

Merger knock-backs—down but not out

Proposed company mergers that get a knock-back from the ACCC's mergers branch have not necessarily reached the end of the road, as pharmaceutical wholesalers API and Sigma are showing.

The two companies want to combine in a massive \$1.4 billion merger designed to rationalise the pharmaceutical wholesaling business in Australia.

An assessment recently conducted by the ACCC found that the merger would be likely to result in a substantial lessening of competition in that market. For this reason the companies were advised the ACCC would oppose the merger as a breach of one of the key competition provisions of the Trade Practices Act—section 50.

The merger would have led to a duopoly of full-line pharmaceutical wholesalers in Australia, reducing the current three players—API, Sigma and Faulding to just two, with a combined API–Sigma accounting for 60–70 per cent of pharmaceutical products wholesaled to retail pharmacies.

The ACCC was concerned that the merger might lead to a cut in the quality of services and lower rebates than those now received by retail pharmacies.

API and Sigma believe, however, that their merger would benefit not only their own shareholders but also retail pharmacies and the nation.

The two companies argue that the public benefits of the proposed merger outweigh any anti-competitive effect, and that an 'on balance' assessment taking public benefit factors into account will show that the merger should be allowed.

An alternative route to merger approval—the authorisation process—is provided in the Trade Practices Act for companies in just this situation.

API and Sigma announced in June that they would take their proposed merger back to the ACCC and seek authorisation on public benefit grounds. If successful, this would give the merger immunity from being blocked under s. 50 of the Act.

By following the authorisation route, the companies get a fresh chance to convince the ACCC that the merger should be allowed.

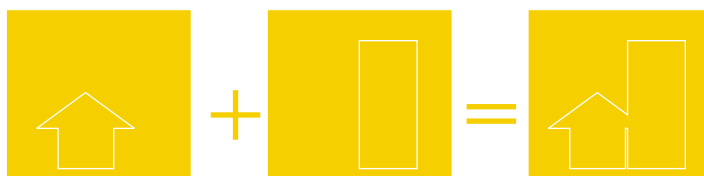
The Trade Practices Act spells out the kinds of public benefit that can be persuasive in an authorisation application.

As well as having to take into account any general public benefit the parties may argue, the Trade Practices Act says the ACCC 'must regard' a significant increase in the real value of exports and a significant substitution of domestic products for imported goods as benefits.

Authorisation is a public process under which anyone with an interest in the outcome of a merger can make a submission—and that includes consumers. Submissions are open for inspection on a public register. The companies concerned can get commercially sensitive information protected by having confidential elements held back from the register.

The Australian Competition Tribunal exists as a final safeguard in the merger approval system. Should companies in the situation of API and Sigma fail to convince the ACCC that the public benefits of the proposed merger outweigh any substantial lessening of competition in the market, it can appeal the decision to the tribunal.

The tribunal reaches its own conclusions on whether authorisation should be granted and under what conditions.



Mergers and acquisitions recently approved

The ACCC decided not to oppose GE Capital's acquisition of AGC from Westpac Bank.

'In regard to the provision of in-store credit, some retailers did express their concern to the ACCC with respect to the competitive consequences of this merger', ACCC Chairman, Professor Allan Fels, said.

'However, it is the view of the ACCC that the provision of in-store credit is just one of a number of payment options available to consumers.'

Nor was the Pacific Access acquisition of Fairfax's Citysearch online business opposed.

The primary issue of concern to the ACCC was the control Pacific Access would have over copyright of Citysearch's online business directories, and consequential ability to limit competitive conduct. Fairfax's retention of the right to license, lease or sell the copyright to other parties free from Pacific Access interference resolved this concern.

'The ongoing availability of Fairfax business data and access to directory copyright held by Fairfax for any business seeking to enter the market, or to use the data to provide related services, satisfied the ACCC that the proposed acquisition was unlikely to substantially lessen competition', Professor Fels said.

The Commission also approved the merger of the Australian partnerships of accountants Arthur Andersen with Ernst & Young.

Extensive market inquiries confirmed that after the merger the combined partnerships would still face vigorous and effective competition from the remaining 'big four' accountancy firms, as well as from small global and Australian accountancy firms.

Other transactions allowed by the ACCC recently include:

- the merger between Bayer AG and Aventis Crop Science, two agrochemical companies
- the Grainco Australia and ConAgra Trade Group joint venture, Marketlink, performing the grain trading and marketing operations of both groups in Australia
- the merger of global computer companies Hewlett-Packard and Compaq.

In the past three years the ACCC has considered 685 mergers and has opposed only a handful each year.

