SUBMISSION

BY

THEEU, COMPETITION AND PROCUREMENT GROUP OF A&L GOODBODY

TO

THE COMPETITION AUTHORITY

IN RESPECT OF

THE "DRAFT MERGER GUIDELINES FOR CONSULTATION"

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INTRODUCTION

1. The EU, Competition and Procurement Group of A&L Goodbody (**Group**) welcomes and supports the Competition Authority's public consultation in respect of theDraft Merger Guidelines (**Draft Guidelines**)issued by the Competition Authority (**Authority**) on 13 September 2013. In that regard, we welcome the opportunity to make a submission to the Authority on the Draft Guidelines as part of its public consultation.

2. Please note that the enclosed comments are provided by individual members of the Group and are not made by, or on behalf of, A&L Goodbody or any of itsclients and are not binding in any way.

GENERAL COMMENTS ON THE GUIDELINES

3. We believe that,on the whole, the Draft Guidelines reflect current international trends and conceptsin merger controland will enhance further the merger control regime in Ireland.In that regard, it is important that the Draft Guidelines are updated to increase the transparency of the substantive process which is the basis of the Authority's approach to merger control. The Draft Guidelines should therefore only focus on identifying genuinely competitively harmful mergers and be neutral on mergers that are either competitively beneficial or have no impact on competition.

4. A general observation regarding the Draft Guidelines is that, in parts, they seemto be without sufficient flexibility, whereas in other parts, matters are expressed very broadly and those matters areopen to several possible interpretations. We understand the Authority's desire to retain flexibility but there is also a need for precision where possible in the Draft Guidelines.

5. As the Authority fulfils a statutory function,it is subject to review by the High Court (and, in case of appeal, the Supreme Court) according to *legal* rather than purely economic standards. It is open to debate whether various parts of the Draft Guidelines (e.g., paragraph1.19) meet the legal standard because the Authorityappears to be following an economic test but ignoring the legal standards and requirements (e.g., the Competition Act 2002 (as amended) (**Competition Act**) requires competition to be assessed in the context of particular markets), so market definition is not just important but is actually essential in certain circumstances. The State has legislated for compliance to a legal standard and a legal test (see the comment below in regard to paragraph 1.19) as well asan economic test.

6. The Draft Guidelines should refer, where possible, to previous merger control cases of the Authority and also to other merger control guidelines (such as the European Commission's*Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)*[1]and*Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07)*[2])to illustrate and explain aspects of the Draft Guidelines. In addition, while not strictly concerning the substantive assessment of mergers, the Authority might also clarify when and to what extent notifying parties can rely on the *European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01)*.[3]

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[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF

[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF

[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF

7. The following brief comments are respectfully submitted to assist the Authority and are made in chronological order according to the provisions of the Draft Guidelines rather than in the order of importance.

Section 1: Elements of Merger Review

8. In paragraphs 1.4 – 1.11, the Draft Guidelines consider what a "*Substantial Lessening of Competition*" (**SLC**) means. Reference is made in paragraph 1.7 of the Draft Guidelines to "*all possible theories of consumer harm arising from possible adverse competitive effects*". The Authority should not ultimately take into account merely "*possible*" adverse competitive effects but should only focus on likely demonstrable adverse competitive effects.

9. Accepting the qualification in paragraph 1.8 of the Draft Guidelines, there is no discussion of the meaning of "*substantial*".It would be helpful to merging parties and practitioners for the Authority to explain when it considers there to be a lessening of competition which is "*substantial*" with a focus on what the Authority regards as justifiably material.

10. Reference is made in paragraph 1.8 of the Draft Guidelines to whether a merger is "*likely*" to SLC, while the test under Section 20(1)(c) of the Competition Act is that it "*would*" SLC. In that regard, a standard of proof is missing from the Draft Guidelines and it is suggested that it should be stated to be on the balance of probabilities. In this regard, the Authority should not require a merger defence where there is a "*possible*" SLC finding as stated in paragraph 1.20 of the Draft Guidelines.

