ensure all mergers are notified and business is required to provide adequate information.

30. The disadvantages include additional resources required by the competition authority in assessing mergers and the cost of meeting the requirements of the regulator that will be incurred by merging or acquiring parties.

31. In non-compulsory notification regimes, advantages would include the reduction in workload for authorities and for business. . But one point worth raising is that in countries where there are high compliance levels, firms may still go to the authorities. In countries with low compliance levels, it may be quite opposite.

32. A major disadvantage of a non -compulsory notification regime would be that the regulator may only become aware of an acquisition when it was subsequently found that competition was substantially lessened. This makes it extremely difficult to undo the acquisition.

Relevance to APEC Competition Policy Agenda

33. It should be noted that all APEC member economies are at different stages in the process of implementing an effective competition regime. The discussions on merger notification regimes will assist economies to identify which approach is best for their economy as there is no "one size fits all"

34. In economies, that are yet to establish competition authorities such as Brunei,

this discussion will provide some policy guidelines that may be used to develop their merger control policy. Through the sharing of experiences, competition agencies in the APEC region can benchmark themselves against other agencies allowing agencies to see what their international counterparties are doing in terms of their merger recommended practices and whether they are converging or diverging.

35. In addition, the discussions may highlight the benefits and disadvantages of having either a voluntary or compulsory regimes and economies may consider adopting either of the regimes, whichever is considered the most effective for strengthening markets. Economies with low compliance culture may elect to introduce a mandatory notification procedure initially and phase it out once compliance levels improve or they may choose to modify thresholds over time.

36. The purpose of a change from non-compulsory to mandatory merger notification should firstly be to improve the effectiveness of a regime. It should also increase regulatory risks for businesses in their merger and acquisition activities and further enhance powers of a competition authority for early intervention of anti-competitive deals.

37. It seems that a key issue that countries need to consider is the compliance culture of the business community. If there is a low level of compliance with laws generally this suggests a greater need for a compulsory merger notification regime. Also it is easier to relax a tighter regime by increasing thresholds later than to try to tighten regimes after the implementation of the law.

38. We wish to stress that as part of *APEC's Competition Policy 2014 Collective Action Plan* which includes; Continuing to develop understanding in the APEC business community of competition policy and laws and administrative procedures and Contributing to the use of trade and competition laws, policies and measures that promote free and open trade, investment and competition, hence; the formulation of this paper.

Possible Further Actions

39. Developing APEC guidelines (thresholds etc) on merger control for both developed and developing economies.

40. Capacity building on merger control regime implementation, transition and review.

41. Discussion of Interagency cooperation for mergers across borders.