JONES DAY

COMMENTARY

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ACCC Releases Media Merger Guidelines

IN SHORT

The Situation: The Australian Competition and Consumer Commission ("ACCC") has released new guidelines on mergers in the media industry.

Looking Ahead: The new guidelines provide some—but not sufficient—clarification on how the ACCC will handle media mergers. Below we offer some insights on reading between the lines to get a more clear view.

On November 1, 2017, the Australian competition agency released its revised *Media Merger Guidelines*. These guidelines update the previous version, which was released in 2006. The ACCC's approach to assessing mergers is set out in its merger guidelines, but owing to the unique nature and role of media mergers in Australia, the ACCC has the view that industry-specific guidelines are valuable.

The need for the revised guidelines arises due to tremendous industry changes since the guidelines were first released in 2006 and because the *Broadcasting Services Act 1992* was recently amended to remove two key restrictions on media sector M&A transactions. In particular, Australia has just removed a rule that prevented any one free-to-air TV broadcaster from reaching more than 75 percent of the population and a rule that prevented any one media owner from owning a TV, radio and newspaper property in the same city.

The new guidelines explain that a traditional media property (such as a free-to-air TV network or a daily newspaper) typically competes in most or all of the following eight markets:

- Wholesale level journalism and news content production
- Wholesale level creation of sports content
- Wholesale level creation of entertainment content
- Retail (i.e. publication or broadcast) of the three categories above
- Advertising
- Delivery platforms

In a traditional media delivery model, the players operate in "two sided" markets in which advertising generates the funding needed for the creation of content and delivery and readership drives advertising revenues. "Disruptive" competition tends to "cherry-pick" one or more markets. For example, social media like Facebook cherry-pick the platform and advertising markets while not participating in the creation and retail delivery of content.

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ACCC Chairman Sims has publicly stated that he is sympathetic with traditional operators needing to merge to save costs and continue to compete. This attitude is borne out in the recent deals discussed in the new guidelines, all of which were approved.

A key problem with the new guidelines is that none of the included example deals were blocked, so they do not provide a good sense of the reach of the ACCC's likely approach to a media merger assessment. Additionally, the following key questions remain unanswered:

How Would the ACCC Process Applications for Authorization Under the Public Benefit Test on the Basis that a Merger to Monopoly Is Necessary to Fund "Shoe Leather" Journalism?

The guidelines discuss only the ACCC's approach to the competition assessment process, but merging

parties can instead apply for authorization on the basis of public benefits. The New Zealand Commerce Commission has already been confronted with such a merger between the two main publishers of daily newspapers. In a decision of more than 300 pages, the agency wrestles with this very controversial issue.

What Evidentiary Threshold Does the ACCC Expect to Be Shown for New Technologies?

Although new technologies that threaten to change the industry are regularly introduced, many technologies fail. Even those that succeed generally only win part of the revenue.

Market Definition Is Key but the ACCC's Method Is Unexplained?

Like its overseas counterparts, the ACCC relies on a traditional antitrust test for deciding what constitutes a market. This involves considering the effects of a "significant non-transitory increase in price" ("SNIP"). However, in many media markets, the SNIP technique cannot be used without controversial modifications because there is often no explicit price paid by consumers. Rather, prices are often nominal and are used to gain statistics on readership rather than to fund content. Instead, the funding often comes from advertising. The ACCC's recent opposition to the oOh!Media merger provides a window into how the ACCC will likely undertake this assessment.

How Will the ACCC Assess the Competitive Effect of Public Broadcasters?

There are two public broadcasters in Australia: the ABC (for general content) and the Special Broadcasting Service (for ethnic entertainment, World News and foreign sports content). Both of these networks are important in content markets, and SBS is also a player in advertising markets.

How Will the ACCC Deal with the Unequal Treatment for Different Media Companies under the Regulations?

As entities other than traditional media companies enter the entertainment space, it is unclear how the ACCC will address inequitable regulations that provide new entrants with a substantial competitive advantage. Open issues include:

- Tax treatment. Foreign operators may be able to channel profits through favorable tax jurisdictions, whereas licensees and owners of physically printed media are unable to avoid domestic tax obligations.
- Local censorship laws.
- Local content requirements. Requirements to produce and broadcast Australian-made products and to carry political advertising during elections applies only to domestic licensees.
- Regulation of political advertising, such as attributing messages to a natural person and disclosing the party affiliation.

A copy of the media merger guidelines may be obtained here.

TWO KEY TAKEAWAYS

1. In response to the removal of two key legislative prohibitions on media M&A deals, the ACCC has released its revised media merger guidelines. The guidelines take a sympathetic approach to greater consolidation of traditional players in the face of competition from disruptive technologies.
2. The guidelines provide little guidance on the "outer bounds" of what is acceptable, and they fail to address a number of central questions that are unique to the media industry.

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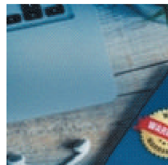

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