INTERNATIONAL BAR ASSOCIATION
ANTITRUST COMMITTEE'S
WORKING GROUP COMMENTS REGARDING
THE IRISH COMPETITION AUTHORITY'S
DRAFT MERGER GUIDELINES FOR CONSULTATION

6 November 2013

1. INTRODUCTION

1.1. The Antitrust Committee of the International Bar Association welcomes the opportunity provided by the Irish Competition Authority ("**CA**") to participate in the public consultation on its Draft Merger Guidelines (the "**Guidelines**") which were published on 13 September 2013.

1.2. The International Bar Association ("**IBA**") is the world's leading organization of international 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 across the world.

1.3. The IBA's approximately 50,000-strong membership of individual lawyers from across the world, including antitrust practitioners and experts with a blend of jurisdictional backgrounds and professional experience, places it in a unique position to provide an international and comparative analysis in the development of commercial laws. Further information on the IBA is available at http://www.ibanet.org/.

1.4. These comments have been prepared by a Working Group of the IBA Antitrust Committee ("**IBA-WG**"). The members of the IBA-WG are listed in Annex 1.

1.5. The IBA-WG congratulates the CA for consulting stakeholders on the Guidelines which are an impressively thorough guide to the CA's approach to key elements of the exercise of its merger control function. In this submission, the IBA-WG limits its comments to specific points which it feels are of greatest relevance to its members.

1.6. The Guidelines, as provided under Para. 1.3, are intended to be accessible to specialists and non-specialists alike. The IBA-WG commends the CA's clarity of drafting and also its use of "everyday language".

1.7. In the expectation that the CA will adopt a final version of the Guidelines over the coming months, the IBA-WG would strongly encourage the CA separately to consider publishing consolidated jurisdictional guidelines in the near future. The IBA-WG notes, in this regard, that the CA has published guidance regarding certain relevant jurisdictional issues. However, there are many jurisdictional issues that are not specifically addressed by the relevant CA guidelines.

1.8. The CA has confirmed that guidance can be sought from the European Commission's Consolidated Jurisdictional Notice under the EU Merger Regulation in respect of certain matters of interpretation which are not covered by the CA's Notice in respect of certain terms used in Part 3 of the Competition Act 2002 as amended on 12 December 2006 Nonetheless, it is not always clear what is the correct approach to interpretation. Accordingly, it would be very helpful to legal practitioners as well as the Irish/international business community if the CA were to issue jurisdictional guidelines.

1.9. Pending the ultimate publication of such jurisdictional guidelines, the IBA-WG recommends that the CA should, in the interests of legal certainty, provide guidance on the extent to which the provisions of the European Commission's Consolidated Jurisdictional Notice may be relied upon when considering Irish merger control issues.

1.10. Similarly, the CA might also address the extent to which other merger control guidance from the European Commission may be followed in an Irish context. Given the similarity of culture and approach between the Irish and EU systems, the IBA-WG suggests that the CA might consider advising practitioners that full reliance may be placed on EU merger control guidance, making exceptions only for identified elements in that guidance which the CA finds do not transfer well into the Irish context.

1.11. Of lesser urgency but nonetheless important, the CA might also consider reviewing its February 2006 Revised Procedures for the Review of Mergers and Acquisitions.

2. ALIGNMENT WITH EUROPEAN COMMISSION GUIDELINES

2.1. Both EU and Irish merger control rules apply in Ireland. Which set of rules will apply to a given transaction involving companies based in Ireland or having effects in Ireland depends on whether a given transaction meets the jurisdictional thresholds under EU or Irish merger control law. Moreover, even once jurisdiction has been determined on the basis of turnover thresholds, referrals between Ireland and the European Commission can take place. Under the EU Merger Regulation, a Member State may refer a merger notification to the European Commission. In addition, the Commission may refer a notification in whole or part to a

Member State. Accordingly, in the interests of legal certainty, the IBA-WG believes that it is important that the approach of the CA is consistent with that of the Commission. The IBA-WG further believes that this alignment should be explicitly acknowledged.

2.2. The IBA-WG notes that, in substance, the CA's overall approach is generally well aligned with the relevant European Commission's guidance. However, there are some potential divergences from the Commission's Horizontal and Non-Horizontal Merger Guidelines.

