January 31, 2024

Competition Review Taskforce
The Treasury
1 Langton Crescent
PARKES ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Australia: Comments on the Potential Changes to Australia's Merger Rules and Processes

Dear Competition Review Taskforce,

We have great pleasure in enclosing a submission prepared by the Mergers Working Group of the Antitrust Section of the International Bar Association in response to the public consultation process initiated by the Treasury of the Australian Government on Potential Changes to Australia's Merger Rules and Processes.

The Co-Chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with the representatives of the Competition Review Taskforce as appropriate.

Yours Sincerely,

Samantha Mobley
Co-Chair Antitrust Section

Janet Hui
Co-Chair Antitrust Section

SUBMISSION TO THE COMPETITION REVIEW TASKFORCE REGARDING THE POTENTIAL CHANGES TO AUSTRALIA'S MERGER RULES AND PROCESSES

1. INTRODUCTION

1.1. On behalf of the Mergers Working Group of the Antitrust Section of the International Bar Association ("**IBA**") (the "**Working Group**") this submission is provided in response to the Competition Review regarding potential changes to Australia's merger rules and processes, as announced by the Treasury of the Australian Government on 23 August 2023 and described within the consultation paper and its appendices released on 20 November 2023 by the Competition Review Taskforce ("**Taskforce**") (the "**Consultation**").

1.2. The Working Group is grateful for the opportunity to provide these submissions to the Taskforce for its consideration, and, at the outset, expresses its willingness to be consulted (or to otherwise contribute constructively where possible and as appropriate), in terms of the development of any changes to the merger rules and processes, including the related guidelines, in due course.

1.3. The IBA is the world's leading international organisation of legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession throughout the world. The IBA has a membership of more than 80,000 individual lawyers from over 170 countries, including Australia, and it has considerable expertise in providing assistance to the global legal community.[1] The IBA Antitrust Section, which is broadly representative of the global antitrust community, regularly makes submissions on developments related to the implementation and refinement of competition laws worldwide.

1.4. The IBA's Antitrust Section includes antitrust / competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The Working Group's contributions draw on the vast experience of the Section's members in merger control law and practice around the world.[2]

1.5. As a general principle, the Working Group believes that there should be a convergence

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1 Further information on the IBA is available at: http://ibanet.org.

2 Further information on the Antitrust Section and its Working Groups is available at: https://www.ibanet.org/unit/Antitrust+Section/committee/Antitrust+Section/3001.

toward agreed best practices by all jurisdictions in terms of the development and operation of merger control regimes, and for this convergence to be rooted deeply in the principles of transparency, consistency, predictability, certainty, and procedural fairness.

1.6. The International Competition Network ("**ICN**") (of which the Australian Competition and Consumer Commission ("**ACCC**") is an active member) has issued Recommended Practices for Merger Notification and Review Procedures (the "**ICN Recommended Practices for Merger Notification Document**") and the Recommended Practices for Merger Analysis (the "**ICN Recommended Practices for Merger Analysis Document**"), which the Working Group considers are relevant and insightful in the context of considering the implementation of the potential changes to the existing merger rules and processes. The ICN Recommended Practices for Merger Notification Document and the ICN Recommended Practices for Merger Analysis Document are further referred to in this submission where relevant.

1.7. The Working Group presents its contributions below divided into the following sections: (i) general observations on whether, based on the international experience and evidence, substantial changes to the existing merger control regime, rules and processes are necessary to address the concerns raised by the ACCC; (ii) should such changes be necessary to address the related concerns, comments on the potential change to the substantive test and to a 'satisfaction standard'; and (iii) comments on the potential changes to the judicial review function of the Federal Court, also based on the international experience, in particular for review / appeal rights and safeguards.

2. GENERAL OBSERVATIONS REGARDING PROPOSALS FOR SUBSTANTIAL CHANGE TO THE EXISTING MERGER RULES AND PROCESSES IN AUSTRALIA

(A) Is there a need for change?

2.1. The Working Group welcomes the efforts in improving the merger control regime in Australia and respectfully recommends that the aim should be at striking a balance between preventing anti-competitive mergers whilst not unduly overburdening businesses undertaking M&A activity or expending substantial agency resources reviewing mergers that are unlikely to raise competition concerns. With this, the Working Group respectfully suggests that the Taskforce and Treasury assesses, based on evidence, (i) whether some concerns raised by the ACCC are indeed a result of the current regime; and (ii) whether such concerns might be more appropriately addressed by making incremental enhancements to the existing elements of the current regime rather than undertaking a major regime overhaul. For this purpose, the Working Group

encourages the Taskforce and Treasury to consider the experiences of other jurisdictions – including current voluntary jurisdictions such as Singapore and the UK where the voluntary element of those regimes is considered to be working well, and jurisdictions that have implemented major reforms to their existing merger control rules such as Brazil and Chile where those reforms have not been without significant challenges, both for the relevant competition authorities and merging parties.

(B) Practical experience with the UK and Singapore as voluntary systems that, as an example, seem to work well in their respective jurisdictions for cost savings and efficient enforcement

<u>The UK's voluntary regime results in considerable cost savings to the vast majority of M&A transactions in the UK that do not raise competition concerns</u>

2.2. The UK has a voluntary and non-suspensory regime. It has existed for decades and is considered to work well based on certain factors.[3] In 2021, the UK government launched a consultation on the UK's competition regime, including its merger control regime. The government concluded that it would retain the voluntary regime in light of the considerable overall cost savings to significant numbers of businesses that do not undergo merger review in the UK, unlike in comparable jurisdictions.[4]

2.3. In its April 2023 impact assessment of its proposed reforms to the merger regime, the UK government noted the following:

The UK's voluntary notification regime is a key feature of the framework, with the CMA investigating roughly 60 transactions per year which is significantly less than comparable mandatory regimes. For example, in 2020 Germany's Federal Cartel Office (FCO) which operates a mandatory notification regime reviewed roughly 1,200 cases. In 2019/20, the CMA reviewed a total of 62 cases, for context, in the same period the Office for National Statistics (ONS) reported 881 mergers and acquisitions involving UK companies worth £1 million or more (the total number including firms worth under £1 million would be larger). This demonstrates that the CMA formally reviews only a small portion of all merger and acquisition (M&A) activity in the UK. This provides more certainty to businesses pursuing a benign merger that the majority of transactions will not undergo the costs of merger review in comparison to a scheme with broader jurisdictions. Therefore, if the regime is to retain the benefits to business of reviewing relatively few mergers, the jurisdictions must reflect those transactions likely to raise a competition concern

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3 Note, the mergers reforms expected in 2024 will introduce a notification requirement for firms with 'strategic market status' to report a merger / relevant transaction to the CMA.

