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REVEALED: POSSIBLE THRESHOLDS FOR PROPOSED MANDATORY MERGER FILING REGIME IN AUSTRALIA

Documents obtained from the Australian Competition and Consumer Commission (**ACCC**) under Freedom of Information (**FOI**) laws suggest that transactions involving companies with turnover of AUD$400 million or a transaction value of more than AUD$35 million would trigger a mandatory ACCC merger filing under proposed reforms to the Australian merger notification regime.

STATUS OF PROPOSED REFORMS

As outlined in our briefing dated 4 July 2023, the ACCC continues to support sweeping reforms to Australia's merger review regime including the introduction of a mandatory and suspensory merger notification model and changes to the substantive merger test that would result in closer alignment of Australia's merger control laws with those of the European Union.

Although such reforms have been touted for some time there has remained a degree of uncertainty around timelines for consultation and implementation, as well as the quantum of possible thresholds that would trigger a mandatory merger filing to be made to the ACCC. Reportedly, a submission dated March 2023 from the ACCC to Australian Treasury and Competition Minister, Andrew Leigh, recently obtained under FOI laws has confirmed much of what has been previously written about on this topic, including the ACCC's pursuit of the introduction of mandatory merger filing thresholds and shifting the burden of proof as part of a broad-ranging revamp of Australia's merger control regime (**ACCC Proposal**)[1].

INTRODUCTION OF MERGER FILING THRESHOLDS

Proposed merger filing thresholds

The ACCC's Proposal indicates that "*determining thresholds…could be set with reference to the value of the proposed transaction, the size of the business being acquired globally and/or within Australia, or a combination of these factors*". It has been reported that the ACCC Proposal goes on to suggest that transactions satisfying the following thresholds would trigger a mandatory merger notification to the ACCC:

Key issues

- For the first time, possible mandatory notification thresholds for Australia's merger control regime have been revealed.
- It has been reported that transactions involving companies with turnover of AUD$400 million or a transaction value of more than AUD$35 million would trigger a mandatory ACCC merger filing under proposed reforms.
- It remains unclear what type of turnover would satisfy the proposed threshold(s) and whether any additional nexus to Australia would be required to trigger a filing. Further details around the interpretation and application of the Proposed Thresholds will be required before more meaningful comparisons with other jurisdictions can be drawn and implications of the Proposed Thresholds can be more definitively assessed.
- The Proposed Thresholds (as reported) are low, particularly given their apparent global nature, and have the potential to capture a significant number of transactions, including global transactions with limited nexus to Australia. Details around the form, substance and any fees associated with any filing have not been released.

[1] James Panichi and RyanCropp, *New thresholds, tougher assessments would hit dealmakers under Australian antitrust proposal,* MLex 16 July 2023.

- Companies to a transaction meet a turnover threshold of AUD$400 million (or USD$273.3 million); or
- The global transaction value exceeds AUD$35 million (or USD$23.9 million)

  (**Proposed Thresholds**).

Whilst the ACCC is reported to have acknowledged that mandatory notification thresholds require "*careful consideration*", it has also been reported that the ACCC believes that the AUD$400 million figure is appropriate.

The Proposed Thresholds would appear to currently lack the level of specificity and certainty needed by merger parties to determine whether a transaction would be notifiable and to be consistent with International Competition Network best practice.

Further detail regarding the application of the Proposed Thresholds, such as whether the relevant turnover is Australian-specific or global in nature, if the turnover threshold is combined between both merger parties or capable of being satisfied by one merger party, if one or both thresholds would need to be satisfied to trigger a filing, and if any additional Australian nexus would be required, have not yet been revealed and are relevant factors for merger parties.

Implications of the Proposed Thresholds

The Proposed Thresholds (as reported) both appear to be global in nature and would potentially capture a significant volume of transactions, including those with a reasonably de minimis nexus to Australia.

As a point of comparison, the Proposed Thresholds fall well below those used in the merger notification regimes of the European Union and the US but are higher than the current combined worldwide turnover thresholds currently used in France, Greece and the Netherlands. Unlike the thresholds used by the Competition and Markets Authority (**CMA**) in the UK, there is no reported reference to a "share of supply" test.

Global thresholds have the drawback of capturing transactions that have minimal or no nexus to Australia. If implemented without other, cumulative thresholds that require the target to have a certain degree of sales or assets in Australia, the ACCC's merger regime has the potential to go from one in which parties to transactions that raise no conceivable concerns in Australia can opt not to notify, to one in which hundreds of “no issues” mergers would have to be notified every year, many of which have no nexus to Australia. Even the UK’s new proposals to introduce new thresholds to capture acquisitions of nascent competitors (while retaining the voluntary regime) require at least one of the parties (which could be the purchaser) to have significant turnover in the UK (£350m) and a significant UK share of supply (33%).

