

Regional Webinar on Merger Control in Times of Crisis in the Asia-Pacific Region

1 Date: October 28, 2020 (hosted by the JFTC)

2 Moderator: **Ms. Saiko Nakajima**, Senior Officer for Mergers and Acquisitions, Japan Fair Trade Commission (JFTC)

Speakers: **Mr. Manish Mohan Govil**, Adviser and head of the Competition Division of the Competition Commission of India (CCI)

Mr. Andy Gallagher, Inspector, Acting Director in the Merger Investigation branch of the Australian Competition and Consumer Commission (ACCC)

Ms. Sara Mirabella, Acting Director of the Remedies Unit at the Australian Competition and Consumer Commission (ACCC)

Ms. Caroline Genevois, Head of merger control unit of the New Caledonia Competition Authority (CCA)

Mr. Tadashi Shiraishi, Professor of the University of Tokyo, Graduate Schools for Law and Politics, in charge of competition law

Mr. Harikumar Pillay, Associate principal on the Competition & Antitrust Practice Group at Baker and McKenzie Wong & Leow

3 Summary of Presentations

This regional webinar, led by the CADE (Administrative Council for Economic Defense of Brazil), aimed to explore Merger control in Times of Crisis in different region of the world. 4 topics were covered by the CADE, namely (1) **Practical aspects of merger assessment** (Implementation of practical/procedural measures, effective tools, and guidance to respond to the current crisis), (2) **Substantive Merger Assessment** (Assessment of the impacts of the crisis), (3) **Failing Firm Defense** (Assessment of whether the current standards of proof and procedures in place are appropriate to address urgent mergers involving firms in financial distress) and (4) **Remedies** (Evaluation, design and implementation of remedies in times of uncertainty).

In the Asia-Pacific region webinar, 6 distinguished speakers made presentations. The first presenter was Mr. Manish Mohan Govil of CCI. He focused on the topic of Practical Aspect of Merger Assessment. The second and third presenters were Mr. Andy Gallagher and Ms. Sara Mirabella of ACCC. They focused on the topic of Substantive Merger Assessment and Remedies. The fourth presenter was Ms. Caroline Genevois of

CCA. She focused on the topic of Failing Firm Defense, including a case study (Courte & Fils Group/ Contact & Vous). The fifth presenter was Mr. Tadashi Shiraishi, Japanese NGA. He focused on the topic of Failing Firm Defense, including a case study (USEN/CAN). The sixth presenter was Harikumar Pillay, Singapore's NGA. He focused on the Impact of COVID-19 on Merger Control in Southeast Asia.

The main points of their presentations are as stated below.

1) Mr. Manish Mohan Govil (CCI)

1. The COVID-19 pandemic has been the biggest challenge for countries across the globe. Several governments have taken measures to curb the spread of the virus and flatten the curve through various degrees of lockdown. The pandemic has not only been a health crisis but it has abruptly and in an unprecedented manner disrupted the normal economic activities. The pandemic has led to a surge in the demand for certain products while triggering shortages for others. The sudden lockdown has triggered an unprecedented disruption in merger and acquisition activities for businesses. In many cases supply chains are disrupted and companies are facing credit crunch, resulting in takeovers, mergers or acquisitions. This has prompted competition authorities to quickly put in place arrangements for timely approval of mergers and acquisitions to mitigate adverse effects on the wider economy.

2. The Competition Commission of India performs its task of giving regulatory approval to the mergers and acquisitions notified to it. In India we have a mandatory filing regime. In the preceding year (2019-20), M&A activity was observed across diverse industries such as health care, infrastructure sector like power and aviation and key service sectors such as finance and IT. The M&A filings were both international as well as domestic.

3. The Commission introduced a new trust-based system 'Green Channel' in August 2019. Under this system parties to the combination may self-assess their combinations to see if they have any horizontal, vertical or complimentary overlaps. In the absence of such overlaps, they can notify their transaction under 'Green channel'. The parties can also avail an optional and non-binding pre-filing consultation with the case team. On filing the notice, the parties get an automatic approval from the Commission. The parties can immediately consummate the transaction. This system facilitates speedy approval of combinations, reduces compliance cost for the parties and promotes ease of doing business.

4. March 24, 2020, the Hon'ble Prime Minister announced a nationwide lockdown and all activities were suspended. The following steps were taken by CCI to put in place

a system for merger regulations-

- i. CCI activated its system of e-filing and digital payment of fees.
- ii. A new video conferencing system was set up by the NIC (National Informatics Centre), the government's IT Department for interaction of case team with the Commission.
- iii. All internal movements of files were directed towards the internal email & E-office system, through which records & filings could be accessed by the case teams from home.
- iv. A dedicated helpline was set-up to communicate with the stakeholders and business community.
- v. Initially, Green channel combinations were allowed to be filed and got automatic approval. However, by 13th April 2020, all combination filings were resumed. After that, parties could file their forms (Both form 1 & form 2) by email, and such email was received at a dedicated secured email system at the Commission.
- vi. The Commission issued various guidelines from time to time to keep all the stakeholders informed.

