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APEC Information Sharing Best Practices on Merger Control Regimes

Port Moresby, Papua New Guinea | 1-2 March 2018

APEC Economic Committee

July 2018

APEC Project: EC 06 2017A

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APEC#218-EC-04.1

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Introduction

The APEC Information Sharing Best Practices Workshop on Merger Control Regimes (MCR) was held in Port Moresby, Papua New Guinea, on 1-2 March 2018.

The workshop was arranged by the APEC Secretariat and the Independent Consumer and Competition Commission (ICCC) of Papua New Guinea.

The workshop was facilitated by Dr Rhonda Smith of the University of Melbourne. The opening welcome was given by Mr Paulus Ain, Commissioner and Chief Executive Officer of the ICCC,

The workshop reflected the importance of competition in modern economies. Competition can generate benefits for an economy, such as: economic growth, innovation, and productivity; and increased consumer choice for goods & services. These benefits help to reduce prices and improve quality. Effective MCRs seek to achieve those benefits by preventing mergers and acquisitions that are likely to substantially lessen competition in markets.

The main objectives of the workshop were:

1) to build the capacity of officers from competition agencies in the APEC region through discussions and presentations by APEC experts about the policy considerations relevant when considering the type of MCR (either voluntary or mandatory) to be adopted; and
2) to help inform those officers and agencies about procedural approaches and changes to make their MCR procedures effective and efficient.

The workshop stemmed from APEC's broader initiatives to promote competition in economies in the region. Those initiatives include:

- the work of the APEC Economic Committee and the Competition Policy and Law Group;
- the Renewed APEC Agenda for Structural Reforms (RAASR) 2016 – 2020:
  - RAASR pillar 1 encourages more open, well-functioning, transparent and competitive markets;
  - RAASR pillar 2 encourages deeper participation in those markets by all segments of society, including MSMEs, women, youth, older workers, and people with disabilities; and
- APEC's Competition Policy 2014 Collective Action Plan ((f) Contribute to the use of trade and competition laws, policies and measures that promote free and open trade investment and competition).

16 presentations were given at the workshop. These presentations represented the approaches taken to merger review in ten APEC member economies, namely: Australia; Chile; Korea; Mexico; New Zealand; Papua New Guinea; Peru; The Russian Federation; United States; and Viet Nam. The MCRs in those economies provided an instructive cross-section of approaches.

The workshop was attended by 48 delegates. The presentations were well received by the delegates who participated in discussion after each presentation and during scheduled breaks in the program.

This report summarises the main contributions made at the workshop. It is intended to provide a record of those contributions in furtherance of the objectives of the workshop.

Merger Control – Dr Rhonda Smith (University of Melbourne)

The first presentation gave a key-point overview of the nature and purpose of merger control in APEC economies.

The presentation highlighted:

- the rationale for merger control;
- different types of mergers;
- economic and commercial rationales for mergers;
- the positive and negative potential effects of mergers;
- the substantial lessening of competition test typically adopted in MCRs;
- the importance of effective merger control;
- the historical evolution of merger control in the US and the EU;
- the varying approaches taken to merger review in MCRs; and
- the challenges for MCRs in APEC member economies.

The reasons why firms merge were outlined. Most notably, firms merge in order to:

- achieve growth
- make efficiency gains;
- facilitate exit or expansion (eg failing firms/creeping acquisitions);
- get tax advantages (eg write off losses against other business income);
- speculate (capital gains from rise in share price/asset stripping); and
- reduce competition by gaining control of competitor.

Mergers may result in significant efficiency gains. However, they can be anti-competitive. Horizontal mergers may facilitate collusion and other coordination of market conduct, and may increase unilateral market power. Vertical mergers may increase market power (foreclosure; exclusion). Conglomerate mergers may increase market power (portfolio effects).

Anti-competitive mergers may adversely affect economic welfare in serious ways. The main potential adverse effects on economic welfare are:

a. higher prices;
b. reduced output;

c. reduced choice;
d. poorer quality product; and
e. less innovation.

Merger control processes have seven main dimensions:

1) mandatory v voluntary notification of mergers;
2) formal v informal clearance;
3) timeframe for review
4) sources of evidence and information gathering powers;
5) quantitative v qualitative assessment of effects of a merger;
6) remedies; and
7) penalties.

Looking ahead, MCRs face several challenges:

- whether and/or how to take account of likely efficiency gains from a merger that is also anti-competitive;
- difficulty in identifying the market in which merger occurs due to increasing complexity of business models, including digital platform businesses; and
- determining jurisdiction and defining relevant markets in the context of online business which increasingly take place globally or in a number of economies.

Merger Control in Australia: Informal and Formal Review – Professor Brent Fisse (Brent Fisse Lawyers, Australia)

The second presentation described the merger review process in Australia under the *Competition and Consumer Act 2010* (Cth).

There is no mandatory notification under the Australian MCR. Voluntary notification is recommended in the *ACCC Merger Guidelines*[1] where the products of the merger parties are substitutes or complements and the merged firm will have greater than a 20% market share. The possibility of mandatory notification has been considered from time to time but have not been considered necessary.

The MCR in Australia provides for informal review and formal review.

Informal clearance (a letter of comfort) can be given by the ACCC and has been widely used. The informal review process is based on ACCC practice and guidelines, not legislation.

The informal review process is believed by the ACCC and many others to have worked well. 288 mergers were considered by ACCC from 2016 -2017. 88% were cleared without the need for public review. Thirty three (33) were subject to a public review. Twenty three of those 33 were cleared unconditionally. Two were cleared subject to undertakings. Eight were discontinued by the applicants.

The strengths of the informal review process are:

- certainty;
- maintenance of confidentiality;
- speed;
- reliability;
- ease of access and communication;
- quality of outcome;
- flexibility;
- feedback at an early stage and throughout the process;
- takes account of transaction timetable including foreign investment approvals and financing;
- pre-clearance can permit speedy confidential outcomes in some cases;
- access to senior staff and sometimes Commissioners;
- undertakings, if required, can be negotiated as transaction proceeds;
- no application fee; and

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[1] At: https://www.accc.gov.au/publications/merger-guidelines

- costs of using informal review process may be significant but can be kept under control by merger parties.