4 Reforming Competition and Consumer Policy: Government Response to Consultation Presented to Parliament by the Secretary of State for Business, Energy and Industrial Strategy by Command of Her Majesty April 2022. Reforming competition and consumer policy: government response to consultation (web accessible PDF) (publishing.service.gov.uk).

as opposed to capturing a broad range of mergers which are likely benign.[5]

The UK's voluntary regime seeks to strike a balance between ensuring scrutiny of potentially problematic mergers and allowing benign M&A to proceed without the costs of merger review

2.4. In its April 2023 impact assessment of its proposed reforms to the merger regime, the UK government noted that it "*seeks to have a merger control system that imposes proportionate requirements on benign or low risk mergers while ensuring robust scrutiny of mergers that raise potential concerns. The objectives of the reforms proposed are to help the UK merger control system operate more effectively:*

4.7.1 Ensure the UK's merger control regime is focused on mergers which are likely to cause harm to consumers and markets, whilst reducing or removing the burden to businesses where transactions are less likely to be harmful.

4.7.2 Reduce the time and costs of merger review faced by businesses during self-assessment and provide greater clarity and certainty to businesses about when they will be covered by the UK's merger control regime.

4.7.3 *Improve market efficiency and consumer outcomes through increased competition*".[6]

Singapore's voluntary notification regime achieves efficient enforcement against anti-competitive mergers

2.5. Singapore also has a voluntary and non-suspensory regime. It is recognised that the competition and merger control regime in Singapore is modelled with the need to "*balance regulatory and business compliance costs against the benefits from effective competition*" in mind. Instead of attempting to catch all forms of anti-competitive activities, the principal focus is on those mergers that have an appreciable adverse effect on competition in Singapore or that do not have any net economic benefit.[7] The voluntary merger regime best gives effect to this principle, as firms would not be mandated to seek approval or to notify the CCCS of any merger, and only mergers that substantially lessen competition and have no offsetting efficiencies are prohibited. This reduces the business costs for unproblematic mergers, while also allowing the CCCS to

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5 Paragraph 6, Reforms to Merger Control IA No: BEIS057(F)-22-CCP RPC: Reforms to merger control: annex 3 impact assessment (publishing.service.gov.uk).

6 Paragraph 31, Reforms to Merger Control IA No: BEIS057(F)-22-CCP RPC: Reforms to merger control: annex 3 impact assessment (publishing.service.gov.uk).

7 The Senior Minister of State for Trade and Industry (Dr Vivian Balakrishnan), Col. 86 Second Reading of the Competition Bill: https://www.cccs.gov.sg/~/media/custom/ccs/files/media%20and%20publications/speeches/second%20reading%20speech%20for%20the%20competition%20bill%20by/19oct042ndreadingspeechfinal.ashx.

utilise its resources to take necessary enforcement action against mergers that lead to competition law issues.[8]

2.6. Notably, the voluntary merger regime in Singapore also ensures that there is effective enforcement in this jurisdiction against consummated mergers that are anti-competitive. In Singapore, this is achieved through a multipronged approach of (i) a voluntary notification regime; (ii) prompt and strict enforcement action against errant merger parties; (iii) the power to impose financial penalties as a punishment and deterrent; and (iv) wide powers to impose remedies to restore competitive outcomes, or at least contestability, even if the merger cannot be completely reversed.[9]

2.7. Enforcement by the CCCS has historically been robust but targeted. To date, there have been 106 mergers reviewed or under review by the CCCS. In the past five years (2019 to 2023), five out of 33 (or approximately 15%) of merger notifications have proceeded to a Phase 2 review (or were notified of the CCCS's intention to move into Phase 2).

2.8. In the absence of a notification, the CCCS may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for suspecting that Singapore's Competition Act 2004 has been infringed or will be infringed. The CCCS's powers to investigate a transaction and to impose fines and/or directions is evergreen, and the CCCS can, and has done so, even after the transaction has closed for several years.

(C) Caution regarding redesign of Australia's merger regime

2.9. When designing or redesigning a merger regime, it is critical to consider which aspects are suitable for the jurisdiction at hand. "*Identifying the appropriate institutional structure for a given jurisdiction's competition authority will ultimately depend on that jurisdiction's particular political and regulatory context*."[10] There is no "one-size-fits-all" or optimal option and jurisdictions look to a variety of factors.[11] These factors can include a competition authority's scope of mandate, its independence from government, desire

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8 Organisation for Economic Co-operation and Development (OECD), "*Disentangling Consummated Mergers – Experiences and Challenges – Note by Singapore*" (2022), page 4: https://one.oecd.org/document/DAF/COMP/WD(2022)44/en/pdf.

9 Organisation for Economic Co-operation and Development (OECD), "*Disentangling Consummated Mergers – Experiences and Challenges – Note by Singapore*" (2022), page 7: https://one.oecd.org/document/DAF/COMP/WD(2022)44/en/pdf.

10 OECD, Roundtable on Changes in Institutional Design of Competition Authorities – Note by the European Union, DAF/COMP/WD(2014)107, 1 (December 5, 2014): https://one.oecd.org/document/DAF/COMP/WD(2014)107/en/pdf; OECD, Roundtable on Changes in Institutional Design of Competition Authorities – Note by BIAC, DAF/COMP/WD(2014)126, 46 (December 10, 2014): https://one.oecd.org/document/DAF/COMP/WD(2014)126/en/pdf.

