



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION



International
Competition
Network



MERGER WORKSHOP

MELBOURNE • AUSTRALIA • 2020

Thursday 27 February—Friday 28 February 2020
Sofitel Melbourne on Collins, Melbourne

Achieving the right balance: How competition authorities are approaching merger control and remedies in the changing market environment

Pre-Workshop function will be held Wednesday 26 February 6:00pm to 8:00pm at No35 Restaurant, Level 35, Sofitel Melbourne on Collins.

Day one—Thursday 27 February

8:30 am—9:00 am	Registration/Tea & Coffee
9:00 am—9:15 am	Acknowledgment of Country by Scott Gregson, and Welcome to Workshop by Rod Sims
9:15 am—10:30 am	<p>Plenary Session 1—Getting the balance right in merger law Sydney room</p> <p>Avoiding ‘false negatives’ and ‘false positives’ in merger law—are laws and competition authorities achieving the right balance? Exploring the appropriate place for the burden of proof in merger matters, the use of structural presumptions (such as market share, market concentration, size of parties, or size of transaction), and whether parties with market power (or a substantial share of the market) should be required to prove why a proposed acquisition would not be anticompetitive before obtaining clearance or legal protection to consummate the acquisition (akin to dominant players’ special responsibility not to hinder competition in markets under Article 102 TFEU).</p> <p>Moderator: Mr Stephen Ridgeway, Commissioner, Australian Competition and Consumer Commission</p> <p>Participants</p> <ul style="list-style-type: none">■ Ms Melissa Fisher, Deputy Commissioner, Mergers Directorate, Competition Bureau Canada■ Mr Michael Moiseyev, Assistant Director, Mergers, Bureau of Competition, United States Federal Trade Commission■ Dr Andrea Pomana, Attorney, Debevoise & Plimpton LLP, NGA■ Mr Alípio Codinha, Deputy Director, Mergers, Portuguese Competition Authority (AdC)
10:30 am—11:00 am	Morning tea break—Sofi’s Lounge

11:00 am—12:30 pm Breakout Sessions**Session 1: Breakout discussion of the plenary topic****Perth room**

This session facilitates a smaller group discussion—led by a small panel from different jurisdictions—on the topics raised at the first plenary session, giving participants the opportunity to reflect on the issues, discuss challenges in their own jurisdiction, and seek specific advice and insight on key challenges.

Panellists will discuss what parts of their laws and their approach to merger control are working well and not so well, giving examples and generating ideas to fix the problems identified. Further discussion may include how authorities find the balance between faster, less resource intensive, less burdensome merger review processes and slower, more burdensome, but more comprehensive processes?

Moderator: Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, Australian Competition and Consumer Commission

Participants

- Mr Gerardo Calderón, Senior Associate, Baker & McKenzie, NGA
- Mr Étienne Chantrel, Head of the Mergers Unit, French Competition Authority (Autorité de la concurrence)
- Ms Kala Anandarajah, Head, Competition & Antitrust and Trade, Rajah & Tann, NGA
- Mr Tzahi (Isaac) Berkovich, Team Leader, Markets Department, Israel Competition Authority
- Mr Tadashi Shiraishi, Professor, University of Tokyo, NGA

Session 2: Ex-post reviews**Brisbane room**

Latest developments and examples of ex-post merger review. What have authorities learned from ex-post reviews? Are there examples of remedies that did not achieve their intended result? How have authorities that conduct ex-post reviews implemented lessons into their merger review processes and decision making? And, how do authorities resource and conduct ex-post reviews—do they have statutory requirements to conduct them? What investigative powers do they have? Session to include learnings from digital economy mergers.

Moderator: Mr George Siolis, Partner, RBB Economics Australia, NGA

Participants

- Mr Shungo Omiya, Chief Investigator, Mergers and Acquisitions Division, Japan Fair Trade Commission
 - Ms Maria Coppola, Counsel for International Antitrust, United States Federal Trade Commission
 - Mr Pierre Zelenko, Partner, Linklaters, NGA
 - Mr Michele Pacillo, International Affairs Officer, Italian Competition Authority
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Session 3: Engaging the judiciary**Victoria Suites**

How to best equip and engage the judiciary to assess and properly weigh the risks of mergers—is it a matter of economic and econometric submission, or do we need to review the current approach to articulating the role of merger laws and the public interest in preventing anti-competitive mergers before they occur?