The informal review process has its downsides. The main downside is that key submissions may not be public and the reasons of the ACCC for the decision are not always published in any detail and may not be apparent. The decision in Foxtel – Fox Sports (7 Dec 2017) is a recent example. The brief details about that decision on the ACCC website[2] left stakeholders in the dark about key facts, submissions and the ACCC reasons for the decision.

The informal review process has also become more formal. There are more market inquiries and secondary reviews. Submissions and data are subjected to closer review. The timelines for complex mergers may have increased. There is increased use of s.155 investigative powers by the ACCC. Informal review can be expensive given role of lawyers and experts.

A new formal review process was introduced in late 2017. This process provides for authorisation by the ACCC as an alternative to the informal review process. It replaces a formal clearance process that was never used and an Australian Competition Tribunal authorisation process that was rarely used.

The strengths of the new formal authorisation-based process are:

- authorisation creates an exemption from liability (informal clearance does not);
- authorisation is possible on the basis of the SLC test or the public benefit test (informal clearance applies only where there is no SLC);
- a specific legislative time frame applies;
- an authorisation decision is subject to Review by Australian Competition Tribunal (informal clearance is not); and
- apart from application fee, may not be more costly than informal review.

The downsides of the authorisation process are:

- there is no guarantee of access to key submissions;
- the ACCC now substantially controls formal as well as informal review (contrast the constraint and discipline of the former ability of parties to seek authorisation by the Australian Competition Tribunal);
- the 90-day timeframe may be unduly long;
- the public process gives more limited confidentiality than informal review;
- merits review by Australian Competition Tribunal is limited to information that was before the ACCC or new material in some circumstances;
- Australian Competition Tribunal review is not limited to the merger parties; and

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[2] See at: http://registers.accc.gov.au/content/index.phtml/itemId/1204706/fromItemId/751046

- there is a substantial application fee (AUD 25,000).

The authorisation process thus has advantages and disadvantages. The informal review process is likely to remain the predominant merger review avenue in Australia. This is despite the fact that the informal process can suffer from lack of transparency (as illustrated by the case study of the recent Foxtel – Fox Sports merger review in December 2017).

NZ Merger Procedure: With Reference to NZME / Fairfax – Dr Andrew Simpson (Barrister, NZ)

The third presentation focussed on the main features of the MCR in New Zealand.

As in Australia, there is no mandatory notification procedure. Unlike the position in Australia, there is formal clearance only – there is no equivalent of the Australian informal review process.

An acquirer may voluntarily seek either:

(a) clearance by the NZCC, on the ground that no SLC is likely to result; or

(b) authorisation by the NZCC, on the ground that the public benefit from the transaction outweighs the detriment that would result.

Key features of the formal clearance process are:

- "pre-notification discussion" with NZCC;
- Day 1: register application (with fee of NZD 3680):
  - NZCC accepts 'clear or authorise' application;
- Day 25: give clearance or send "Letter of Issues";
- Day 40: Give clearance or send "Letter of Unresolved Issues":
  - deemed to decline by day 40, unless applicant agrees to extension;
  - average 66 working days;
- Day 60+: final decision; and
- +20 days: Appeal lies to HCNZ, by Acquirer or Vendor.

Key features of the authorisation process are:

- Day 1: register application for authorisation (fee of NZD 36,800);
- Day 10: provide draft investigation timeline;
- Days 10-40: investigate; receive submissions; publish;
- Day 40-50: publish draft determination;
- Days 50-60: receive submissions; hold conference if required;
- Day 60: deemed to decline, unless applicant agrees to extension;
- Days 70-80: final determination to grant or decline authorisation; and

- +20 days: Appeal lies to HCNZ, by Acquirer or person with “direct and significant interest”.

The recent NZME / Fairfax merger was discussed as a case study. Two major media companies proposed to merge. The NZCC declined clearance and authorisation. The NZ High Court upheld the NZCC on most points. The most interesting aspect of the decision is the approach taken to the meaning of ‘public benefit’. The High Court held that the combined unquantified and quantified benefits (NZD40-200m) did not outweigh the quantified and unquantified detriments, especially the loss of ‘media plurality’ and the decline in product quality (range, volume, variety).[3] That decision is now on appeal.

The presentation explained why a voluntary merger notification regime can be efficient:

- mandatory notification necessitates ‘thresholds’ to filter the work. These raise difficulties:
  - commonly over-inclusive – agency must review many unobjectionable deals;
  - potentially under-inclusive;
  - some risk of ‘gaming’;
- a voluntary regime puts the onus on the parties to self-assess their transaction:
  - why would an acquirer seek clearance?
- the voluntary regime appears to work well:
  - about 20 clearance applications/year;
  - about 1 in 10 is declined (buyer self-restraint from SLC?);
  - applications for authorisation relatively rare – slower and more costly.

It was further explained that merger compliance without mandatory notification in NZ is facilitated by:

1) predictability (eg, comprehensive, reliable agency guidelines; and transparency in agency process);
2) expertise (eg, expert advisers; judges familiar with competition law);
3) monitoring (eg, vigilance of regulatory agency; right of third parties to apply for injunction to prevent merger);
4) remedies (eg injunctions and other orders; damages);
5) corporate sanctions for breach of the prohibition against anti-competitive mergers;[4] and
6) individual and accessorial liability for breach of breach of prohibition against anti-competitive mergers.[5]

These conclusions were drawn:

- parties do voluntarily apply for clearance under the NZ MCR;

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[3] *NZME Limited v Commerce Commission* [2017] NZHC 3186 (18 December 2017).

[4] See eg *New Zealand Bus Limited v Commerce Commission* [2007] NZCA 502.

[5] See eg *New Zealand Bus Limited v Commerce Commission* [2007] NZCA 502.

