Joint statement on merger control enforcement

Competition and Markets Authority (CMA), Australian Competition and Consumer Commission (ACCC) and Bundeskartellamt

Purpose of this statement

1. The CMA, ACCC and Bundeskartellamt release this joint statement to highlight to businesses, advisers, courts and governments that there is a common understanding across competition agencies on the need for rigorous and effective merger enforcement. This statement is made in the face of high levels of concentration across various markets in the UK, Australia and Germany and a marked increase in the number of merger reviews involving dynamic and fast-paced markets. The need for effective merger control remains important where our economies are weakened, including as a result of the Coronavirus (Covid-19) pandemic.

2. The combination of the uncertainty inherent in the forward-looking nature of merger control and changes in the nature and complexity of the mergers under review presents challenges to preventing further concentration from anticompetitive mergers over the longer term. It is important that the decisions by competition agencies, the courts and tribunals give due credence to the importance of competition and the economic principles underlying merger control, so as to ensure good outcomes for consumers and the economy.

Purpose of merger control

3. The purpose of merger control is to ensure that relevant transactions are assessed, and anticompetitive mergers are prevented so that consumers benefit from the lower prices, higher quality products and services, greater choice and innovation that effective competition brings. Competition increases consumer trust in markets and drives the functioning of market economies and economic prosperity.

4. Without strong merger control regimes, there is a risk that mergers will proceed that lessen the level of competition by weakening competitive constraints and in some cases strengthening dominant positions. An effective regime therefore seeks to prevent companies from gaining market power

through acquisitions. Firms are typically motivated to use gains in market power to increase shareholder returns at the expense of consumers.

5. Given the long-term structural effects of mergers, ineffective merger control that does not properly scrutinise mergers can cause long-term negative consequences for businesses and end consumers. It can be very difficult, and in some cases impossible, to reverse the loss of competition by taking enforcement action after a merger has taken place. Equally, it can take considerable time for markets to adjust to recover the competition lost through a merger.

The impact of the Coronavirus (Covid-19) pandemic

6. Companies are facing difficult times as a result of the pandemic, which may result in more takeovers and acquisitions. However, these weakened economic conditions and the greater struggles companies may face does not mean that consumers should bear the costs of the loss of competition that can arise from anticompetitive mergers.

7. The pandemic should not be used to bring about a relaxation of the standards against which mergers are ultimately assessed. It is important that merger assessments remain focused on the long-term consequences of a merger and do not unduly focus on short-term market features. For instance, while it is conceivable that the pandemic could lead to an increase in valid failing firm claims, the pandemic is not a reason to lower the standard for accepting such claims. While in some circumstances it may be necessary to factor the short-term impact of the pandemic into merger assessments, this will need to consider the impact on all firms in the market and competition agencies' assessments must remain rigorous and evidence-based. In particular, competition agencies cannot base assessments on speculation or unfounded claims as to the impact of the pandemic.

Challenges for merger control

8. Competition agencies face a difficult challenge when taking a view on future market positions and company actions, and the forward-looking nature of merger control review will always mean competition agencies face some uncertainty when making such decisions. However, uncertainty as to the future should not necessarily mean that potentially anticompetitive mergers are cleared because of that uncertainty: a seemingly small transaction can cause a competitive market to tip in an anticompetitive direction. For example, an acquisition of a small start-up could in reality be the acquisition of what would have been a major competitive threat to the purchaser in the longer term.

9. When faced with uncertainty, it is therefore important that competition agencies are willing to challenge the presumption often promoted by merging firms and their advisers that mergers are generally efficiency-enhancing and should only be restrained where there is certainty that serious detriment will result.

10. Competition agencies are increasingly reviewing mergers in dynamic and fast-paced markets. These mergers can involve hundreds of products or services in related markets, as well as products and services in earlier research and development stages. In addition, the last decade has seen the rise of acquisitive tech giants with activities across multiple current or future markets. Anticompetitive mergers in these markets can cause significant harm given the increased importance of these products and services and the aggregation of data over time across various services. Technology markets can also be examples of highly concentrated markets with features such as high barriers to entry due to network effects. This can result in high market concentration, such that market power is easily created or entrenched, and is likely long-lived.

