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6 April 2023

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Alex Reed and Louisa Wilson
Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Dear Alex and Louisa

As you know, we act for a multi-store retail chain.

We have been instructed to respond to the Commission's letter dated 21 March 2023 inviting submissions from interested parties in relation to an undertaking offered by Linfox Armaguard Pty Ltd (**Armaguard**) and Prosegur Australia Holdings Pty Limited (**Prosegur**) in response to the Commission's Statement of Preliminary Views dated 21 December 2022 (**Proposed Undertaking**).

Our client submits that the Proposed Undertaking is deficient in numerous respects. Most fundamentally, it is incapable of remedying the serious and irreversible harm to competition that will crystalise should the Proposed Transaction be allowed to proceed.

Completion of the Proposed Transaction, whether subject to the Proposed Undertaking or not, would lead to the immediate elimination of competition from the CIT market which would be unlikely to occur in the foreseeable future in the absence of the Proposed Transaction. Should the Proposed Transaction be authorised, customers of the parties, including our client, will be left with no alternative but to deal with a monopoly CIT operator. The Proposed Undertaking's prescriptions are an inadequate substitute for competition and would be incapable of effectively constraining the conduct of the newly formed monopolist.

As described below, the Proposed Undertaking fails every criterion to which the Commission has regard when assessing the suitability of a Proposed Undertaking.[1]

Our client urges the Commission to reject the Proposed Undertaking and to not authorise the Proposed Transaction.

The Proposed Undertaking is wholly inadequate

The criteria considered by the Commission when assessing the suitability of a court-enforceable undertaking offered by parties seeking merger authorisation under s87B of the *Competition and*

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1 Paragraphs 9.6 to 9.10 of the Merger Authorisation Guidelines 2018< https://www.accc.gov.au/system/files/Merger%20Authorisation%20Guidelines%20-%20October%202018.pdf>

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Consumer Act 2010 are set out in section 9.9 of the Commission's Merger Authorisation Guidelines. Those criteria are whether the undertaking:

(a) will be effective in addressing the Commission’s concerns;

(b) can be effectively administered;

(c) will be likely to deliver the required outcomes; and

(d) will not give rise to unreasonable monitoring and compliance requirements.

Our client submits that the Proposed Undertaking fails every criterion.

The Proposed Undertaking will not be effective in addressing the Commission's concerns

The Commission's Statement of Preliminary Views articulates serious concerns about the likely effect of the Proposed Transaction on the supply of CIT services in Australia, and identifies those concerns as a significant public detriment weighing against authorisation of the Proposed Transaction.

Rather than proposing a remedy to address those concerns by maintaining effective competition in the market, the parties have instead proposed a remedy which attempts to substitute competition for a set of high level behavioural rules meant to govern complex, dynamic commercial interactions for an indefinite period of time and which most closely resemble the types of obligations contained in access undertakings given in relation to natural monopolies like ports and rail. The supply of CIT services is not a natural monopoly and the proposed rules are a poor substitute for vigorous competition. They are unlikely to lead to the merged firm behaving as if it was subject to competitive constraint.

By way of example:

(a) The undertaking does not require the merged entity to *improve* service levels or *innovate*, as would be a natural outworking of the competitive process; instead, the merged firm is required only to *maintain* existing service levels.

(b) The pricing mechanism appears to allow for annual price rises of up to inflation plus 5% - or more if the customer's volume requirements are reduced. Our client questions whether price rises of that magnitude would be experienced in the absence of the Proposed Transaction.

(c) The target revenue model set out in Appendix 1 of the Proposed Undertaking is extremely complex and difficult to understand. It is unlikely that an 'average' customer would be able itself to determine whether the pricing it is being offered is consistent with the Proposed Undertaking. In the absence of the Proposed Transaction, customers could play the parties off of each other and be assured that they are getting the most competitive price available, which will not be the case with the proposed revenue and pricing mechanisms.

(d) The merged entity undertakes to offer CIT Services to customers on a 'national basis' to all of the cash point locations that it services as at the commencement date of the undertaking. But there is no guarantee of service expansion if our client, or other national retailers, opens new stores in new locations. A firm subject to workable competition would be incentivised to seek to capture that new business, but that will not be the case under the Proposed Undertaking.

Our client submits that the Proposed Undertaking is not effective in addressing the Commission's serious competition concerns, and the rules set out in the Proposed Undertaking will lead to significantly poorer outcomes for customers, and in turn, end consumers, than in the absence of the Proposed Transaction.

The Proposed Undertaking cannot be effectively administered and will not deliver required outcomes

Our client submits that the Proposed Undertaking cannot be effectively administered and will not deliver the required outcomes because of significant uncertainty as to how provisions will operate in practice and the difficulty of anticipating future strategic conduct by the merged entity. There is significant scope for the merged entity to engage in monopolistic practices while appearing to comply with the terms of the Proposed Undertaking.