- the NZ MCR enables predictable outcomes;
- even in a doubtful case, the incentives under the NZ MCR favour application for clearance;
- where merger review outcomes are less predictable, or incentives are weaker, mandatory notification might achieve higher compliance.

Mandatory Merger Control Regimes – Ms Leah McCoy (DOJ, Antitrust Division, USA)

The fourth presentation addressed two fundamental questions:

1) why mandatory merger regimes?
2) what are the key legal elements of an effective merger enforcement regime?

The Hart-Scott-Rodino Act (HSR) requires all mergers and acquisitions above a certain dollar value to be notified to the FTC and DOJ. The threshold amount is adjusted annually. There is an initial waiting period of 30 days. The DOJ and FTC can challenge non-reportable transactions.

Mandatory notification has been adopted in the USA for these main reasons:

- "midnight mergers" – lack of incentives for parties to notify or provide information to agencies about mergers;
- pyrrhic victories – high cost of litigation for agencies, the parties, the public where anti-competitive mergers occur;
- it is often impossible to restore competition fully after a merger has been consummated; and
- inability to unscramble the egg – it is difficult or impossible to find an effective remedy after companies have been integrated;
- duration of post-merger litigation – a Congressional study found that resolution took 5 to 6 years on average.

After outlining the US MCR, the presentation focussed on the International Competition Network Recommended Practices for Merger Notification and Review Procedures.[6] The ICN guiding principles for merger notification and review are:

- sovereignty;
- transparency;
- no-discrimination on the basis of nationality;
- procedural fairness;
- efficient, timely, and effective review;

[6] At: http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf

- coordination;
- convergence; and
- protection of confidential information.

The presentation then commented on the ICN Recommended Practices for Merger Notification before discussing how they are reflected in the US MCR.

Several points were made about mandatory notification:

- thresholds should be clear and understandable so as to reduces uncertainty as to when to file;
- thresholds should be based exclusively on objectively quantifiable criteria. The prime criteria are:
  - the measurement tool (e.g., assets or sales, but not market shares);
  - the geographic area (e.g., national or worldwide); and
  - the time period (e.g., calendar year).
- the time within which notification is required has to be specified;
- rules are needed on:
  - the information to be provided as part of notification;
  - who has to notify; and
  - the review period, including any waiting period;
- failure to comply with mandatory notification needs to be enforced:
  - the need has been highlighted by "gun-jumping" (failure to observe waiting period) by activist investors and shareholders recently in the US; and
  - violators subject to civil monetary penalties in the US.

It was emphasised that an effective MCR requires an enforceable standard of harm. How is harm to competition defined? What factors are relevant to evaluating whether or not the harm is sufficient to justify opposing the merger? Attention was drawn to the guidance on these questions that is provided in the *DOJ and FTC Horizontal Merger Guidelines*.[7] The goal is to have an effective, efficient, transparent, and predictable merger review process.

Emphasis was also given to procedural fairness. The main elements of procedural fairness are:

- providing merger parties with sufficient and timely information on the facts and competitive concerns that form the basis for a proposed adverse decision and meaningful opportunity to respond;
- giving third parties an opportunity to express their views during the merger review process; and

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7 At: https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf

- managing the merger review process to ensure it is implemented fairly, efficiently, and consistently.

The importance of protecting confidentiality was highlighted. The main points were as follows:

- confidential information received during an investigation should be subject to protection;
- agencies should promote transparency of confidentiality laws, policies, and practices applicable to their merger investigations; and
- agencies should avoid public disclosure of pending transactions since this may adversely affect the merging parties' commercial interests.

The essential role of transparency was stressed. Transparency helps agencies to achieve: consistency; predictability; fairness; and credibility. Transparency is particularly important in relation to:

- jurisdictional scope of the merger control law;
- agency decision-making procedures; and
- merger review principles and criteria.

Transparency can be promoted by agencies in a number of practical ways:

- publishing guidelines on laws and procedures;
- publishing enforcement decisions and non-enforcement decisions that set a precedent or represent a shift in enforcement policy;
- issuing press releases on important decisions;
- delivering speeches;
- publishing informational materials; and
- if the agency takes non-competition factors into account, making these transparent.

Administrative Processes Needed for Effective Enforcement of Mandatory Pre-Merger Notification – Mr Timothy Hughes (FTC, USA)

The fifth presentation focussed on the administrative processes used by the FTC in mandatory premerger notification.

Two screens are involved in merger review:

1) Which transactions should be notified and which should not be? A rough screen that sorts transactions that have little effect on commerce in the jurisdiction from those that have sufficient effect to warrant requiring the parties to notify.
2) Which transactions should be permitted and which blocked or permitted with conditions? This screen carefully sorts transactions likely to have a harmful effect on competition in a specific relevant market.

In the US, the first screen uses monetary value criteria, which are adjusted annually. One of their criteria in 2018 was that the monetary value of the transaction be USD 84.4 million or more.

The following key principles were outlined:

- very few mergers are anticompetitive:
  - mergers almost always create efficiencies;
  - one concern is not to "chill" pro-competitive mergers; and
  - fewer than 2% of all mergers are investigated;
- rigorous analysis:
  - all markets are different and markets change with time;
  - all presumptions are rebuttable;
  - "hot" documents or "admissions" not enough; and
  - need "business records" and "business documents" to understand how market works;
- maintain confidentiality of sources and information;
- transparency with parties almost always is helpful;
- the standard applied is injury to competition, not injury to competitors:
  - be sceptical of competitor complaints; and
  - customers won't complain if they can pass on price increases.