Moderator: Ms Wendy Peter, General Counsel, Legal and Economic Division, Australian Competition and Consumer Commission

Participants

- Mr Ibrahim Bah, Director, Competition Enforcement and Mergers Division, Competition and Consumer Protection Commission Ireland (CCPC)
- Mr Omar Wakil, Partner, Torys LLP, NGA
- Honourable Ray Finkelstein AO QC Australia, NGA

12:30 pm—1:30 pm**Lunch break—Sofi's Lounge**

1:30pm - 3:00pm**Plenary Session 2—Procedural fairness: approaches benefitting authorities and merger parties
Sydney room**

This session will explore approaches to procedural fairness afforded to merger parties. What are the benefits to merger parties and authorities of procedural fairness systems, and how do they work in balancing confidentiality and internal efficiency with transparent and predictable processes? Panellists will lead a discussion on how different authorities approach the issue and what NGAs see as areas of importance and potential improvement.

Moderator: Mr Tom Leuner, General Manager, Mergers Investigations, Australian Competition and Consumer Commission

Participants

- Mr Hideki Utsunomiya, Partner, Mori Hamada & Matsumoto, NGA
- Ms Cristiane Landerdahl de Albuquerque, Head of Merger and Antitrust Unit, Brazilian Competition Authority (CADE)
- Mr Cecilio Madero, Deputy Director General, Mergers, European Commission, DG Competition
- Mr Francisco Borquez, Senior Associate, Barros & Errázuriz, NGA

3:00 pm—3:30 pm**Afternoon tea break—Sofi's Lounge**

3:30 pm—5:00 pm**Breakout Sessions**

Session 4: Technology assisted document review

Perth room

Some jurisdictions have a 'document heavy' approach to merger review, and merger parties also have many more documents (particularly emails) than they did in the past. What are the latest developments in the use of technology assisted document (TAR) review and artificial intelligence to respond to (or review the response to) information requests or compulsory notices? What are the pros and cons? Is it more reliable than 'in person' document review? Participants to discuss how TAR has changed the way competition authorities request or require production of information, and provide examples of types of questions or definitions specifically targeted at TAR approaches by merger parties when searching for potentially responsive documents.

Moderator: Mr Daniel McCracken-Hewson, Acting General Manager, Adjudication, Australian Competition and Consumer Commission

Participants

- Mr Giorgio Motta, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, NGA
- Ms Ariane Jaros-Denis, Associate Deputy Commissioner, Mergers Directorate, Competition Bureau Canada
- Ms Belinda Harvey, Partner, Norton Rose Fulbright, NGA

Session 5: International cooperation on merger investigations, and fostering engagement with new and smaller competition authorities

Brisbane room

This session will focus on ways to foster international engagement on merger investigations between new or small competition authorities and the larger network of authorities represented at ICN. What levels can engagement occur at? What are some strategies for agencies to ensure effective and relevant engagement?

Moderator: Ms Melanie Aitken, Co-Head of Competition, Antitrust & Foreign Investment, Bennett Jones, NGA

Participants

- Ms Kaoru Harada, Senior Officer, Mergers and Acquisitions Division, Japan Fair Trade Commission
 - Ms Eleni Gouliou, Director, Mergers, United Kingdom Competition and Markets Authority
 - Mr Adrien Giraud, Partner, Latham & Watkins, NGA
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**Session 6: Comparing regulators' information and document requests
Victoria Suites**

Compulsory information and document requests are a contentious issue in merger regulation usually due to scope, burden, and timing. In this session, three or four competition authorities will prepare a typical information and document request based on a simple hypothetical merger. What are the various options for information and document requests? What are the pros and cons of the various approaches?

Facilitator: Mr David Anderson, Managing Partner - Brussels, Bryan Cave Leighton Paisner (BCLP), NGA

Participants

- Mr Tom Leuner, General Manager, Mergers Investigations, Australian Competition and Consumer Commission
- Mr Juan Cristobal Gumucio, Partner, Cariola Díez Pérez-Cotapos, NGA
- Ms Maria Coppola, Counsel for International Antitrust, United States Federal Trade Commission
- Ms Elie Yoo, Assistant Director, Mergers, United Kingdom Competition and Markets Authority

6:30 pm—9.30 pm

Dinner—Melbourne Museum, 11 Nicholson Street

Address by Rod Sims, Chair, ACCC

Day two—Friday 28 February

8:30 am—9:00 am Registration/Tea & Coffee

9:00 am—10:15 am **Plenary Session 3—Updating merger assessment for digital markets**
Sydney room

This session looks at the rationale for changes to merger assessment, and how authorities are dealing with mergers in digital markets. Plenary to include views from competition authorities and NGAs, from a range of jurisdictions.