11. Paragraph 1.11 refers to non-controlling merger shareholdings.However, the Draft Guidelines give no guidance on how the Authority would review such shareholdings or, indeed, why the Authority *may* review them.The Authority should confirm that "*control*" isand remains the only basis for the necessity or any voluntary decision to submit a notification to the Authority under Part 3 of the Competition Act.Further guidance in relation to the "*competitive effects that may arise*" is needed as the reference to non-controlling minority shareholdings raises potential questions which are left unanswered.

Section 2: Market Definition

12. Paragraph 1.19 reduces the role of market definition in the assessment of competitive effects.We agree that market definition is not an end in itself and that merger control must look at a wide range of factors and effects before reaching a fully considered decision (part of which may be to avoid any rigid application of market definition guidelines).

13. However, the Draft Guidelines should not diminish the role of market definition. Market definition remains a necessary element of merger analysis under Irish merger control. Any move away from a market definition exercise will make it more difficult for businesses to decide whether to proceed with a merger (or at least a more in-depth analysis of the competitive effects of a merger).

14. The test under Section 22(3) of the Competition Act requires the Authority to determine whether the transaction would substantially lessen competition "*in markets*" for goods or services in the State. The relevant market is therefore a necessary part of the proof which the Authority must establish. This is not an issue in the vast majority of determinations but would certainly be an issue in any determination which is challenged. Market definition is not always optional, as paragraph 1.19 implies, and the text should be revised to reflect this.

15. We welcome the further guidance provided in the Draft Guidelines on the Authority's approach to market definition and the factors they take into account. The Draft Guidelines would benefit from illustrative references to past Authority (and where helpful other jurisdictions') merger control cases (though, of course, each merger turns on its own specific facts).

16. In paragraph 2.5, perhaps the word "*important*" in line 4 should be replaced with the word "*essential*" as the sentence relates to situations where there is "*significant*" horizontal and/or vertical overlap in which case market definition is not "*likely to be an important part*" but *"likely to be an essential"* part of the Authority's assessment.

17. In paragraphs 2.10 and 2.12, there is a certain looseness in the drafting through use of words such as "*usually*" in paragraph 2.10 and "*at least*" in paragraph 2.12.

Section 3: Market Concentration

18. Regarding paragraph 3.9, it should be noted that in a small market, such as Ireland, the existence of a small number of competitors can often mean that data/research companies are deterred from collecting and publishing data as there would be too few buyers for their reports.

19. Regarding paragraph 3.13, the first bullet may be too broad and could benefit from some explanation. In the third bullet, the phrase "*potential entrant*" is vague. There is some amplification in paragraph 4.3 but it is a vague expression and could be used to deter mergers on a somewhat whimsical basis (e.g., an undertaking could easily switch production and could therefore be a "*potential*" competitor even though it has never expressed any interest in the market before). The last bullet may not make sense as paragraph 3.13 starts by saying "….*a merger that falls below the HHI thresholds*" (i.e., less than or equal to 2000 according to paragraph 3.11) but the last bullet relates to a situation where a party has a pre-merger market share of 50% (i.e., 50x50=2500).

20. In relation to the importance of market shares, there seems to be differing approaches/points of emphasis in parts of the Draft Guidelines by reference to: (i) the general importance of identifying the relevant market (Section 3 of the Draft Guidelines); (ii) market shares being just one element of the analysis; and (iii) the statement in paragraph 4.15 of the Draft Guidelines that "*market share and concentration measures are central elements in assessing the impact of a merger on market structure*". While this latter statement is then partly qualified in paragraph 4.15 (at least as regards unilateral effects), it seems that the Authority regards market definition and market shares as key determinants in assessing whether a merger would SLC.