Other main features of the FTC merger review process were then described. In summary:

- a substantial filing fee is charged;
- about 85 of approximately 180 lawyers at the FTC do merger-related work only;
- the initial filing is examined closely but is not necessarily conclusive;
- review is often terminated at an early stage;
- any doubt requires a preliminary investigation;
- preliminary investigation makes extensive use of telephone interviews of competitors and customers;
- parties often want to discuss the transaction, and use "white papers" for that purpose;
- FTC asks for key documents (eg pricing documents; financial statements);
- a full phase investigation begins with a second request
- a second request is issued by the Commission and is made during the initial 30 or 15 day waiting period;
- a second request extends the waiting period to 30 days after "substantial compliance";
- second requests can be very burdensome but the burden is reduced in various ways including by using electronic submissions and limiting the scope of the investigation to key issues;

- the vast majority of investigations (including consent orders) are completed in less than 4 months;
- uncertainty about the timing of the investigation process means that the FTC prepares for litigation at the same time;
- the FTC has broad compulsory process tools;
- transcribed depositions of key people in the merging firms are very useful.
- the parties to the merger have incentives not to hold back information;
- some merger cases that fall below the notification thresholds may raise competition concerns;
- competition concerns and the need for FTC investigation may arise after a merger has been notified and completed.

The conclusions drawn included the view that pre-merger review in the US was "costly" and very "time consuming".

New Economic Tools: UPP Test for Merger Assessment – Mr Bok, Hongseok (KFTC, Korea)

The sixth presentation discussed examples where the KFTC had used economic analysis in merger reviews.

The main focus was on the application of the Upward Pricing Pressure (UPP) method developed by Farrell and Shapiro.[8] The UPP method is one of a number of economic merger simulation tools used to assess the unilateral effects of a merger.[9]

The UPP method measures the probability of a price increase after a merger, which is one important consideration when assessing whether or not the merger is likely to be anti-competitive. The probability of a price increase depends on two factors, as explained below:[10]

> The first factor is the diversion ratio. The diversion ratio answers the following question: If the price of product 1 increases, what portion of the consumers will switch to product 2? The diversion ratio can be calculated by using consumer surveys or historical data. Market share estimates can be used alternatively. Under the assumption that all

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8 J Farrell & C Shapiro, "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition" (2010) 10(1) The B.E. Journal of Theoretical Economics, Article 9.

9 See R Willig, "Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions" (2011) 39 Review of Industrial Organization 19; D Hildebrand, "UPP, GUPPI and IPR – Merger Screening Tools" (2013) 2, at: https://www.ee-mc.com/uploads/media/Merger_Screening_Tools.pdf.

10 D Hildebrand, "UPP, GUPPI and IPR – Merger Screening Tools" (2013) 2, at: https://www.ee-mc.com/uploads/media/Merger_Screening_Tools.pdf

products are equally distant, the lost sales of one product are likely to be diverted to the other products in the market in accordance with the market shares.

The second factor is the gross profit margin (the difference between the price and the marginal cost).

The probability of a price increase post-merger is calculated by multiplying the gross profit margin with the diversion ratio followed by the subtraction of the efficiency gains ("downward pricing pressure").

The discussion following the presentation included these observations:

- while the UPP is a useful tool, it does not consider other factors such as barriers to entry;
- merger assessment typically requires a mix of qualitative and quantitative methods and no particular quantitative method should prevail.

Mergers & Acquisitions Under Papua New Guinea's Competition Law – Mr Emmanuel Auru (ICCC, PNG)

The seventh presentation canvassed the MCR in PNG.

Section 69 of the *Independent Consumer & Competition Commission Act 2002* prohibits any person from acquiring the assets of a business or shares in a business, if that acquisition would have, or would be likely to have, the effect of substantially lessening competition (SLC) in a market in PNG.

The ICCC administers two types of merger and acquisition review processes under the ICCC Act:

1) clearance (s 81) – a SLC competition test applies
2) authorization (s 82) – a public benefit test applies.

These processes are voluntary.

Obtaining a clearance or authorization for a merger or acquisition confers protection from enforcement action under s 69 of the ICCC Act.

Clearance or authorization is not available for acquisitions that have already taken place.

Voluntary notification has been problematic since 2011. Many M&A transactions have bypassed the clearance and authorisation processes of the ICCC Act and pose significant competition concerns in PNG. Examples include:

- Steamship Trading Company's (Steamships) acquisition of Kambang Holdings shares in Consort Express Lines in 2011;
- Digicel PNG Limited's (Digicel) acquisition of Hitron in 2014; and

- Exxon Mobil PNG Ltd's (Exxon) acquisition of InterOil Corporation Ltd's interests in the Papua LNG project in 2016.

These acquisitions resulted in Steamships, Digicel and Exxon acquiring conglomerate-like status in PNG's shipping, telecommunications and mining industries, respectively.

In the cases instanced above, the parties to the acquisitions:

a) never informed the ICCC about the acquisitions;
b) did not seek clearance or authorization under the ICCC Act;
c) the ICCC became aware of the acquisitions only after the acquisitions were completed; and;
d) refused to provide all, or any, information or documents to the ICCC after the ICCC had requested them to submit the relevant information and documents for the ICCC to undertake a proper competition assessment.

The failure of voluntary notification has occasioned high costs and required extensive time to be spent on post-merger investigations where the mergers should have been assessed in advance.

The ICCC has proposed that mandatory notification be introduced in the ICCC Act. The thresholds proposed are:

1) the transaction value exceeds PGK 50,000,000; or
2) the total proposed share transfer is 40% or more of the total shares in the company whose shares are being acquired; or
3) the transaction is likely to result in a market share increase of 50% or more of the acquirer; or
4) the ICCC forms the view that a notice seeking clearance for the acquisition is required, irrespective of whether or not the transaction has been concluded or is about to be concluded.

The amendments proposed will also enable the ICCC to revoke or vary a clearance or authorization that it has granted where it was based on incorrect or misleading information.

Voluntary Procedure to Mandatory Merger Control – Mr Jose Ignacio Loeser (Fiscalía Nacional Económica, Chile)

The eighth presentation described the Chilean MCR experience.

Chile moved from a voluntary to a mandatory MCR regime in June 2017.

The previous voluntary regime created several significant problems:

- considerable enforcement costs arose;

- anti- competitive mergers were consummated without notification; and
- it was very difficult to unscramble those mergers.