2) Mr. Andy Gallagher, (ACCC)

When we are defining the market impacted by a merger, or assessing the closeness of competition between two firms, we need to look at the degree of substitutability between firms and their products or services. Economic crises, such as the one we are in, generally bring about a reduction in consumers' willingness to part with their cash. For a lot of products and services, this is likely to increase the elasticity of demand, as consumers are likely to divert their purchases to other suppliers rather than to bear cost increases. It follows that, in certain industries, economic crises may increase substitution between brands. Pre-crisis evidence may not realistically portray the current state of competition.

Where more brands are suddenly brought into closer competition, a particular merger may be less likely to adversely affect competition. However, it's not a foregone conclusion that an increase in elasticity of demand would lower the harm resulting from a merger. For example, increased elasticity could mean that a firm which was a small, cheap, or new supplier in a market (and which, if it were acquired pre-crisis may not have materially altered competition), may now represent a more significant competitor.

Further, any changes in elasticity may or may not be permanent.

3) Ms. Sara Mirabella (ACCC)

Merger remedies may be impacted in a number of ways during times of crisis. Divesting assets during the COVID-19 pandemic may be more challenging, for example - due to a lack of interested purchasers given the economic uncertainty, purchasers being unable to access credit and demonstrate financial viability, or purchasers being unable to conduct due diligence or site inspections due to COVID-19 restrictions. This is likely to place increased emphasis on assessing purchaser risk, and may also lead to greater asset deterioration risks during any divestment period.

At the ACCC we have a standard form divestiture undertaking containing key provisions, which we use as a starting point for all remedy negotiations, and which we consider would be capable of adapting in times of crisis. It has built in mechanisms to enable us to flexibly adapt to changing situations, such as the ability to waive obligations or extend the time an obligation is due.

In order to assist with minimising the potential purchaser risk we have core criteria, to ensure that the proposed purchaser is independent, of good financial standing and has the intention to maintain and operate the divestiture business as a going concern. While this criteria hasn't changed, in uncertain times we may request more detailed information and additional evidence of contingency planning before being able to approve a potential purchaser.

In order to assist with minimising the potential asset deterioration, particularly where there isn't an upfront purchaser, we appoint both an independent manager and independent auditor to oversee the running of the divestiture business and the merger parties' compliance with their obligations in the undertaking. These appointed experts may need to take on an even greater role during times of uncertainty to ensure that the merger parties are maintaining the divestiture business appropriately, and adapting to any risks that are being presented prior to the business being divested.

4) Ms. Caroline Genevois (CCA)

In a decision dated July 29, 2020, the New Caledonia Competition Authority (ACNC) authorized unconditionally, the acquisition by the Courte and Fils groupe, via its subsidiary Sogesti, of Contact & Vous, with both companies being active in the publishing printing mass mailing sector. This authorization followed a first decision from the ACNC on November 27, 2019 which had agreed to grant a derogation to the merger filing suspensive effect, meaning the parties could preemptively conclude the transaction pending the full review of the filing before the ACNC;

The transaction closed on January 22, 2020 and the applicant resubmitted their filing on April 22, 2020. Pursuant to article Lp. 431-5 of the code of commerce, the ACNC has 40 working days from the date of the complete filing to issue a decision on the matter (either authorizing or denying the transaction or extend the review period into “Phase 2”) meaning in this case it had until June 23, 2020 to do so.

However, due to the health crisis with Covid-19, the government of New Caledonia issued a deliberation on April 11, 2020 (“Délibération n° 21/CP du 11 avril 2020”) which provided for the suspension of any governmental decision or act that was due between March 23 and June 3, 2020. For merger filing proceedings this meant that the waiting period for filings submitted between March 23 and June 3, 2020 would be suspended during that time and that the clock would only start again on June 4. So for the present case, the decision deadline was extended from June 23, 2020 to July 30, 2020.

Regarding the horizontal overlap on the market for services of outgoing document and data management, the ACNC found that this market was very concentrated with only three actors, Sogesti, Contact & Vous and their main competitor CSB. The transaction would result in the new entity having a combined market share between 20-30% with an increment of 1-10% in favor of Sogesti, and CSB would still remain a leader with 70-80% market share.