2.3. First, the Guidelines' discussion of market concentration screening (in particular, through the use of the Herfindahl-Hirschman Index ("**HHI**")) appears to (i) apply the same HHI thresholds to both horizontal and non-horizontal transactions; and (ii) introduce additional considerations that can lead to competitive harm – even in transactions involving non-concentrated markets (or low deltas). The CA does make clear that this is intended as a screening device. Nevertheless, it seems questionable that the same market concentration principles would apply to horizontal and non-horizontal mergers, given that the CA's own case decisions (in line with European Commission practice) show that non-horizontal mergers are much less likely to give rise to competitive harm. The Guidelines themselves propose to assess horizontal and non-horizontal mergers differently (See Section 3.1, below). Moreover, in practice, the Guidelines would appear to lead to a situation where the CA could find competition concerns – and justify in-depth investigations – at a lower threshold than what would obtain in practice before the European Commission.

2.4. Furthermore, while the CA acknowledges in the discussion of market shares that "competition concerns are more likely to arise where the merger creates a merged entity with a large market share", unlike the European Commission's guidance, it does not indicate a market share level below which the transaction is unlikely to give rise to competition concerns. Consistent with the Commission's Guidelines, the CA might indicate that horizontal mergers resulting in a market share not exceeding 25% and vertical mergers where the post-merger share of the new entity in each of the markets concerned is below 30%, are unlikely to give rise to competition concerns.

2.5. Second, in the context of efficiencies, the Guidelines appear to require a higher standard of proof than what is required in practice before the European Commission. It is unclear whether this is intentional; clarification on this point would be helpful.

2.6. Third, regarding the timeliness of entry as described under Para. 5.5, unlike the relevant EU guidance, there is no indication of the period connected with entry that the CA might deem timely, e.g., two years. The IBA-WG recommends that the CA should follow the Commission's example.

2.7. Finally, in light of the Commission's latest proposals on changes to the simplified procedure, the IBA-WG recommends that the CA might consider the introduction of market share

thresholds which will give a 'non-binding' indication that a transaction is unlikely to lead to competition problems. For example, the CA might indicate that horizontal mergers where the combined market shares of the merging parties is less than 20% do not give rise to competition concerns. This would increase consistency with the Commission's approach, even in the absence of a formal simplified procedure in Ireland.

3. ISSUES OF PRESENTATION

3.1. The IBA-WG welcomes the CA's proposal to distinguish between horizontal and non-horizontal mergers. The latter are structurally different to horizontal mergers and thus require a different evaluation methodology. The IBA-WG shares the CA's opinion that non-horizontal mergers do not directly result in the loss of competition since the merging parties are not competitors in principle, and, it is highly unlikely that there would be a change in the level of market concentration as a result of the non-horizontal merger. Specifically in relation to conglomerate mergers, the IBA-WG recommends that the CA should expressly note that this type of merger is highly unlikely to give rise to competition concerns. We also suggest the CA might include a statement that only horizontal mergers have previously given rise to prohibition or the requirement for substantial remedies.

3.2. The IBA-WG notes that the CA has gained significant merger control experience, reviewing nearly 600 notifications since the entry into force of the current Irish merger control regime in 2003. This work has often required the CA to apply to specific situations many of the theoretical concepts addressed in the Guidelines. The IBA-WG suggests that, to increase the practical utility of the Guidelines, the CA should refer to its own previous decisional practice by way of illustration. For example, there is a very useful discussion on co-ordinated effects in both the CA's 2013 decision regarding Uniphar/CMR and its 2008 decision regarding Heineken/Scottish & Newcastle. References to previous cases are a hallmark of the Commission's guidelines on both horizontal and non-horizontal mergers.

3.3. The IBA-WG recommends that the CA should further illustrate the Guidelines by the insertion of some hypothetical/worked examples. The IBA-WG notes that CA has previously used this approach for example in its Notice on the Activities of Trade Associations and Compliance with Competition Law dated November 2009. Indeed, such examples are widely used by the European Commission in its Guidelines on horizontal agreements.

3.4. The IBA-WG suggests that certain phrases used in the Guidelines should be exemplified or clarified. For instance, we understand that the term "minimum size" used in Para. 1.17, refers to the "output, capacity or customer base that a firm requires in order to compete effectively with incumbent firms in a market" as it is stated in the footnote 18. It might be useful in Para. 1.17 to cross-refer to footnote 18. Similarly, the terms "potential competitor" (Para.'s 1.16 and 1.17); "large market share" (Para. 3.5); "significant period of time", "historical changes" and "recent changes" (all in Para. 3.6); the term "historic" (Para. 3.8);

and “timely fashion” (Para. 6.7) might be more clearly expressed. For example, there is US precedent regarding the concept of a ‘potential competitor’ which might be helpful.