11 OECD, Key Points of the Roundtables on Changes in Institutional Design, DAF/COMP/M(2015)1/ANN9/FINAL, 24 (May 18, 2016): https://one.oecd.org/document/DAF/COMP/M(2015)1/ANN9/FINAL/En/pdf.

for integration of investigative and adjudicative functions, existing checks and balances, staffing capability, budget restraints, and more.[12]

2.10. Consider two jurisdictions, the European Union and Canada, which follow different approaches regarding separation that may be due in part to their differing legal traditions. In Canada, a majority common law jurisdiction, the Competition Bureau investigates potential anti-competitive activity, while the Competition Tribunal exercises adjudicative power.[13] Conversely, in the European Union, of which the original six Member States all followed civil law traditions, the European Commission is an integrated authority wielding both investigatory and adjudicative power.[14]

2.11. Design can also be based on non-legal factors, such as economic or social ones. For instance, scholars suggest that South Africa, influenced by its post-apartheid climate, amended its competition regime to ensure that more equity and mobility would be possible.[15]

2.12. Because aspects of a country's merger regime are so interlinked with factors as unique as social climate, politics, legal tradition, and more, any country seeking to "cherry-pick" individual aspects must exercise caution and consider the ramifications and potential knock-on effects in introducing an aspect that might not be suitable for the jurisdiction at hand. "*Institutional and procedural differences are likely to generate widely different substantive outcomes, even with a similar legislative mandate*," and even well-intentioned borrowers must carefully consider how an amendment to a merger regime will affect the jurisdiction.[16]

(D) Caution against low and broad thresholds for a mandatory and suspensory regime that could risk over capture and committing substantial time and resources for minimal substantive benefit

2.13. The Working Group respectfully submits that low and broad thresholds in a mandatory suspensory regime should be avoided. Thresholds should instead be based on materiality and aim to "*screen out transactions that are unlikely to result in appreciable competitive effects in a given jurisdiction*."[17] "*If thresholds are set too low . . . there may be an excessive number of notifications, imposing unnecessary costs on both merger parties and*

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12 OECD, *supra* note 8, at 3, 16, 31; OECD, *supra* note 9, at 11, 18, 23.

13 *See* Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions* 25(3) World Comp. 361, 364 (2002).

14 *See* Eleanor M. Fox, *Antitrust and Institutions: Design and Change* 41 Loy. U. Chi. L.J. 473, 475 (2009).

15 *Id.*

16 Trebilcock & Iacobucci, *supra* note 11, at 455.

17 ICN, Setting Notification Thresholds for Merger Review – Report to the ICN Annual Conference, 4 (April 2008): https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_SettingMergerNotificationThresholds.pdf.

authorities".[18] This cost is particularly best avoided when one considers that "*for many agencies, a significant portion of their budget is dedicated to merger review, and only a tiny percentage of the reviewed transactions are potentially problematic*."[19] It is thus "*crucial to set them* [thresholds] *at a high level, so as not to impose unnecessary burdens on business or the reviewing agency and its limited resources*," and so that these resources can be "*better utilized in pursuing cartel cases or other anticompetitive conduct*."[20]

2.14. Apart from the level they are set at, it is also important to choose the right criteria for thresholds. Thresholds that are overly broad will cast a wider net than necessary "*to catch the few transactions that merit closer review*."[21] Relying only on transaction size, without also considering local nexus and turnovers, for instance, might create difficulties in assessing the impact a transaction will have on a specific jurisdiction or have the effect of triggering in a jurisdiction where there is no nexus at all.[22] There may also be challenges in precisely determining the value of a transaction at the time of filing.[23]

2.15. Creating a tailored multi-criteria based threshold, as in Mexico and the United States, may better help jurisdictions determine these impacts.[24] The use of exemptions may also help alleviate the issues that stem from thresholds that trigger notification of a large number of transactions, as thoughtfully created exemptions should provide an off-ramp for some transactions unlikely to raise any competitive concerns.[25] Targeted approaches or lists that seek to capture sectors or players of note, such as in Norway, may also be viable alternatives to creating low or broad thresholds, as may ex-post review powers.[26]

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18 OECD, Jurisdictional Nexus in Merger Control Regimes – Background Paper by the Secretariat, DAF/COMP/WP3(2016)4/REV1, 16 (July 27, 2016): https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf; OECD, Jurisdictional Nexus in Merger Control Regimes – Note by BIAC, DAF/COMP/WP3/WD(2016)26, 23 (June 6, 2016): https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)26/En/pdf.

19 Maria Coppola, *ICN Best Practice: Soft Law, Concrete Results*, CPI ANTITRUST CHRONICLE 1, 2 (July 2011): www.ftc.gov/system/files/attachments/key-speechespresentations/1107cpicoppola.pdf.

20 Maureen K. Ohlhausen, *An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification* (November 5, 2013): https://www.ftc.gov/news-events/news/speeches/ounce-antitrust-prevention-worth-pound-consumer-welfare-importance-competition-advocacy-premerger-0.

21 ICN, *supra* note 1, at 4.

22 OECD, Start-ups, Killer Acquisitions and Merger Control – Background Note, DAF/COMP(2020)5, 173 (May 7, 2020), https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf.

23 *Id.* at 172.

24 OECD, Jurisdictional Nexus in Merger Control Regimes – Background Paper by the Secretariat, DAF/COMP/WP3(2016)4/REV1, 53-54c(July 27, 2016): https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf.

25 *Id.* at 57.

26 OECD, *supra* note 6, at 181, 187.

(E) Caution against wide call-in powers that create uncertainty

2.16. The Consultation indicates at page 6 that the ACCC proposes to change the merger control regime to that of a mandatory formal clearance regime where the ACCC must be satisfied that mergers are not likely to substantially lessen competition before granting clearance. This is opposed to the existing "judicial enforcement" merger control model where the party bringing an action (e.g., the ACCC seeking to restrict the completion of a merger transaction which it determines to be anti-competitive) bears the evidentiary burden of establishing that the transaction is likely to substantially lessen competition on the balance of probabilities.

2.17. The Consultation also calls for the ACCC to be provided with powers to "call-in" transactions which raise competition concerns and is proposing that this power be applied to all deals that fall below the threshold involving company turnover of more than A$400m or a global deal value of A$35m. This is understood to be a low threshold in the Australian transactional context. The Working Group would respectfully encourage further elaboration on the types of transactions that may be seen as raising competition concerns and have a significant effect on the market structure under the ACCC's "call-in" power.

2.18. While the ability to call-in unnotified transactions is fundamental to the ACCC's ability to effectively mitigate the competition concerns posed by a problematic merger transaction, the Working Group also respectfully stresses that such powers, particularly when used extensively and without prior warning, can be significantly disruptive to the merger parties' legitimate interests in ensuring predictability and certainty related to the timing of their proposed transaction. This need for restraint against extensive use of such call-in powers is reflected in the ICN Recommended Practices for Merger Notification Document, which recognises that merger investigations should be conducted in a manner that promotes an effective, efficient, transparent and predictable merger review process, and competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties.[27] Jurisdictions should adopt mechanisms allowing for flexibility in their review of transactions, and competition agencies should seek to limit the information sought from parties to transactions that do not appear to present material competitive concerns.[28]

2.19. For example, under the UK's current regime, a qualifying transaction only falls within the CMA's jurisdiction (and therefore may be reviewed by the CMA, either further to being voluntarily notified by the parties or as a result of being called in for review by

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27 Section VI(A) at page 18 and VI(E) at page 20 of the ICN Recommended Practices for Merger Notification Document.