Moderator: Ms Morag Bond, General Manager, Digital Platform Inquiry, Australian Competition and Consumer Commission

Participants

- Ms Isabelle de Silva, President, French Competition Authority (Autorité de la concurrence)
 - Mr Joel Bamford, Senior Director, Mergers, United Kingdom Competition and Markets Authority
 - Ms Toshiko Igarashi, Senior Officer, Mergers and Acquisitions Division, Japan Fair Trade Commission
 - Dr Howard Shelanski, Partner, Davis Polk & Wardwell LLP, and Professor, Georgetown University, NGA
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10:15 am—11:00 am **Short plenary session—Update from ICN Mergers Working Group**
Co-Chairs
Sydney room

A short session to update participants on the MWG's work under the Annual Plan, followed by a Q&A session to facilitate feedback on the MWG's interim reports on conglomerate mergers and procedural infringements.

Participants

- Ms Akiko Kasahara, Investigator, Mergers and Acquisitions Division, Japan Fair Trade Commission
 - Ms Eleni Gouliou, Director, Mergers, United Kingdom Competition and Markets Authority
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11:00 am—11:30 am **Morning tea break—Sofi's Lounge**

11:30 am—12:30 pm Breakout Sessions**Session 7: Capturing problematic concentration****Perth room**

When should competition authorities be concerned about concentration levels, and what are recent economic developments telling us about concentration measures? Are there deals ‘slipping through the cracks’? What are the circumstances where small increases in concentration lead to substantial competition concerns?

Moderator: Ms Tanya Dunne, Deputy General Counsel, Australian Competition and Consumer Commission

Participants

- Mr Ben Hamlin, Deputy General Counsel, New Zealand Commerce Commission
- Mr Maurice de Valois Turk, Partner, Oxera Consulting LLP, NGA
- Mr Andy Chen, Former Commissioner for the Taiwan Fair Trade Commission and Dean and Professor of Law at the Chung Yuan Christian University in Taiwan, NGA
- Mr Remzi Özge Aritürk, Head of Supervision and Enforcement Department-V, Turkish Competition Authority

Session 8: Assessing competition between online and offline suppliers**Brisbane Room**

This session looks at key questions arising in the assessment of mergers in sectors where the digital economy has shifted consumers’ habits, for example in accessing news.

Is the ‘market’ no longer the market it was (with the same boundaries) and is it appropriate for competition authorities to define a broader or otherwise different market in scenarios where products span online and offline?

Moderator: Mr Mory Fodé Fofana, Competition Law Officer, Mergers Directorate, Competition Bureau Canada

Participants

- Mr Michael Corrigan, Partner, Clayton Utz, NGA
 - Dr Katharina Krauss, Head of 7th Decision Division, Bundeskartellamt, Germany
 - Dr Saurabh, Joint Director (Economics), Competition Commission of India
 - Ms In Seon Choi, Partner, Kim & Chang, NGA
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Session 9: Potential competition and innovation**Victoria Suites**

Merger law is difficult due to the forward looking nature of the test. The purpose of merger law is to prevent anticompetitive mergers before they occur. This session will explore the likelihood/probability thresholds for including events in the competition analysis, drawing upon recent examples and case law, with a specific focus on the difficult question of probability thresholds when dealing with potential competition theories of harm. Speakers will frame the discussion around the following simple hypothetical:

Company A faces minimal competition in the production of widgets. Company B has a business plan to expand significantly into widget production. Company A proposes to buy Company B. What are the thresholds for assessing the likelihood of Company B's plans for expansion?