To take one example, the Proposed Undertaking provides that the merged entity undertakes to supply CIT services to ongoing customers in accordance with the standard of service that those customers were supplied CIT services in the period immediately preceding the commencement date.

'Standard of service' is not defined, would be difficult to define, and would be very difficult to enforce in practice.

(a) Would deploying smaller or less advanced vehicles to deliver cash be a reduction in the standard of service?

(b) Would employing less experienced (and cheaper) workers be a reduction in the standard of service?

(c) Would failing to upgrade or maintain vehicles to the same level or on the same schedule as pre-acquisition be a reduction in the standard of service?

(d) Would manning vehicles with one less staff member be a reduction in service?

(e) Would employing fewer staff members in customer service or call centre roles than the two companies did prior to the merger be a reduction in service?

(f) If service levels were variable prior to the undertaking, would it be sufficient for the merged firm to fulfil the lowest standard of service it can point to?

(g) Is the relevant 'standard of service' referable to what is occurring in practice in the period immediately preceding the commencement date or what is contractually obliged (which may not be the same)?

(h) Could the merged firm subtly deteriorate service levels in the lead up to the commencement of the undertaking so that the lower service levels become the relevant standard of service under the undertaking?

The lack of precision means that there is considerable scope for the merged firm to act in a manner which pays lip service to the obligation while in reality engaging in practices that circumvent the rules, or are not in their spirit, but are difficult to detect and prevent.

<u>The Proposed Undertaking will give rise to unreasonable monitoring and compliance requirements</u>

Our client submits that the Proposed Undertaking will give rise to unreasonable monitoring and compliance requirements.

By offering the Proposed Undertaking in its current form, the merger parties are effectively asking the Commission to become the economic regulator for a newly created industry monopoly for an indefinite period but without the grant of corresponding regulatory powers, budget or resources.

While the merged entity commits to establishing a complaints handling process for dealing with complaints (which process is not detailed in the Proposed Undertaking), the complaint handling process provides no guarantees that customers' concerns will be adequately addressed nor that such a process would yield an equivalent result to a customer threatening to switch, or actually switching, to a rival CIT services supplier.

Likewise, the proposed independent auditor, which will report to the Commission once a year, will be in no position to take action to resolve day to day performance concerns and is unlikely to have visibility over all such concerns.

Instead, it is very likely that the Commission will be called on to police day to day commercial conduct of the merged entity for an indefinite period of time but without a regulatory toolkit or additional resources to effectively constrain the behaviour of the merged firm.

When our client next seeks to renew its CIT services contract, it will not have the benefit of choosing between two vigorously competing service providers vying to win its business but will instead be faced with engaging with a monopolist that is unlikely to be incentivised to do anything beyond the minimum required to comply with the Proposed Undertaking, and maybe not even that unless the Commission is actively policing the day to day performance of the merged firm and promptly responding to complaints from aggrieved customers. Even if the Commission is in a position to respond, the inevitable 'lag' between the raising of a complaint and any action that might follow, is not an adequate substitute for the competitive process (whatever form that may take in the foreseeable future).

As the Commission states in its 2008 Merger Guidelines, "*behavioural remedies are rarely appropriate on their own to address competition concerns*" and "*it is particularly rare for the ACCC to accept behavioural remedies that apply on a permanent basis due to the inherent risk to competition combined with the monitoring and enforcement burden such remedies create.*"[2] The parties' Proposed Undertaking is not adjacent to structural remedies and will apply on a permanent basis, giving rise to significant monitoring and enforcement burden and risking sub-optimal outcomes for the parties' customers.

Conclusion

The parties have proposed a behavioural undertaking that will do nothing to prevent a substantial lessening of competition arising as a result of the only two national suppliers of CIT services merging. The Proposed Undertaking will not be effective in addressing the Commission's concerns, and will not be effectively administered or deliver required outcomes, but will give rise to unreasonable

[2] Paragraphs 19-21 of Schedule 3 of the Merger Guidelines 2008 <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>

monitoring and compliance requirements. The Proposed Undertaking is a poor substitute for the maintenance of competition.

The loss of competition will harm our client and other customers of the parties, but will also hurt Australian consumers who in turn are likely to face higher costs for the goods and services they purchase from the parties' customers. The loss of competition in the market for CIT services is a significant, irreversible and perpetual public detriment that will outweigh any minor public benefits that may arise.

For these reasons, our client urges the Commission to reject the Proposed Undertaking and to not authorise the Proposed Transaction.

Please let us know if you have any questions about this letter.

Yours sincerely

Ross Zaurrini
Partner

John McKellar
Senior Associate