Under Resolution 667, issued by the FNE, a transaction must be notified to the FNE when:

1) the sum of sales in Chile of the firms subject to a transaction are at least UF 1.8 million during the last calendar year; *and*
2) the sales in Chile of at least two of the firms subject to a transaction are at least UF 290,000 in relation to each of those firms during the last calendar year.

Under the mandatory notification scheme, Phase 1 allows 30 days for assessment of the transaction. Cases can be escalated to Phase 2 if necessary; in Phase 2 there is a 90-day period for assessment.

FNE has tripled the size of its Merger Control Division in order to handle the additional workload of the new mandatory scheme.

To date, the new scheme has worked well:

- there has been positive feedback from the law firms that have represented the merging parties;
- most cases approved in Phase 1 have not been subject to conditions (4 were subject to conditions, 18 were not); and
- there has been 1 case in Phase 2 and that was approved unconditionally.

Merger Control in Viet Nam – Mr Le Quang Lan (Viet Nam Competition and Consumer Authority, Viet Nam)

The ninth presentation outlined Viet Nam's MCR and the challenges faced.

Merger and acquisition activity has increased in Viet Nam, as has the value of mergers and acquisitions.

Viet Nam now has a mandatory notification regime that was established in 2004.

Economic concentration must be notified if the merger parties have a combined market share of 30–50%. An economic concentration that results in a combined market share of more than 50% is prohibited unless exempted.

Proposed reforms will replace notification thresholds based on market shares with monetary thresholds. The proposed notification thresholds are:

- assets of either party of VND 500 billion; or
- total turnover of either party of VND 1,000 billion in preceding fiscal year; or
- transaction value of VND 500 billion.

The 50% combined market share test that now applies to the prohibition of economic concentration will be replaced with a test of significant restriction of competition.

Conditional clearance will become possible where the parties undertake to take steps to remedy likely anti-competitive effects.

Under the proposed reforms, the review process will have two phases: preliminary review; and official review. At the official review stage, account will be taken not only of competition effects but also efficiency gains and other positive welfare effects.

The Viet Nam MCR faces these main challenges:

- non-compliance by merging parties;
- significant resource constraints;
- the limited competition law awareness of enterprises; and
- the need for better cooperation of related state management agencies.

Merger Control in Perú – Mr Héctor Abel Palacios Fuentes (INDECOPI, Perú)

The tenth presentation highlighted the main features of the MCR in the electricity sector in Perú.

Perú has a mandatory notification regime for mergers in the electricity sector.

Prior approval is required where:

- a horizontal merger will result in more than a 15% market share, jointly or severally; or

- a vertical merger will result in more than a 5% market share in a relevant market.

Prior approval is not required if the merger involves:

- acquisition of productive assets with a value of less than 5% of the productive assets of the party from whom acquired; or
- acquisition of less than 10% of the shares with the right to vote.

An authorization request must include this information:

- identification of the parties;
- the ownership structure and details of the economic group;
- the personal, property and/or management links with other firms;
- the affected markets and relevant information (geographic scope, level of competition, market access);
- the likely effects of the merger; and
- documents related to the merger.

Assessment of an authorization request focusses on:

- market definition;
- competition conditions:
  - concentration levels;
  - possibility of choosing suppliers, distributors and users;
  - entry barriers; and
  - supply and demand dynamics.
- effects of the merger:
  - efficiencies within the market?
  - significant increase of concentration?
  - facilitation of conduct likely to impede or limit competition? and
  - displaces or impedes access to the market?

Both quantitative and qualitative methods are used in merger assessment.

Mergers may be authorised subject to conditions.

Substantial fines may be imposed for:

- omitting to make an authorization request before a merger;
- providing fraudulent information;
- not providing information before deadlines;
- proceeding with a merger after notification but before the final authorization decision;
- proceeding with a merger after denial of authorization; or
- not complying with conditions of an authorization.

An authorization may be revoked where the authorization decision was based on fraudulent information or where the conditions imposed have not been complied with.

Development of Competition Policy and Merger Control Regime in the Russian Federation – Mr Roman Fedyukov (Federal Antimonopoly Service, Russian Federation)

The eleventh presentation described the MCR in the Russian Federation, with several case studies.

The Russian Competition Authority was created in 1990 at the very beginning of market reforms. The FAS Russia consists of the Central Office and 84 Regional Offices. Antimonopoly regulation in Russia is governed by the Federal Law dated July 26, 2006 №135-FZ, On Protection of Competition. The law has since been modernised and further amendments are in the pipeline.

There is a National Competition Development Plan for 2018 to 2020. The National Competition Development Plan seeks to:

- ensure effective prevention and suppression of antimonopoly violations that lead to restricting and eliminating competition on the markets, and to support entrepreneurial initiative, including development of small and medium business.
- increase consumer satisfaction and economic efficiency and competitive ability of economic entities, to support business and to improve the investment environment, as well as to ensure sustainable growth and development of the mixed economy of the Russian Federation.

New methodological approaches to mergers are being developed in light of the specifics of market performance and their impact on global markets. The need to adapt and modernise the law so as effectively to address innovations in the telecommunications and IT sectors and developments in an increasingly digital economy were also emphasised.

Two case studies were presented on how the FAS assessed mergers. The first case study discussed the Bayer AG and Monsanto Company merger. This merger was allowed subject to behavioural remedies aimed at creating conditions for the development of potential competition from Russian companies in the seed market and digital platforms for precision farming. The remedies included:

- providing technology transfer relevant to agro-climatic conditions in Russia and access to data and knowledge required for the development of the new varieties / hybrids of key crops;
- non-discriminatory access of Russian resources suppliers (seeds, plant protection, fertilizers, etc.) to digital platforms for precision farming;

- non-discriminatory access of Russian companies to the array of data (soil, climate, etc.), on which forecast models are built on digital platforms for precision farming; and
- non-discriminatory access to the telematic services market for digital platforms for precision farming.