28 Section V(B) at pages 15 and 16 of the ICN Recommended Practices for Merger Notification Document.

the CMA) where:

4.10.1 *the enterprise being acquired has turnover in the United Kingdom exceeding GBP70m (the 'turnover' test); or*

4.10.2 *the merger itself creates or enhances a 25 per cent share of supply or purchases of any goods or services in the United Kingdom, or in a substantial part of the United Kingdom (the 'share of supply' test).*

2.20. While the turnover test is straightforward to apply, the share of supply test is less so. The test is not a market share test and allows wide discretion in describing the goods or services, which need not amount to relevant economic markets and may differ from the relevant economic market identified for the purposes of the CMA's substantive assessment of the merger.

2.21. As a result, the share of supply test may create a degree of unpredictability for merging parties when self-assessing whether the regime applies and if so, whether to notify the CMA. Furthermore, such a test is arguably not consistent with ICN Recommended Practices for Merger Notification Document, which state that notification thresholds should be "*clear and understandable*" and "*based on objectively quantifiable criteria*".[29]

2.22. Reforms to the UK's merger regime (expected to come into force in 2024) will expand the scope of the regime by introducing a new acquirer-focused threshold to capture mergers that do not involve direct competitors (the share of supply test requires a horizontal overlap between the parties' activities in the UK). However, the reforms will not amend the use of the share of supply test and the lack of legal certainty it involves for merging parties.

(F) Practical experience in Brazil with the challenges of moving to a mandatory suspensory regime

2.23. Prior to the enactment of the current Brazilian competition law in 2012 (Law No. 12,529/2011 – "**Brazilian Competition Law**"), which implemented the current suspensory regime for transactions that meet the legal criteria, Brazil had a non-suspensory regime. The transition from a post-merger control regime to a mandatory, suspensory regime in Brazil was a major reform of the Brazilian merger control regime, aimed at enhancing the effectiveness and efficiency of merger review. However, the change also posed significant challenges for both the antitrust authorities and the merging parties, as it required a substantial adaptation of the legal framework, the

[29] ICN Recommended Practices for Merger Notification Document, II(D) and (E): Microsoft Word - ICN NP Recommended Practices I-XIII.doc (internationalcompetitionnetwork.org).

institutional capacity, the procedural rules, and the substantive criteria for merger analysis.

2.24. Under the Brazilian Competition Law, both CADE and the notifying parties had to face significant challenges to move to the new suspensory regime. Some of the challenges presented were due to the transition to a pre-merger notification itself, as well as "*shorter procedural deadlines, which demanded more speed and efficiency from the authority; and the introduction of fact-finding procedures in merger review and antitrust cases (…)*".[30]

2.25. During the transition to the new regime, working groups were created to study the best practices for implementing the new legal provisions, especially regarding the suspensory merger analysis. Since the "*vacatio legis*" lasted for six months, the groups had to be created a year before the implementation of the new law due to the significant changes to the previous antitrust regime.

2.26. One of the main challenges of the transition was the increased workload and resource demand for the antitrust authorities as well as for merging parties. As a result of these changes, in the 10-year period since the new law was enacted, the number of cases reviewed by CADE has greatly increased with CADE analysing more than five thousand merger cases in that time period, although the average time taken to review a case has generally reduced.

2.27. This is mostly due to the system that encompasses both a fast-track procedure and a regular procedure, depending on the complexity of the transaction (with very different deadlines for CADE to complete each merger review). The new law has brought a stricter timeframe for review: 30 days for fast-track cases and a maximum of 330 days for regular cases (but with a shorter timeframe in less complex regular cases). For instance, in 2022, the average total review period for fast-track cases was 21.4 days, and 125.6 days for regular cases. In total, CADE reviewed 660 merger cases (84% through the fast-track procedure).

2.28. The high number of cases can also be explained by the fact that Brazil is a country with relatively low filing thresholds, which generates a high number of filings. The low thresholds, combined with a suspensory regime, may result in significant burden to merging parties.

2.29. Over 90% of cases analysed by CADE under the suspensory regime have been unconditionally cleared, which demonstrates that, under the new regime, a high number of cases that do not pose any competition concerns are still being submitted to CADE's

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30 Available at: https://cdn.cade.gov.br/portal-ingles/topics/about-us/strategic-planning/document/CADE_Strategic-Plan_2024.pdf.

review, demanding significant resources not only for the merging parties, but also for the public administration. In fact, since the entry into force of the new Brazilian Competition Law, CADE has increased its personnel and budget by more than 100%.[31]

2.30. The new regime also imposed a higher standard of information and documentation to be submitted by the parties. Furthermore, the new regime had a potential impact on merging parties' strategic planning, financing, contractual arrangements, and business operations, as they had to factor in the possibility of delays, uncertainties, and conditions in the merger review process.

2.31. With this, when considering redesigning Australian merger control regime, it is important to consider the aspects that are suitable to the Australian jurisdiction. In particular, the Working Group respectfully encourages the Taskforce and Treasury to consider (i) avoiding low and broad thresholds for a mandatory and suspensory regime; (ii) avoiding wide call-in powers that may create uncertainty; (iii) taking into account the practical challenges of moving to a mandatory, suspensory regime – not only for merging parties but also for the ACCC.

3. COMMENTS ON THE POTENTIAL CHANGE TO THE SUBSTANTIVE TEST AND EXPANDED DISCRETION BY COMBINING A REVERSED ONUS WITH A MOVE TO A 'SATISFACTION' STANDARD

(A) Caution should be exercised in considering major changes to the substantive test and expanding the ACCC's discretion

3.1. The Working Group also respectfully encourages the Taskforce and Treasury to aim at striking a balance between preventing anti-competitive mergers whilst not overburdening businesses undertaking M&A activity. With this, the Working Group respectfully requests the Taskforce to assess, based on evidence, (i) whether some concerns raised by the ACCC are indeed a result of the current regime; and (ii) whether such concerns might be more appropriately addressed by making incremental enhancements to the existing elements of the current regime rather than undertaking a major regime overhaul. For this purpose, the Working Group encourages consideration of the experiences of other jurisdictions – including current voluntary jurisdictions (such as Singapore and UK), and jurisdictions that implemented major reforms to existing merger control rules (such as Brazil), as noted above.