Section 4: Horizontal Mergers

21. We have some drafting suggestions on section 4. In paragraph 4.9, the first "*to*" in the first line should be omitted. In paragraph 4.24(b), the phrase "*at some un-specified time*" is too vague by virtue of being open-ended and needs precision. Finally, in paragraph 4.30, the last sentence is also imprecise. Saying "*a large number of suppliers*" is not accurate – the market power of one or more large suppliers could change the balance despite there being a "*large number*" of suppliers and so greater clarity here would enhance this section.

22. In relation to co-ordinated effects, the Authority refers to the extent to which a merger "*is likely to establish coordinated behaviour, or exacerbate pre-existing coordinated behaviour, leading to an SLC*". This suggests that the Authority will take into account its own interpretation of pre-merger behaviour. In this regard, the Authority may wrongly interpret previous "*coordinated behaviour*" as effective competition and thus add this to factors leading to a conclusion that a merger would be likely to result in coordinated effects. The Authority should only be looking at the wider prospective criteria to determine whether there would be coordinated effects as a result of a merger.

23. This issue also arises in the Authority's statement at paragraph 4.40 of the Draft Guidelines as follows: "*In the absence of credible contrary evidence, previous overt or tacit coordinated behaviour will be considered an indicator of possible or likely coordination postmerger.*" There is no certainty as to what burden of proof the Authority is applying here. The Authority seems to be reaching back for what it regards as relevant evidence and then requiring notifying parties to provide "*credible contrary evidence*" to rebut the Authority's interpretation of a relevant "*indicator of possible or likely coordination*".

24. We submit that this does not represent an appropriate standard or sufficiently rigorous approach to the determination of coordinated effects which itself has been found in the *Airtours*[4] and *Impala*[5] decisions of the EU Courts to be a very complex evidential process.

[4] T-342/99, *Airtours plc v. Commission*, (2002) ECR II-02585

[5] T-464/04, *Impala v. Commission*, (2006) ECR II-2289

Section 5: Barriers to Entry and Expansion

25. We have some drafting suggestions on section 5. In paragraph 5.2, there is a looseness of language in words such "*costless*" and "*quick*" –more reasonable alternatives should be considered. An inference from the language in paragraph 5.17 is that there may be an inclination against mergers when we understand the Authority to take a neutral approach to mergers- indeed, it would be useful for the Draft Guidelines to state explicitly that the Competition Authority (as does the legislation) takes no positive or negative view of transactions as such (i.e., it takes a neutral view).

26. In relation to sufficiency of entry, we agree that it is not necessary that one new entrant alone duplicates the size and scale of the merged entity as set out in paragraph 5.9 of the Draft Guidelines. To provide notifying parties with some indication of the required level of sufficiency, we would suggest that it would be enough if the notifying parties could demonstrate either that entry in the market would replace the amount of output reduced as a result of the merger, or thata maverick would enter the market.

Section 6: Efficiencies

27. The Draft Guidelines place many challenges in the way of justification of efficiencies (both in terms of evidence and burden of proof) that it is difficult to see how efficiencies could realistically be raised as a defence to a merger that would otherwise SLC.

28. The Authority states at paragraph 6.7 of the Draft Guidelines, that: "*The evidence provided to the Authority in support of efficiency claims must be demonstrated to a high degree of certainty*". We suggest that the phrase "*a high degree of certainty*" be changed to "*a high degree of probability*" as certainty is either certain or not and is not a matter of degree. In paragraph 6.10, the standard of proof required of "*convincing evidence*" is similar to the criminal standard of "*beyond reasonable doubt*" rather than the appropriate civil standard of "*on the balance of probabilities*" and should be amended as such. We believe that the Authority could at least qualify this by, for example, stating that such "*certainty*" is on a balance of probabilities. Preferably, the Authority would state generally that the standard of proof of any requirements on notifying parties, as set out in the Draft Guidelines,to show that a merger does not SLC is on the balance of probabilities.