The second case study discussed the merger of Yandex Taxi and Uber (completed in February 2018). This merger was allowed subject to conditions designed to foster competition in the emerging market for taxi services of the kind supplied by these companies. The conditions included a requirement that the software used be upgraded so that the travel information is accessible to the passenger (state registration number; make / model / colour of the car; name of the carrier partner; taxi license number; and order history of information stored).

There are areas that warrant changes in the current law:

- the increase time taken in assessing mergers and acquisitions which may have negative consequences for competition;
- the possibility of access to confidential information of interested governmental and other parties without the consent of the parties to the transaction;
- the possibility of involving third parties in monitor the implementation of merger conditions should be considered; and
- responsibility for non-compliance with merger conditions should be upheld more effectively.

Mergers Control Procedure México – Mr Juan Hernandez (Federal Telecommunications Institute, México)

The twelfth presentation described the MCR in México.

México has two competition regulators:

1) the Instituto Federal de Telecomunicaciones (IFT) (telecommunications and broadcasting sectors); and
2) the Comisión Federal de Competencia Económica (COFECE) (all other sectors).

Under Article 61 of the Federal Law of Economic Competition, the Authority (COFECE or IFT) shall challenge and penalize those mergers whose purpose or effect is to diminish, harm or impede competition and free market participation.

Notification of a proposed merger is mandatory where thresholds under Article 86 apply. Voluntary notification is also possible, which is useful if the parties are uncertain about the lawfulness of the transaction.

The mandatory notification thresholds are:

1) the transaction is over 18 million times the Measurement and Actualization Unit (UMA) (approx. USD 78.1 million); or
2) the transaction will result in accumulation of 35% or more of the assets or shares of an economic agent whose assets or sales in the national territory amount to more than 18 million times the UMA (aprox. USD 78.1 million), or
3) where two or more economic agents take part in the transaction, their assets or annual volume of sales, jointly or separately, total more than 48 million times the UMA (USD 208.4 million), and the transaction results in an accumulation of assets or capital stock in excess of 8.4 million times the UMA (USD 35 million).

Merger review may be under a normal procedure or a simplified procedure:

- normal procedure – this applies for 60 days after the parties present all the information required by the Authority and may be extended for another 40 days; and
- simplified procedure – this applies for 15 days when the parties have given the Authority all the information required and prove that the transaction will not harm competition.

The Authority is deemed not to object the merger if the Authority does not issue a resolution within the statutory period.

Merger remedies may be structural or behavioural. Remedies may be imposed or accepted only if they directly seek to correct the anti-competitive effects of the merger and are proportional.

Merger assessment focusses on these dimensions:

- market definition:
  - product market;
  - geographic market;
- market power:
  - market shares;
  - ability to set prices and quantities;
  - competitors and customers have no ability to counteract;
  - elasticity of demand;
  - potential entrants; idle capacity; and
  - barriers to entry;
- merger effects:
  - unilateral effects;
  - coordinated effects; and
  - conglomerate effects;
- efficiency gains.

Several case studies illustrated the approach taken by the IFT in merger assessment:

- the ATT acquisition of DirecTV;
- the ATT acquisition of GSF(Iusacell); and
- the Grupo Televisa / CVQ/ TVI transaction.

Jurisdictional disputes have arisen between IFT and COFECE (eg the Nokia / Alcatel case, where a court decided that IFT, due to its specialization, should review the merger given that the markets were in the telecommunications sector).

In 2016, the IFT reviewed four mergers. Two were subject to remedies (Televisa - TVI and AT&T – Time Warner). One occasioned a jurisdictional dispute between IFT and COFECE. One was highly controversial (América Móvil / Telcel – MVS). The Competition Unit of IFT also provided to the IFT Plenum approximately 1,200 opinions on competition matters, which have allowed the Plenary to take decisions on economic competition issues.

Merger Review and Penalties for 'Gun-Jumping' - Dr. Andrew Simpson (Barrister, NZ)

The thirteenth presentation discussed "gun-jumping", which is a pervasive problem in MCRs.

Merger review can be done much more easily and effectively before a merger (or acquisition) is consummated. However, businesses can be impatient to complete their deals.

Inevitably, some merger parties will steam ahead to implement their transaction without:

- notifying the Commission (if that is mandatory); or
- seeking clearance or authorisation; or
- waiting for clearance or authorisation to be granted; o
- complying with conditions attached to clearance or authorisation.

Weighty sanctions apply to gun-jumping in the USA and the EU:

- *AP Moller* (1998) EC imposed EUR 33k fine, for non-notification;
- *Samsung/AST* (1999) EC imposed EUR 229k fine, for non-notification;
- *Electrabel* (2009); *Marine Harvest* (2009) EC fined each EUR 20m, for non-notification
- *Smithfield Foods* (2010) US DOJ and parties agreed USD 900k settlement, for exercising beneficial ownership;
- *Flakeboard/Sierra Pine* (2014) parties agreed to pay USD 3.8m civil penalty and USD 1.15m in (unusual) disgorgement of illegal profits;
- *Duke Energy* (2017) agreed civil penalty of USD 600k, for exercising control of target prior to end of HSR Act waiting period.

NZ has a voluntary notification process whereby responsibility is shifted onto the parties. This process appears to work well. There are about 20 clearance applications a year. Only about 1 in 10 is declined. Applications for authorisation are relatively rare – they tend to be slow & costly.

The NZCC cannot impose sanctions against gun-jumping but can and does apply to court where enforcement action is warranted. A court can:

- impose a pecuniary penalty for contravening the prohibition against anti-competitive mergers (*Commerce Act 1986*, s 83);
- grant an injunction to restrain a person from contravening the merger prohibition (s 84);
- order damages for any loss or damage caused by conduct in contravention (s 84A); and/or
- order divestiture of shares or assets, within 2 years from contravention (s 85).