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[31] As noted by CADE's General Superintendent, Alexandre Barreto, on an interview to the book "10 anos da lei de defesa da concorrência", published by IBRAC in 2022. Available at: https://www.ibrac.org.br/UPLOADS/Livros/arquivos/10_Anos_da_Lei_de_Defesa_da_Concorr%C3%AAncia.pdf?utm_source=Manesco,+Ramires,+Perez,+Azevedo+Marques+Sociedade+de+Advogados&utm_campaign=f8d5a192fa-EMAIL_CAMPAIGN_4_29_2020_14_45_COPY_01&utm_medium=em.

3.2. To date, in Australia, mergers are only prohibited if the ACCC can prove that a transaction will have the effect or likely effect of substantially lessening competition. The onus is on the ACCC to establish that a proposed merger contravenes the law, and this approach is consistent with other provisions dealing with anti-competitive conduct under Part IV of the Competition and Consumer Act 2010. Essentially, the current regulatory framework operates so that businesses are free to engage in conduct unless the conduct would likely harm competition.

3.3. The Consultation has proposed reversing the onus so that merger parties must show that their deal will not be likely to substantially lessen competition, thereby creating a 'satisfaction' standard (i.e., the ACCC must be satisfied a proposed merger is not likely to substantially lessen competition). This change to the substantive test would grant the ACCC greater discretion to intervene across a broad spectrum of proposed mergers and has the potential to make transactions more difficult to complete to a certain extent, including transactions which may not pose material competition risks.

3.4. The Working Group respectfully recommends the Taskforce and Treasury aim at striking a balance, with regards to its decision-making process, between such changes and (i) the current standard which requires the ACCC to make an affirmative finding relating to competitive harm, which may result in an adequate decision-making, with adequate procedural safeguards to provide for due process and the right of review, and (ii) a forward-looking counterfactual test for an effective merger control regime. For this purpose, the Working Group encourages consideration of the experiences of other jurisdictions – including the commonly accepted and adopted forward-looking counterfactual test in various jurisdictions (such as Singapore and UK).

(B) Experience with affirmative-finding results in an adequate decision making, particularly in an administrative model which requires thoughtful design with procedural safeguards to provide for due process and the right of review

3.5. A standard requiring an authority to make an affirmative finding that a merger will substantially lessen competition is preferable to a standard that effectively presumes illegality and requires the parties to ensure that an authority is satisfied that a merger will not substantially lessen competition. The former protects due process principles by allocating the burden of proof to the reviewing authority, instead of placing the onus on the parties.[32] This is particularly important " *[i]n cases where economic effects are in doubt, [as] the burden of proof creates an important protection against the possibility that competitively*

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[32] *See* OECD, Summary of Discussion of the Roundtable on Safe Harbours and Legal Presumptions in Competition Law, DAF/COMP/M(2017)2/ANN2/FINAL, (September 27, 2018), 4: https://one.oecd.org/document/DAF/COMP/M(2017)2/ANN2/FINAL/en/pdf.

neutral conduct will be found unlawful."[33] Apart from foundational due process concerns, this type of reverse onus, seen as well in the designation of certain companies as "gatekeepers" who must automatically notify the European Commission under the Digital Markets Act once they achieve this designation, has also been criticized as "*a move away from an economics-based approach to competition law enforcement*."[34]

3.6. Pragmatically, an affirmative standard also lessens incidents of false positive findings of antitrust liability by requiring a full analysis and better decision-making, whereas a reversed standard can be overbroad and may lessen the credibility of and trust in a reviewing agency in the long run.[35] This is particularly true in an administrative model, wherein investigatory and decision-making powers can be combined within one authority and it is crucial to include procedural safeguards to preserve independent and objective decision-making.[36] Shifting the onus to the merging parties to show that their actions will not substantially lessen competition could also produce a chilling effect, preventing some mergers from occurring at all and thus stifling innovation.[37]

3.7. Australia is not the only jurisdiction grappling with the struggles that come with shifting a burden of proof—the recently proposed Competition and Antitrust Law Enforcement Act in the United States, which would require parties to "*certain acquisitions that either significantly increase concentration or are extremely large [to] bear the burden of establishing that the acquisition will not materially harm competition*," has also received varying degrees of criticism and support.[38]

(C) Experience with a forward-looking counterfactual test

3.8. The Working Group refers to the ACCC's comments relating to the existing substantial lessening of competition test under Australia's merger control regime at page 13 of the Consultation, noting that the ACCC is concerned that the forward-looking counterfactual test combined with a judicial enforcement model is '*skewed towards clearance*', and that the counterfactual test is not sufficiently effective in identifying

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33 OECD, Judicial Perspectives on Competition Law: Contribution from the United States, DAF/COMP/GF/WD(2017)28, 4 (December 1, 2017): www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/judicial_perspectives_on_competition_law_united_states.pdf.

34 Frederic Jenny, Competition Law and Digital Ecosystems: Learning to Walk Before We Run, 177 (April 4, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3776274; Maureen K. Ohlhausen & John M. Taladay, Are Competition Officials Abandoning Competition Principles, Journal of European Competition Law & Practice 4 (2022).

35 OECD, *supra* note 18, at 3.

36 OECD, *supra* note 9, at 22-23.

37 Ciaran Willis, *Practitioners Push Back Against Reversing Burden of Proof in Mergers*, Global Competition Review (March 3, 2020): https://globalcompetitionreview.com/article/practitioners-push-back-against-reversing-burden-of-proof-in-mergers.

38 Competition and Antitrust Law Enforcement Reform Act of 2021, S.225, 117th Congress (2021).

merger transactions that result in a substantial lessening of competition.

3.9. The forward-looking counterfactual test is a commonly accepted and adopted test in the assessment of mergers in most jurisdictions, including voluntary regimes such as the UK and Singapore. The review of merger transactions requires competition agencies to conduct competitive effects analysis to identify the transactions likely to harm competition significantly by creating or enhancing market power. This is recognised in the ICN Recommended Practices for Merger Analysis Document, which states that the agency's assessment of the counterfactual should be "*informed not only by the existing conditions of competition, but also by any significant changes in the state of competition likely to occur without the merger*".[39] The Working Group respectfully submits that, with regard to the practical experiences in the UK and Singapore, the forward-looking counterfactual test may be appropriate in identifying merger transactions that result in a substantial lessening of competition.