11. Harm to consumers may arise where incumbents seek to protect their market position by acquiring potential competitors in the form of smaller firms or potential entrants in adjacent markets. This is relevant where, absent the merger, entry or expansion by either or both merger firms may have resulted in new or increased competition between them. Even if the likelihood of entry is not high, the threat of entry can still constrain incumbent firms. This is particularly the case if entry, in the event it occurred, would likely have a substantial impact on the profits of incumbent firms.

12. Merging firms and their advisers often assert that their merger will increase competition. This is generally based on claims that the merger will generate synergies or other efficiencies. Our experience suggests that merging firms often overstate the apparent efficiency benefits of mergers and how these will translate into more competitive outcomes for markets. Given the long-term structural change and clear loss of rivalry that can result from a merger, protecting competition may require the prevention of problematic mergers rather than the acceptance of submissions relating to purportedly procompetitive benefits that are difficult to verify and predict.

13. Companies are often advised and represented by law firms and economists that strongly advocate for their views of the market. Competition agencies (and courts and tribunals where appropriate) are tasked with reviewing and testing that advocacy to examine the evidence, particularly documents and data, and decide whether these claims are supported.

14. The merger review process relies on competitors and customers (who are often unrepresented or not heavily engaged in the review) to make available any evidence that could support or counter the claims of the merging companies. However, it is not uncommon for some firms (whether suppliers, competitors or customers) to be reluctant to provide information that may jeopardise their commercial relationship with the merged firm, particularly if the merged firm is a key customer or supplier. It is also relevant that individual consumers are a disparate and disaggregated group that are often not well placed to coordinate to represent their interests. Because of this, competition agencies, courts and tribunals need to be aware of the risk of accepting the merger firm's views over those of competitors, customers and consumers simply because the merger firms are more engaged in the merger review process.

Remedies

15. In view of the challenges to ensuring effective merger control, competition agencies have an opportunity to reassess their approach so that a degree of uncertainty about future developments in the relevant markets does not lead, by default, to a clearance decision. In practice, this may mean intervening in a merger to seek remedies to maintain competition or, where that is not possible, prohibiting the merger.

16. The increasing complexity of dynamic markets and the need to undertake forward-looking assessments require competition agencies to favour structural over behavioural remedies. It is widely acknowledged that complex behavioural remedies that create continuing economic links and dependencies are unlikely to recreate the pre-merger competitive intensity of the market, can raise significant circumvention risks, and can quickly become outdated as market conditions change. In some circumstances they can also distort the natural development of the market.[1] Behavioural remedies also place a burden on competition agencies and businesses by necessitating extensive post-merger monitoring of companies and their conduct.

17. Structural remedies – whether prohibition or divestment of a standalone business – are more likely to preserve competition and lead to an optimal solution for stakeholders and are therefore in the best interests of consumers. Importantly, the threshold of proof required to prohibit a merger is not higher when no divestment would be effective in restoring the lost competition;

1 CMA109 (18 June 2019), Merger remedy evaluations: Report on case study research.

indeed, protecting competition and consumer welfare can sometimes only be achieved by blocking a merger outright.

The way forward

18. Effective merger control is vital to ensuring competitive markets exist in a free market economy. Competition drives prices down; quality, choice and service up; and pushes companies to innovate. Competition can only be maintained by ensuring anticompetitive mergers do not happen. This is even more so in a fast-developing digital world impacted by the Coronavirus (Covid-19) pandemic. We believe that in the world today there is a real need for strong merger enforcement from competition agencies globally to ensure that high concentration levels do not become the accepted norm, and to maintain and promote competition for the benefit of consumers. To achieve this, competition agencies, courts and tribunals are strongly encouraged to protect competition also when there is uncertainty raised by contentious mergers and ensure the interests of consumers are promoted over the profits of the merging firms.