New Zealand Bus Ltd v Commerce Commission [2008] 3 NZLR 433 (CA) is one case study. NZ Bus acquired an equitable interest in Mana. That acquisition was likely to substantially lessen competition. Clearance by the NZCC had not been obtained. The ACCC took enforcement action. A pecuniary penalty of NZD 500,000 was imposed. NZ Bus was also ordered to pay legal costs and expert witness expenses of NZD 619,629.

Pernod Ricard S.A. and Allied Domecq PLC (NZCC Decision No. 553, 13 July 2005) is a further case study. In July 2005 the NZCC granted PR clearance to acquire Allied Domecq, subject to PR's voluntary undertaking to divest Lindauer, Chardon, Chasseur and other brands. PR subsequently reneged on its divestment undertaking. The NZCC opened an investigation but determined not to bring action under s 47, as a substantial lessening of competition appeared to be unlikely even without the divestment. The Commerce Act subsequently was amended:

- s 69AB – clearance or authorisation is void if a divestment undertaking is contravened;
- s 85A – a pecuniary penalty may be imposed for breach of a divestment undertaking; and
- s 85B – a court may order divestiture of assets or shares, where a divestment undertaking is contravened.

The presentation explored what can be lawfully done and what cannot lawfully be done by merger parties pre-merger. The legal risks include entering into an arrangement or understanding that may have the purpose or likely effect of substantially lessening competition in a market, or that contains a cartel provision. Thus, in the *Gemstar-TV Guide* case, the parties agreed on "need to slow-roll" customer discussions so that each abandoned negotiations with a customer of the other. This was an anti-competitive agreement that violated s 1 of the Sherman Act.

The presentation also explored the legal risks of pre-merger steps towards integration of the buyer's and the target's businesses. It is legitimate to plan for integration but unsafe to implement changes in the target's business. For instance, in the *DigiCOURSE* case, several of

the buyer’s executives moved into the offices of the target and began running a division while also running DigiCOURSE. A fine of USD 450,000 was imposed.

Merger Control in Australia: *ACCC v Metcash* – Prof Brent Fisse (Brent Fisse Lawyers, Australia)

The fourteenth presentation was a critique of a leading Australian decision on merger law – *ACCC v Metcash Trading Ltd* [2011] FCAFC 151, a decision of the Full Federal Court of Australia.

Anti-competitive mergers are prohibited by s 50 of the *Competition and Consumer Act 2010*. The test is whether the merger is likely to substantially lessen competition (SLC) in a market. *ACCC v Metcash* was concerned with two key issues under s 50:

- what does “likely” mean in the s 50 SLC test?
- when applying the SLC test, does a counterfactual need to be proven on the balance of probabilities?

These questions were not resolved by the decision of the Full Federal Court. The decision may be seen as a battle between the search for a workable and settled interpretation of the law, on the one hand, and sterile legalistic technicality, on the other. Legalism won without settling the law.

On the meaning of “likely” two different interpretations emerged from the *Metcash* decision:

- “likely” = a real chance; and
- “likely” = more likely than not

This difference remains unresolved but the ACCC operates on the assumption that “likely” means a real chance:

> “Although not conclusively determined by the Full Court on this occasion, the ACCC considers that there is strong judicial support for the view that “likely” means a “real chance”. The ACCC will continue to assess the likely competitive effect of an acquisition on the basis of a “real chance” test, Mr Sims said” (News Release NR 228/11).

Does a counterfactual need to be proven on the balance of probabilities? Three different answers to this question emerge from the *Metcash* decision:

1) the ACCC must show that there is a real chance that the counterfactual will come to pass, and that there is a real chance of a substantial lessening of competition comparing the merger to that counterfactual; or

2) the ACCC must show that it is more probable than not that the counterfactual will come to pass, and that there is a real chance of a substantial lessening of competition comparing the merger to that counterfactual; or
3) the ACCC must show that it is more probable than not that the counterfactual will come to pass, and that it is more probable than not that there will be a substantial lessening of competition comparing the merger to that counterfactual.

The following conclusions were drawn:

- The ACCC received a reality check:

  > "The case exposed deficiencies in the way the ACCC evaluated the available evidence. Both at first instance and on appeal, the Federal Court criticised the ACCC's counterfactual analysis for relying on speculation, rather than a rigorous assessment of the merger based on commercial realities. …"[11]

- Legalism won the SLC v Legalism battle in *Metcash* by a spectacular margin.
- The legalism, although copious, did not settle the law on key SLC issues.
- The Competition Policy Review (Harper Report) (2015) failed to address the meaning of "likely", the standard of counterfactual proof, and the meaning of "substantial" in the s 50 SLC test – these known problems were left without solutions.
- The decision in *Metcash*, and its hangover in Australia ever since the litigation in 2011, exemplified world worst practice in merger review.

International Cooperation in Merger Enforcement – Ms Leah McCoy (DOJ, Antitrust Division, USA)

The fifteenth presentation focussed on international co-operation in merger review, with particular reference to the DOJ's experience.

This presentation addressed three topics:

1) mechanisms for case cooperation;
2) practical aspects of international cooperation; and
3) promoting international cooperation.

Cooperation is formalised under:

- bilateral and multilateral cooperation agreements between governments;
- a Memorandum of Understanding (MOU) between enforcement agencies; and
- soft agreements (that do not provide for exchange of statutorily protected information.

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[11] S Chubb S & C Cadd, "Why the Metcash Case Will Continue to Trouble the ACCC" (2011) at: https://www.lexology.com/library/detail.aspx?g=30157ce6-4d20-4de5-83bd-1dc89caa58de

The DOJ and FTC Antitrust Guidelines for International Enforcement and Cooperation are one useful resource.[12]

The DOJ and FTC are bound by laws and practices from disclosing certain confidential information provided by parties and third parties to their investigations. However, some information can be exchanged without violating confidentiality laws, including:

- public information about the parties or third parties;
- information regarding industries or business sectors;
- DOJ analyses that do not contain or refer to a party's or third party's confidential information;
- DOJ investigation status and timing;
- theories of harm being investigated; and
- whether the agency has met with the parties or received materials from the party.

Waivers are used to share non-public information with other agencies investigating the matter.