Extracts from CMA's Merger Assessment Guidelines (3.6-3.8 and 3.14)[40]

3.10. The Working Group has extracted relevant principles relating to the assessment of the counterfactual from CMA's Merger Assessment Guidelines below.

> *3.6 In determining the counterfactual, the depth of analysis in the CMA's assessment is usually not to the same level as in its competitive assessment. Indeed, in many cases the counterfactual assessment is likely to be brief, although this will vary across cases.*
>
> *3.7 The counterfactual is not intended to be a detailed description of the conditions of competition that would prevail absent the merger. Those conditions are better considered in the competitive assessment.*
>
> *3.8 The counterfactual assessment will often focus on significant changes affecting competition between the merger firms, such as entry into new markets in competition with each other, significant expansion by the merger firms in markets where they are both present, or exit by one of the merger firms.*
>
> […]
>
> *3.14 Establishing the appropriate counterfactual to assess the merger against is an inherently uncertain exercise and evidence relating to future developments absent the merger may be difficult to obtain. Uncertainty about the future will not in itself lead the CMA to*

[39] Section IV(A) at page 16 of the ICN Recommended Practices for Merger Analysis Document.

[40] CMA Merger Assessment Guidelines 18 March 2021, CMA 129: Merger Assessment Guidelines (CMA129) (publishing.service.gov.uk).

assume the pre-merger situation to be the appropriate counterfactual. As part of its assessment, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger firms to pursue alternatives to the merger, which may include reviewing evidence of specific plans where available.

3.11. The Competition Appeal Tribunal's 2022 judgment in *Meta/Giphy* also provides insights into the way the counterfactual should be assessed in respect of dynamic competition.[41]

3.12. The CMA's forward looking counterfactual test does not appear to have made it harder for the UK competition authority to find an SLC - with a relatively high enforcement rate in respect of those cases reviewed. Of the seven Phase 2 decisions in 2022, only two were unconditionally cleared, two were blocked, two remedied and one abandoned.

<u>The counterfactual test is effective in identifying merger transactions with competition law issues in Singapore</u>

3.13. The focus of CCCS's analysis is on evaluating the impact of the merger in Singapore and how competition between the merger parties and their competitors may change as a result of the merger. In its review of whether a particular merger transaction results in a substantial lessening of competition, the CCCS will evaluate the competitive situation, with and without the merger. This is known as the counterfactual test, and the applicability and use of this test is ubiquitous and unchallenged in Singapore. The Working Group has extracted relevant principles relating to the identification of the appropriate counterfactual based on the CCCS Guidelines on the Substantive Assessment of Mergers below (4.14-4.24):

4.15 Typically, where the substantive assessment is conducted prior to the completion of the merger situation or shortly thereafter, the relevant counterfactual is forward looking. The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable. A counterfactual should not involve a violation of competition law.

4.16 In most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition, as this may provide a reliable indicator of future competition without the merger. However, in some cases, status quo may not be the appropriate counterfactual. CCCS may need to take into account likely and imminent changes in the structure of competition in order to reflect as accurately as possible the nature of rivalry without the merger.

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41 Competition Appeal Tribunal [2022] CAT 26: 1429/4/12/21 Meta Platforms, Inc. v Competition and Markets Authority - Judgment | 14 Jun 2022 (catribunal.org.uk).

4.23 CCCS will consider all available evidence to decide on the relevant counterfactual.

4.24 The focus of CCCS's analysis is on the effects that the merger situation has on competition. Competition concerns that do not result from the merger situation under consideration and are likely to exist in the counterfactual are outside CCCS's remit in merger assessment.

3.14. The Working Group considers that the application of the forward-looking counterfactual test remains effective and gives effect to identifying and enforcing against merger transactions that adversely affect the competition incentives and abilities of the merger parties and their competitors in Singapore. This forms a key focus of the CCCS's analysis.[42]

3.15. With this, when considering implementing changes to the substantive test and expanded discretion by combining a reversed onus with a move to a 'satisfaction standard', it is important to consider the aspects that are suitable to the Australian jurisdiction. In particular, the Working Group respectfully urges the Taskforce and Treasury to consider that (i) an affirmative-finding system relating to competitive harm may result in an adequate decision-making, in particular when combined with adequate procedural safeguards, and (ii) the counterfactual test may be effective in identifying merger transactions with competition law issues.

4. COMMENTS ON THE POTENTIAL CHANGES TO THE ROLE OF THE FEDERAL COURT

4.1. Under Australia's current judicial enforcement model, the Federal Court is the ultimate decision-maker in the merger control process. Merger parties can also seek a declaration from the Federal Court that allows the merger to proceed. Options 1 and 3 described in the Consultation propose to change the role of the Federal Court. These models would require parties to rely on the Competition Tribunal as the sole review mechanism. It is not yet clear whether the Competition Tribunal would continue to apply the limited merits review that has been in place since the Harper Review, or whether a full merits review would be available.

4.2. The Working Group notes some potential concerns with the proposal. The Federal Court seems to remain an effective and well-equipped place for reviews to be heard and to handle and test evidence. An appeal in the Federal Court allows parties rights of discovery and the ability to cross-examine witnesses and experts. These processes have not generally led to cases in the Federal Court taking considerably longer than those

42 CCCS Guidelines on the Major Provisions, paragraph 6.6.

heard in the Competition Tribunal.

4.3. On the other hand, the current form of limited merits review performed by the Competition Tribunal may not be adequate as the sole avenue for review for the bringing of new evidence or the cross-examination of witnesses and experts to test the findings of the ACCC,[43] as well as with either correcting any perceived unfairness in the ACCC process, or testing the reliability or credibility of information that was previously before the ACCC.[44] While this limited form of merits review may be adequate where a party has voluntarily notified the ACCC of the merger, and other review avenues are available, having this as the only form of review may have a detrimental effect on procedural and substantive fairness.

4.4. The Working Group respectfully recommends the Taskforce and Treasury to aim at (i) exercising caution against a substantial change in the administration and enforcement of the merger regime if it is not carefully calibrated; and (ii) incorporating effective judicial and procedural safeguards to protect due process and the right of review. For this purpose, the Working Group encourages the consideration of experiences of other jurisdictions – including procedural safeguards currently applied in the US and Brazil.

(A) Experience in other jurisdictions with review/appeal rights

4.5. The Working Group considers that there can be value in looking to other jurisdictions for examples of effective forms of merger control also concerning review / appeal rights. However, it is prudent that any substantial changes to the Australian merger rules and process be carefully calibrated within the Australian merger regime. The Working Group considers that the adoption of any aspect from another jurisdiction should be considered with reference to the full context of that jurisdiction's regime.

