

17 April 2025

Re: Comments on the ACCC's Draft Merger assessment guidelines

Dear Dr Csorgo and team

Thank you for the opportunity to comment on the draft of the Australian Competition and Consumer Commission's Merger Assessment Guidelines. You and your team should be congratulated on producing a practical and workable set of guidelines. I think focus on potential coordination effects post-merger (Section 3) is the key to assessing the potential anti-competitive effects of mergers, despite its difficulty. Overall, it is an impressive document. My other comments below should be read in this context.

First, the workload associated with the change in guidelines is likely to be immense. Given this, I would suggest that substantially lessening competition should be interpreted as much as possible as substantially reducing welfare (economic surplus). This approach would eliminate the need to assess almost all merger proposals and allow the Commission to focus on potentially anti-competitive mergers in markets of importance to the overall Australian economy.

Second, as mentioned in the Appendix, a potential measure of concentration is the Herfindahl-Hirschman Index (HHI). The HHI index works well at times, perhaps more so in markets with traditional production processes. In markets where networks are important, concentration is likely to be high. In these network markets, traditional views of competition can be problematic, as effective competition might come from the incumbent network being (largely) replaced by another (see Akerlof et al, 2024, 'Network Externalities and Market Dominance', Management Science, for example). Moreover, the value generated for consumers often comes from the (monopolised) network itself, complicating an assessment of the deleterious effects from a reduction in competition with offsetting efficiencies.

Third, care is needed applying the small but significant and non-transitory increase in price (SSNIP) approach to the hypothetical monopoly test, as the current base price might already reflect the exploitation of market power; that is, a firm with market power

might be charging such a high price that consumers consider substitute products/services that they would not have done at a lower price. I note that the ACCC will also consider non-price factors, such as a reduction in quality, for example, which might be a more relevant test in some networks and other markets.

Fourth, sometimes it is not always clear in the Guidelines whether the scenarios presented relate to situations when firms compete once (or infrequently) or whether the focus is on situations when rival firms face each other many times, making strategic decisions as a matter of routine. Presumably the latter is more often the case, by the implications for potential anti-competitive behaviour can be markedly different in either situation. For example, capacity constraints are mentioned in the document. It could be that with one-off (or infrequent) competition, binding capacities can weaken competition. On the other hand, in some circumstances, capacity constraints can lead to more competitive outcomes in markets that routinely meet (because the threat of retaliation from an implicit or explicit agreement might not be so effective). Consequently, care is needed to ensure that most appropriate analytical framework is applied to situation at hand.

Thank you again for the opportunity to provide feedback on the draft Guidelines.

Kind regards

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