Facilitator: Mr Michael Moiseyev, Assistant Director, Mergers, Bureau of Competition, United States Federal Trade Commission

Participants

- Mr Fernando Sánchez Carrillo, Case handler Officer, Mergers, European Commission, DG Competition
- Mrs Maayan Mor, Advocate, Markets Division, Israel Competition Authority
- Mr Alexander Baker, Managing Director, Fingleton, NGA

12:30 pm—1:30 pm**Lunch break—Sofi's Lounge**

1:30 pm—2:30 pm**Breakout Sessions****Session 10: Small overlaps for big mergers****Perth Room**

Does the size of the competitive harm need to match the size of the transaction? How should authorities deal with scenarios where two major companies wish to merge, and they overlap in only one small market (either a very specific product or service market or very specific geographic area), or where the domestic overlap is more significant but small in the context of a large international merger, and a divestment remedy is not possible?

Session to include a short hypothetical fact scenario to facilitate discussion.

Facilitator: Mr Richard May, Principal Investigator, New Zealand Commerce Commission

Participants

- Mr Elton Jangale, Barrister, PFI Partnerships Malawi, NGA
 - Ms Aura María García Pabón, Advisor to the Superintendent, Superintendence of Industry and Commerce Colombia
 - Ms Min-Hui Pan, Specialist, Taiwan Fair Trade Commission
 - Mr Jürgen Schindler, Partner Co-Head Antitrust, Allen & Overy, NGA
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Session 11: Defining markets around a sub-set of customers**Brisbane room**

Consideration of matters where the market (or the scope of the harm) is restricted to only a subset of customers of the relevant products or services. For example, a small subset of customers have restricted options so the merger is problematic for those customers, but the majority of customers have other options so the merger isn't problematic from their perspective. Discuss options considered by competition authorities to deal with these harms and whether mergers have been prohibited despite impacting only a small subset of customers.

Session to include a short hypothetical fact scenario to facilitate discussion.

Facilitator: Ms Leonie Hass, Case handler, Mergers, European Commission, DG Competition

Participants

- Mr Raphael Mburu, Manager, Mergers and Acquisitions, Competition Authority of Kenya
- Dr Anita Lukaschek, Special Advisor, Baker & McKenzie—Vienna, NGA
- Mr Yuji Tanaka, Deputy Director, General Affairs Division, Economic Affairs Bureau, Japan Fair Trade Commission
- Ms Fiona A. Schaeffer, Partner, Milbank LLP, NGA

Session 12: International remedies**Victoria Suites**

Consistency of international remedies for global deals, and ways in which competition authorities can coordinate and assist each other in designing effective remedies are increasingly important in a globalising world. Discuss examples of cooperation in designing merger remedies, any challenges faced, and steps to overcome those challenges (for example, in terms of jurisdictional reach or in certain relevant markets).

Moderator: Ms Aggie Marek, Director, Remedies Unit, Australian Competition and Consumer Commission

Participants

- Ms Tania Pringle, Acting Mergers Manager, New Zealand Commerce Commission
- Dr Marc Reysen, Partner, RCAA, Brussels, NGA
- Ms Shweta Shroff Chopra, Equity Partner, Shardul Amarchand Mangaldas & Co, NGA
- Dr Helen Knudsen, Economist, United States Department of Justice

2:30 pm—3:00 pm**Afternoon tea break—Sofi's Lounge**

3:00 pm—4:00 pm

**Plenary Session 4—Getting the balance right in remedies
Sydney room**

This session draws on the theme in Plenary Session 1 of achieving the right balance to explore the fundamentals of remedies, and the question of when, and what, remedies are appropriate and effective. How does the efficacy of remedies differ for competitive harm resulting from horizontal, conglomerate, and vertical mergers? Do competition authorities have the right tools to detect and review whether remedies that have been put in place are achieving their aims?

Moderator: Ms Jacqueline Downes, Partner, Allens, NGA

Participants

- Mr Jonas Koponen, Partner, Linklaters LLP, NGA
- Mr Josep Carpi Badia, Head of Unit, Mergers, European Commission DG Competition
- Mrs Francisca Levin, Head of the Mergers Division, Chilean Competition Agency (Fiscalía Nacional Económica, FNE)
- Mr François Dumonteil, Director (Trustee Services), AdVolis, NGA

4:00 pm—4:15 pm

Short presentation—workshop wrap-up

Final address to participants by Stephen Ridgeway, Commissioner, ACCC

From 5.00 pm

Post-workshop social function

An informal event will take place at Casselden, Level 5, 2 Lonsdale St, Melbourne. This event will be preceded by an optional walking tour and other social group activities from 4:15pm.



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