29. The section on "*Evidence for Efficiency Claims*" (paragraphs 6.10 to 6.12) makes it excessively onerous for merging parties to establish such claims. The lists in 6.10 and 6.11 are unnecessarily inflexible. It would seem that a more reasonable approach could be taken in the Draft Guidelines' treatment of efficiency claims. The Draft Guidelines could provide that the presence of efficiencies is a relevant factor in the Authority's broader assessment on whether there is an SLC.

30. The Authority also requires at paragraph 6.14 of the Draft Guidelines that efficiencies be shown with "*sufficient likelihood and speed*". There is no indication what is meant by "*sufficient likelihood*" and efficiencies can be realised over a medium to longer term. In addition, by requiring "*speed*" (itself an unclear term) the Authority may be disregarding genuine efficiencies resulting from a merger.

31. We consider that paragraphs 6.12 and 6.14 also set too high a standard of proof. With regard to paragraph 6.14, the Draft Guidelines state that there must be convincing evidence (which is acceptable) to show that efficiencies "*will*" benefit consumers. "*Will*" involves absolute certainty and a lesser standard (e.g. "*may*" or "*are likely to*")would be more appropriate.

Section 7: Countervailing Buyer Power

32. Not only do the DraftGuidelines make countervailing buyer power more difficult to establish but the reasons for doing so are unclear. A more flexible approach in the DraftGuidelines would be welcomed.

Section 8: Non-Horizontal Mergers

33. The Draft Guidelines could be improved by making explicit the reliance placed on the European Commission's *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07)*.Alternatively, it could be usefully stated that where doubt persists or for further guidance, reference can be made to the guidance of the European Commission.

34. It is submitted, in particular, that the Authority should adopt the safe harbour threshold references in Part III of the European Commission's*Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07)*.

Section 9: Failing Firms and Exiting Assets

35. The Draft Guidelines regarding "*Failing Firm*"may be overly strict in the approach taken as there is almost no prospect of being able to satisfy the failing firm test as drafted in paragraph 9.5. It is unrealistic to expect all four elements of the test to be met and it is unreasonable to preclude the use of the defence in circumstances where only three of the elements can be established. A more pragmatic approach to failing firms, whereby a list of factors which may, but not must, be satisfied in order to raise the failing firm defence would be welcomed. In particular, the treatment of "*Failing Division*" in paragraph 9.11,where an even higher level of scrutiny is involved, is overly harsh.

OTHER COMMENTS

Voluntary Notifications

36. Merging parties and practitioners alike would benefit from guidance from the Authority (as provided in the 2003 Guidelines) in respect of when a so-called "voluntary merger notification" under section 18(3) of the Competition Act might be considered by the merging parties.

37. Section 18(3) merely provides that the merging parties may make a voluntary notification where the thresholds for a mandatory notification under section 18(1) are not met. The Draft Guidelines make reference to voluntary notifications but only in the context of the Herfindahl-Hirschman Index in Section 3. Paragraph 3.14 states: "*The HHI may also be a useful guide for merging parties who areconsidering a voluntary notification where the merger fallsbelow the thresholds for compulsory notification set out insection 18(1) of the Act*." This guidanceshould be more precise with greater clarity on market share thresholds.

38. While it will always be for the merging parties to make their own self-assessment as to whether to notify a transaction, further guidance from the Authority would most certainly be welcomed.

Case studies and precedents

39. As referred to above, many regulatory agencies worldwide issue guidelines with examples and case studies to assist readers and to demonstrate their guidance in practice. Some examples or case studies could be usefully inserted into the proposed guidance.

40. Some agencies issue guidelines with precedent cases cited and it is suggested that a similar approach is adopted here.

Joint ventures

41. Greater analysis of substantive effects on competition by joint ventures would be welcomed, for example, in relation to the Authority's views on spillover effects of joint ventures.

Competing bids and the Counterfactual

42. It would be helpful if the Authority could outline how parties in a competitive bidding process for a target would assess the relevant counterfactual.

Conclusions

43. The Draft Guidelines is a very helpful document and these comments should be seen as suggestions for enhancement.