4.6. For example, more limited avenues of review in certain other jurisdictions should be considered in the context of other checks and balances that are in place within their processes. As an illustration, in the UK, appeals are only permitted on grounds of judicial review. While this is a confined review avenue, there are several checks and balances earlier in the merger review process, including the use of different decision-makers between Phase 1 and 2 and notably the use of a panel of independent members who decide the case at Phase 2 on behalf of the CMA. By way of another example, in the US, both the FTC and DOJ can investigate mergers that fall below notification thresholds. However, neither agency can block a merger, as ultimately this is the role of

43 Applications by Telstra Corporation Limited and TPG Telecom Limited [2023] ACompT 1.

44 S Muys, Substantive, procedural and practical implications of Telstra and TPG (No. 2) for merger parties and the merger reform process – An adviser perspective (Law Council of Australia, Competition and Consumer Law Workshop, 2 September 2023).

a court.

4.7. In the US, parties may appeal decisions by both the Federal Trade Commission ("**FTC**"), Department of Justice Antitrust Division ("**DOJ**"), and state attorneys general. The FTC tries cases in its in-house administrative court before an administrative law judge. These initial decisions may be appealed to the full Commission. Final decisions issued by the FTC may then be appealed to a U.S. Court of Appeals. Decisions in cases against the DOJ, which are brought in federal district court, may be appealed like any other case to a Court of Appeals. Likewise, decisions in cases against state attorneys general may be appealed in state court systems. The U.S. Supreme Court may also elect to hear appeals at their discretion.

4.8. In the EU, the EU Merger Regulation provides for appeal to the EU General Court against decisions of the European Commission on both procedural and substantive grounds.

4.9. In Brazil, the Brazilian Competition Law also provides for the right of private parties to seek the Judiciary when they claim that a particular transaction or a particular CADE decision violates Brazilian Competition Law. A considerable number of CADE's decisions have been reviewed by the courts, but generally to address penalties imposed.

4.10. Further details on review rights for the EU, US, Singapore, Brazil are provided in the overview table below for illustration purposes.

	Can a merger decision by the relevant authority be appealed?	**What decisions are covered?**	**What are the permitted grounds for appeal?**	**Who can appeal?**	**What is the time frame for making an appeal?**	**What are the powers of review body?**	**Can further appeals be made?**
EU	Yes – to the General Court	Most obviously a Phase 2 decision on the compatibility of a concentration but certain decisions taken leading up to the final decision may also be challenged	Both procedural and substantive grounds	Both parties to the transaction and third parties who show standing Member States can also appeal	Within two months of the decision	The Court may dismiss the appeal or uphold the appeal and annul the Commission decision – in which case, the Commission will have to re-assess the concentration	Yes – to the Court of Justice
US	Yes – to a Court of Appeals for both the FTC and DOJ and to appellate state courts at the state-level	Decisions by the FTC, federal district courts, and state courts in relation to an agreement, a merger, an anticipated	Both procedural and substantive grounds	Parties to the proceeding	Within 60 days	A court may dismiss the appeal or uphold the appeal and annul the decision	Yes, to the Supreme Court if it elects to hear the case

	Can a merger decision by the relevant authority be appealed?	What decisions are covered?	What are the permitted grounds for appeal?	Who can appeal?	What is the time frame for making an appeal?	What are the powers of review body?	Can further appeals be made?
		merger, or a conduct					
Singapore	Yes – to a specialist independent board (the Competition Appeal Board)	Decisions by the CCCS in relation to an agreement, a merger, an anticipated merger, or a conduct	Both procedural and substantive grounds	Parties to an agreement, merger, anticipated merger, or any person in respect of whose conduct the CCCS has made a decision, or any person to whom the CCCS has given a direction under section 58A, 67 or 69 of the Competition Act 2004	Within (i) four weeks from the decision from the CCCS relating to a merger transaction, and (ii) two months from the infringement decision from the CCCS for anti-competitive agreements or an abuse of a dominant position	The Competition Appeal Board can: (i) remit the matter to the CCCS for reconsideration, (ii) impose or revoke, or vary the financial penalty, (iii) give direction or take other steps as the CCCS could have given or taken, or (iv) make any other decision which the CCCS could have made	Yes – decisions by the Competition Appeal Board can be appealed to the General Division of the High Court (i) on a point of law arising from a decision of the Competition Appeal Board, or (ii) from any decision of the Competition Appeal Board as to the amount of a financial penalty
Brazil	Yes – to the Judicial Courts	Decisions by CADE in relation to an agreement, a merger, an anticipated merger, or a conduct	Both procedural and substantive grounds	Both parties to the transaction and third parties who show standing Member States can also appeal	Five-year statute of limitations for the submission of private lawsuits, counted from the publication of CADE's final decision in the Brazilian Official Gazette	The Court may dismiss the appeal or uphold the appeal and annul the CADE decision – in which case, CADE will have to re-assess the concentration	Yes – to the superior courts, such as the Superior Court of Justice

(B) Examples of procedural safeguards in other jurisdictions that could be introduced

4.11. There are a variety of procedural safeguards that could and should be considered if the proposal to expand the ACCC's decision-making powers go forward.

4.12. For instance, jurisdictions such as the European Union, Hungary, Spain, and Portugal allow parties access to the case file as a whole, with limited exceptions.[45] This means parties can view the facts upon which a reviewing agency or court is relying and defend themselves with relevant rebuttals. Other jurisdictions, such as the United Kingdom, may provide a list of documents in the file and allow parties to view them upon

[45] OECD, Access to the Case File and Protection of Confidential Information – Background Note, DAF/COMP/WP3(2019)6, 20 (October 15, 2019): https://one.oecd.org/document/DAF/COMP/WP3(2019)6/en/pdf.

request.[46]

4.13. A balance must be struck, however, in protecting confidential information, such as business secrets, commercially sensitive information like pricing and commercial strategies, and sensitive personal information like addresses and telephone numbers. It is vital for competition agencies to "*foster a reputation for respecting confidentiality to ensure the continued supply of information from parties to antitrust proceedings and third parties*."[47] Commonly, many jurisdictions allow parties to prepare and submit non-confidential versions of documents that have been deleted or redacted where relevant, such as in Spain or Greece.[48] Other jurisdictions allow for non-confidential summaries in place of documents (France) or confidentiality rings/data rooms (the United Kingdom).[49] Alternatively, Chile allows parties to request confidential treatment of specific information, and also allows for ex officio assessments.[50] Jurisdictions may also choose to protect confidential information by assessing the age of the data in question, with the European Union holding that commercial information older than five years old is, in principle, not confidential.[51]