On the incoming document and data management market the transaction did not give rise to any horizontal overlaps as Contact & Vous was not active on it. However, the Courte & Fils group had a dominant position on this market via its subsidiary Noumea GED with a 50-60% market share. This market was also very concentrated with just 3 actors: Noumea GED, Visual Office (0-10% market share) and CSB (35-45% market share).

Therefore there was a possible risk of conglomerate effects where the Courte & Fils group could leverage its strong position on the incoming market and offer tied sales or rebates related to the services offered on both related markets of outgoing and incoming document and data management services by Noumea GED and the newly strengthened Sogesti.

However, the ACNC considered that this risk had to be offset with the fact that this situation was pre-existing prior to the transaction. Moreover, the main competitor of Noumea GED is the company CSB which had 35-45 % market share on the incoming document and data management services market and also had a dominant position on the outgoing document and data management services market, therefore the risk that the transaction would have an eviction effect was minimal. This was more problematic

for the 3rd actor Visual Office who is not present on the outgoing document and data management services market and has a low market share on the incoming document and data management services market (less than 10%), so the eviction risk is higher;

Consequently, the acquisition of Contact & Vous by Sogesti had the potential to result in horizontal and conglomerate anti-competitive effects on the incoming and outgoing document and data management services market in New Caledonia.

However, the French and European competition authorities have in the past allowed the acquisition of a failing firm by its competitor without which the failing firm would otherwise disappear. In this case the ACNC applied this “failing firm” exception for the first time considering that:

1. Contact & Vous was facing important financial difficulties which would lead to bankruptcy in the near future and thus its disappearance from the outgoing document and data management services market;
2. There was no other offer of acquisition of Contact & Vous that was less damaging to competition;
3. The transaction did not threaten CSB’s dominant position on the outgoing document and data management services market which is already very concentrated and Contact & Vous disappearance would have weakened Sogesti’s capacity to remain competitive on the outgoing document and data management services market against its sole competitor, CSB.

Therefore, in accordance with the jurisprudence of the French and European competition authorities, the ACNC considered the “failing firm” criteria were met in this case, where the transaction could be authorized unconditionally as it appeared the effects of the transaction were no worse than those that would result in the disappearance of the failing firm.

5) Mr. Tadashi Shiraishi (NGA, Japan)

The presentation provided a case-study examining USEN-NEXT HOLDINGS / CANSYSTEM (“USEN/CAN”), a proposed merger cleared by the JFTC in 2018. USEN/CAN is the only case in which the JFTC cleared a proposed merger relying only on a full-fledged failing firm defense (FFD).

FFD is a vague concept and has several variations. Issues under COVID-19 should be argued with a clear map of those sets of FFD.

This presentation made clear that:

- the failing firm defense that appears in the JFTC Merger Guidelines is a sort of justification defense, which might immunize a merger even when there would be a causal

link between the merger and an anticompetitive market,

- the JFTC refused to apply such a theory to USEN/CAN, and
- the theory that the JFTC relied on to clear the proposal was a failing firm defense as a causation theory: The JFTC cleared it because the post-merger circumstances and the counterfactual would not be distinct.

6) Mr. Harikumar Pillay (NGA, Singapore)

1) Competition authorities in the SEA region experienced some minor “speed bumps” during the early stages of the COVID-19 pandemic. Things are mostly back to “business as usual” across the region currently.

2) The commercial responses to COVID-19 may lead to potential merger control-related competition issues for businesses. More guidance from competition authorities is suggested to provide for commercial and legal certainty going-forward. The guidance should address the practical implications, brought about by the pandemic, on merger parties - e.g. Intra-group restructurings / reorganisations triggering Merger Control requirements; Negotiations over competition clauses; Higher risk of gun-jumping; and outsourcing.

3) COVID-19 will change the macro-economic landscape, which will have wider regulatory implications. Merger control regimes continue to develop across the SEA region. These will have a number of substantive implications from a competition law perspective. Some examples are as follows:

- (i) Changing market definitions/counterfactual analysis;
- (ii) Increased FDI scrutiny; and
- (iii) Increased scope for failing firm defence, perhaps.

4 Summary of Q&A session

Following the presentations above, Q&A session was held. The summary of it is as stated below.

Question 1 (to ACCC from the moderator)

From a merger remedies perspective, has the ACCC seen any COVID specific issues arise?

(ACCC)

There have been no major issues today.

Question 2 (to the Japanese NGA from the moderator)

You talked about the USEN/CAN case. You mentioned that the JFTC cleared the proposed merger conditionally. So, do you have any comments on the remedy on the case?

(Japanese NGA)

More than 99% of remedies worldwide are designed to make the post-merger market competitive. But the remedy in this case was designed to cut the causation between the merger and its anticompetitive effect and to make the post-merger market situation identical to the counterfactual. That's a very exceptional and interesting point.