The practical concerns to consider when engaging in cooperation with another agency on a merger include:

- ensuring staff are properly trained about legal requirements (confidentiality rules, etc.) and best practices;
- maintaining relationships with international partners; and
- tracking cooperation over time to learn from past experiences.

Recommendations for managing case cooperation:

- develop best practice;
- develop a way to track case cooperation;
- use the ICN Model Waivers;[13] and
- be guided by the ICN Practical Guide to International Enforcement Cooperation in Mergers.[14]

Best practices for managing case cooperation can include guidance on:

- Communications:
  - case teams should designate a point person for managing contacts with international agencies; and
  - case teams should set up a tentative timetable for regular inter- agency consultations with foreign enforcement counterparts;

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12 At : https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-2017

13 At: http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf

14 At: http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf

- Legal requirements:
  - requirements for when a waiver is/is not needed;
- Internal reporting requirements:
  - create internal reporting mechanisms.

International cooperation is promoted at the DOJ by:

- technical assistance and exchanges;
- visiting international enforcer programs; and
- leadership in OECD and ICN.

FTC's Experience with Cross-Border Cooperation on Mergers: Mr Timothy Hughes (FTC, USA)

The sixteenth presentation discussed the FTC's experience with cross-border co-operation in merger review.

Several snapshots were given of the extent of FTC cross-border cooperation in merger reviews:

- in FY 2016 the FTC cooperated on 46 cases including 40 merger investigations;
- the cooperation was extended to agencies in 16 jurisdiction (the main agencies were the EC and the Canadian Bureau of Competition);
- Some cases related to multiple jurisdictions, e.g.:
  - Chem China/Syngenta: Australia, Canada, EC, India, and Mexico;
  - Teva/Allergen: EC, Canada, Israel, and Mexico;
- in FY 2011-2016 the FTC cooperated on 187 cases with 27 agencies.

In the review of Thermo Fisher Scientific's Acquisition of Life Technologies (2013-14) the FTC cooperated with nine antitrust agencies, including those in: Australia, Canada, China, European Union, Japan and Korea. Reviewing staff discussed market definition, theories of harm, and analysis of competitive effects. The FTC coordinated its consideration of remedies with many of the agencies, including with the EC, and both agencies approved the same divestiture buyer on the same day.

In the Western Digital & Hitachi Global Storage Technologies merger the FTC cooperated with competition agencies in ten different economies: Australia, Canada, China, European Union, Japan, Mexico, New Zealand, Singapore, Republic Korea, and Turkey. The extent of cooperation with each agency varied, depending on the nature of the likely competitive effects in each jurisdiction. The parties granted waivers on a jurisdiction-by-jurisdiction basis. The subject matter of cooperation included timing, market definition, theories of harm, and remedies. Bilateral discussions with some agencies covered coordinating remedies to address competitive

concerns in multiple jurisdictions. Remedies were required only by the USFTC, the EC, China's MofCom, the JFTC, and the KFTC.

Conclusion

The workshop shared a wide range of information about merger review processes within APEC member economies. That information included basic principles for the design and application of merger review, lessons from practical experience, and challenges facing regulators in developing effective MCRs.

Most economies have or are moving to a mandatory notification regime after reliance on voluntary notification broke down. The exceptions include Australia and New Zealand where voluntary notification appears to work sufficiently well, mainly because the prohibition against anti-competitive mergers is enforced actively by the ACCC and NZCC.

The merger review process in most economies is formal, with specified procedures and prescribed timelines. That approach is exemplified by the US model, which is an instructive reference point. However, not all features of the US model are commendable. That model is resource intensive, costly to administer, afflicted with duality of regulators (merger review is not limited to the DOJ or FTC – both have jurisdiction), and dependent on litigation to an extent that seems unlikely to be feasible elsewhere.

At another extreme, Australia has an informal review process that is used in most cases but is prone to lack of transparency.

The legal tests used to assess whether or not a merger is anti-competitive vary in different economies but have much in common. Future workshops might usefully drill down further into a number of basic issues, including:

- What is meant by a “substantial” lessening of competition or a “significant” restriction on competition? Such tests are obscure around the world but their meaning is pivotal to the application of merger law by regulators and businesses.
- What exactly are “efficiency gains” and to what extent are they relevant and significant?
- To what extent are public interest factors relevant? A competition test may too narrow but a test that allows public interest factors to trump adverse effects on competition raises its own difficulties.[15]
- To what extent is counterfactual analysis of competition effects relevant, necessary and sufficiently reliable?
- To what extent are behavioural undertakings necessary or desirable as a means of remedying anti-competitive effects or proposed mergers?

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[15] See A Ezrachi, “Sponge” (2017) 5(1) Journal of Antitrust Enforcement 49.

It would also seem useful in future workshops to explore the use of quantitative methods of merger assessment in more detail. What are the various quantitative methods that can be used? What are the advantages and limits of each of them? Where have these methods been used by regulators, firms and courts? What case studies illuminate their relevance and potential use?

A pervasive theme at the workshop was the resource-intensive nature of merger review and the resources constraints on regulators. This is perhaps the most acute challenge in MCRs. Suggestions made at the workshop for addressing this challenge included:

- working out priorities for the selection of cases to be reviewed and for the allocation of agency resources;
- seeking assistance from other agencies when dealing with merger cases;
- seeking assistance from international agencies such as the ICN; and
- establishing inter agency relationship with other agencies.

A refreshing feature of the workshop was the absence of any suggested need for “convergence” in MCRs.[16] The US model, the EU model, and other models around the world are very useful starting points to consider but each economy needs to develop approaches that are suitable for and tailored to its own particular circumstances. For most developing APEC member economies, that is the ultimate challenge ahead.

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[16] For one critique of mindless spin about international convergence of competition regulation see K McMahon, “Competition law and developing economies : between 'informed divergence' and international convergence” in A Ezrachi (ed), *Research Handbook On International Competition Law* (Edward Elgar 2012) 209.