4.14. In administrative jurisdictions in which the agency is the decision-maker, it is important to establish an appeals process in which a court can review and annul the authority's decision (such as in Belgium or the United States with the FTC).[52] Timeliness of investigations and reviews are essential to the investigations and reviews themselves, especially where parties will be making significant investment decisions, and is recommended for all jurisdictions by OECD.[53] The International Competition Network also lists "*Efficient and Timely Investigation*" as one of its guiding principles for procedural fairness in competition agency enforcement, stating that authorities should conduct enforcement "*within a reasonable time . . . [to] avoid unreasonable costs and burdens for parties, third parties, and agencies*."[54] Ensuring timeliness also has the added benefit of creating a trustworthy, predictable process and lends institutional support to competition authorities.

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46 *Id.* at 22-23.

47 OECD, Procedural Fairness and Transparency – Key Points, 27 (2012): https://www.oecd.org/competition/mergers/50235955.pdf.

48 *Id.* at 84.

49 *Id.* at 86, 88, 91.

50 Fiscalia Nacional Economica, Decree Law No. 211, Article 39 (1973).

51 European Commission, Communication on the Protection of Confidential Information by National Courts in Proceedings for the Private Enforcement of EU Competition Law, 2020/C 242/01 (July 22, 2020): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0722(01)&from=EN.

52 OECD, The Standard of Review by Courts in Competition Cases – Background Note, DAF/COMP/WP3(2019)1, 31 (June 4, 2019): https://one.oecd.org/document/DAF/COMP/WP3(2019)1/en/pdf.; OECD, *supra* note 20, at 30.

53 OECD, Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement, OECD/LEGAL/0465 (May 10, 2021): https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465

54 ICN, Guiding Principles for Procedural Fairness in Competition Agency Enforcement (2018).

4.15. It is also imperative to ensure that the parties are engaged with the process of review and have opportunities to respond to an authority's charges or concerns and engage early and often in the process, such as in the European Union.[55] Dialogues allow parties to a proceeding to enhance knowledge of the facts and offer occasions for new facts and arguments to be presented to an authority.[56] These dialogues may take the form of a formal right of response, such as in Japan and Korea, or via meetings with the authorities, like in Brazil or Greece.[57] Additionally, allowing parties to use independent advisors such as economists, lawyers, and other financial or business experts in the review process bolsters the engagement process by allowing "fresh eyes" to provide views of the case to the parties and authorities.[58] These and the other aforementioned safeguards help protect procedural fairness in competition review and serve to strengthen the legitimacy and support of competition authorities in their jurisdictions.

Experience in Brazil

Parties' rights of access to information relied on by the competition authority and to the reasoning behind the decision

4.16. In Brazil, in accordance with administrative law and the principle of publicity – given that CADE is an administrative agency within the Executive Power - all decisions made by CADE are public and released both online and on Brazil's Official Gazette.

4.17. In addition, all submissions presented to CADE – i.e., not only those submitted by the applicants, but also those presented by third parties –are made available to CADE's website – except for confidential information.[59]

4.18. This promotes a more transparent environment not only for the parties involved in a transaction, but also for third parties and the market. In particular, this level of transparency ensures that the applicants to a merger case will have full visibility of the reasoning behind the decision issued by CADE, as well as to all pieces of information relied upon by the authority to reach such conclusion – and, ultimately, guarantees the parties' right to full defence and due legal process.

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55 *See* Despina Pachnou, Due Process in Competition Law Enforcement: the New OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement, CPI Columns OECD (February 15, 2022), https://www.pymnts.com/cpi_posts/due-process-in-competition-law-enforcementthe-new-oecd-recommendation-on-transparency-and-procedural-fairness-in-competition-law-enforcement/#_ftn4.

56 OECD, *supra* note 20, at 24.

57 *Id.* at 60, 67-68.

58 OECD, *supra* note 20, at 29.

59 Confidentiality protections may be requested by the parties or implemented *ex-officio* by CADE whenever necessary to preserve strategic or sensitive information; the submitting entities normally present a public version of the submission and another full version with restricted access to the authority.

Opportunities for parties to respond to the authority's concerns

4.19. In Brazil, the parties have several opportunities to appear before CADE and respond to any concerns that may come up during a merger review.

4.20. In cases that are not eligible to the so-called fast track procedure, the applicants engage in pre-notification meetings with CADE (i.e., before formally submitting the notification). It is also common for CADE to send requests for information to the parties during the analysis of a merger case, and to schedule conference calls or meetings with the parties and their lawyers to clarify relevant issues that may impact the analysis of a merger. Such calls and meetings can also be requested directly by the merging parties.

Timeframes for review and transparency related to merger review procedures

4.21. Brazil's merger review system encompasses both a fast-track procedure and a regular procedure, depending on the complexity of the transaction (with very different deadlines for CADE to complete each merger review). Fast-track cases are cleared by CADE in up to 30 calendar days from formal filing, whereas ordinary are decided within a maximum of 330 days (but with a shorter timeframe in less complex regular cases). CADE strictly complies with the review period established by the Brazilian Competition Law and by CADE's regulations.

4.22. CADE has also tried to bring more transparency and legal certainty to the merger review process, such as by releasing formal and public guidelines on gun-jumping, horizontal merger cases, and remedies.

4.23. With this, when considering implementing changes to review / appeal rights in Australia, the Working Group respectfully urges the Taskforce and Treasury to consider that (i) the Federal Court seems to remain an effective and well-equipped place for reviews to be heard, against moving to a new and sole avenue for review; and (ii) any substantial changes to the Australian merger rules and process should be accompanied with effective judicial and procedural safeguards to protect due process and the right of review, in a carefully calibrated manner within the Australian merger regime.

5. OFFER OF FUTURE CONSULTATION OR ASSISTANCE

5.1. The members of the Working Group and Officers of the Antitrust Section would be delighted to have further discussions in respect of the above (or to provide further submissions with a view to engaging constructively) with the Taskforce, should that be of interest at the appropriate juncture.

5.2. In particular, the Working Group would welcome the opportunity to comment further in the context of future consultations related to applicable thresholds, notification fees, notification procedures, anticipated practice standards and merger-related guidelines.

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