Although thresholds based on global transaction value have been implemented in some jurisdictions as a way to catch acquisitions of potential/nascent competitors that do not yet generate significant turnover in a jurisdiction, for the reasons outlined above they are typically combined with a carefully defined test for nexus/likely effects. For example, Germany (which was one of the first to introduce such a threshold) requires the target to be active in Germany “to a considerable extent” (such as having R&D facilities, significant volumes of monthly active users of digital services, or the provision of free services), but the test will not be met by purely future / prospective activities: a target's

activities will not be considered significant if it generated a turnover below €17.5m in Germany and if this turnover adequately reflects its market position and competitive potential (such as where the target's products generate significant turnover abroad but not in Germany).

Ultimately, further details around the interpretation and application of the Proposed Thresholds will be required before more meaningful comparisons can be drawn and the implications of the ACCC Proposal can be assessed more definitively.

UPDATES REGARDING OTHER PROPOSED REFORMS

The ACCC Proposal obtained under FOI also reportedly confirms and clarifies a number of other proposed reforms that have previously been raised as part of the ACCC's merger reform agenda, including:

- the need for clearer statutory language to capture strategic "creeping acquisitions", "killer acquisitions" (in BigTech) and transactions that "entrench or extend a position of substantial market power". The ACCC Proposal confirms that the ACCC is seeking two additional statutory "merger factors" to address these alleged short comings.
- The previous suggestion the ACCC was seeking to limit the role of the Federal Court of Australia was incorrect. Merger parties would retain the ability to seek a declaration from the Federal Court that the merger does not substantially lessen competition[2].
- Confirmation that, if accepted by the Australian Government, reforms to Australia's merger notification regime would move the burden of proof from the ACCC to the merger parties to show that a transaction should be allowed on competition grounds. This is intended to address ACCC concerns about merger parties threatening to close before the ACCC's review has been completed. Reportedly, the ACCC has suggested that merger parties are aware the ACCC would be unlikely to successfully block a global transaction (such as a digital platform merger), and parties therefore give low priority to a timely engagement with the regulator.

Although the ACCC is seeking to establish an internationally recognisable merger clearance model, a number of the proposed reforms do not necessarily align with merger review regimes in other major jurisdictions. For instance, a mandatory merger filing regime does not typically reverse the burden of proof. In all the major mandatory filing regimes the regulator must establish whether the test for prohibition is met.

More broadly, a mandatory regime is also not necessarily needed to prevent merger parties from “threatening to complete” before a merger review has finalised. That could be achieved by having powers (like those of the UK CMA) to impose an ad-hoc prohibition on closing on certain transactions that are undergoing (or about to undergo) review where the CMA considers that closing would prejudice its ability to impose effective remedies. In practice, the CMA has only relied on that power a small number of times in the past 10 years, which suggests that the ACCC’s concern is exaggerated.

Further, the concern that a mandatory regime is needed in order to address an apparent inability for the ACCC to block a global transaction or at least compel

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[2] Id.

timely engagement is not supported by the recent experience of the CMA in the UK, which has recently blocked a number of global transactions under its voluntary regime, including in the area of digital platforms such as the Facebook/Giphy, Sabre/Farelogix and Microsoft/Activision transactions (the first two of which involved a target with minimal UK activity).

NEXT STEPS ON CONSULTATION

No details have been released regarding the form, substance, procedural requirements or any fees associated with mandatory filings. The possible timing of public consultation on or further consideration of the ACCC Proposal by the Australian Government also remains unknown. As such, it is possible that Australia's existing voluntary merger control regime may remain in place for some years to come.

However, it is clear that against the backdrop of increased ACCC concerns around "creeping acquisitions", "killer acquisitions" and deal activity by entities with existing market power, the introduction of a mandatory merger filing regime in Australia will have important ramifications for entities who frequently undertake transactions in or with a potential nexus to Australia. As such, private equity and institutional investors, market participants with larger market shares (particularly those in concentrated industries), and BigTech should be particularly mindful of developments in this space.

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The authors also wish to acknowledge the input received from Clifford Chance colleagues in other jurisdictions regarding their experiences with recent or proposed reforms to merger filing regimes that are similar or comparable in nature to those that have been put forward by the ACCC.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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