3.5. The IBA-WG recommends that the CA might reconsider certain wording which might be interpreted as suggesting that mergers are more frequently harmful to competition than is actually the case. For example, the CA might revisit

a) Para 4.2 in respect of horizontal mergers, “Not all mergers are harmful to consumers.”; and

b) Para 8.5 “Non-horizontal mergers are generally less likely than horizontal mergers to generate competitive concerns.”

The IBA-WG observes that very few mergers have been found by the CA to be harmful to consumers and that virtually no non-horizontal mergers generate competitive concerns.

4. ISSUES OF EVIDENCE AND DATA AVAILABILITY

4.1. The IBA-WG notes that the CA places greater emphasis in the Guidelines on issues of evidence than in its previous guidelines. This approach is welcome and the IBA-WG suggests that the CA might consider providing more guidance on the evidential standards it will apply. In particular, the CA might provide some guidance on its approach to the burden of proof, the standard of proof and the strength and quality of the evidence the parties and the CA should produce.

4.2. The IBA-WG notes that the CA frequently refers to evidence in the form of price and sales data. However, in practice, given the size/value of certain Irish markets reviewed by the CA, such data may be unavailable or prohibitively expensive to obtain. The IBA-WG requests that the CA consider explaining how it will deal with cases in markets in which there is a ‘data drought’.

5. OTHER

5.1. The IBA-WG welcomes the CA’s proposal in Para 1.14 to take into consideration the fact that the situation prior to the merger or acquisition may not always establish the relevant counterfactual.

5.2. Given the prominence of the CA’s explanation of the significance of counterfactual analysis (on page 3 of the Guidelines), the IBA-WG has some concern that the Guidelines might be understood to mean that every case notified to the CA will be subject to counterfactual analysis. In many cases, it may not be necessary to examine the counterfactual in detail in order to confidentially conclude that anti-competitive effects are unlikely to occur. The IBA-WG encourages the CA to make an express statement to that effect.

5.3. The IBA-WG notes that the Guidelines are considerably more detailed that the previous guidelines and that, in respect of certain elements of the Guidelines, the CA goes into much greater detail on its proposed approach than it did previously. In particular, the Guidelines set out lists of factors for review in connection with issues that feature frequently in merger control analysis: examples include conditions conducive to coordinated effects (page 21), constraints on coordination (page 22), issues related to market entry (pages 24-29), buyer power (page 34) and vertical foreclosure (page 39).

5.4. In principle, the IBA-WG welcomes the increased level of insight into the CA's thinking provided by the Guidelines. However, there is a concern that this more expansive guideline could slow down the CA's merger review process if it becomes prescriptive. More particularly, it would be unhelpful if this framework slowed clearance or extended review in non-problematic notifications. The threshold for moving to Phase 2 in the Irish system is less substantively demanding that its equivalent under EU merger control rules. From a practical point of view, the IBA-WG's concern is that, due to the level of detail and the complexity of the analytical elements outlined in the Guidelines, the CA in some cases may find itself unable to conclude at Phase 1 that all the elements of the Guidelines are satisfied with the result that some cases that should be cleared in Phase 1 may have to be moved into an unnecessary Phase 2 review. The IBA-WG therefore suggests that the CA might reconsider the degree of complexity and detail required in the Guidelines or clarify that these elements reflect the manner in which the cases raising serious concerns will be examined.

5.5. Apart from Para. 3.14, the CA pays little or no attention to when a voluntary notification might be considered. By contrast, Para. 7 of the current CA guidelines is entirely devoted to when a voluntary notification might be made. The IBA-WG recommends that the CA address the particular situations where a voluntary notification might be warranted in the updated Guidelines.

6. MISCELLANEOUS

6.1. Para. 1.11 of the Guidelines states that the CA will consider the competitive effects that may arise where any of the merging parties have non-controlling minority shareholdings in relevant third parties prior to the merger. The IBA-WG believes that the CA should clarify: i) what is meant by non-controlling minority shareholdings, and ii) which third parties are likely to be seen as "relevant" in any given transaction.

6.2. In Para. 3.10, it might be useful to demonstrate the calculation of the HHI with a simple example.

6.3. In Para. 4.30, the CA should note that in the case of restricted or negotiated procedures under EU public procurement rules, often a maximum of five parties are invited to submit tenders.

6.4. Regarding Para. 5.18 (a), the CA might address how merging parties might show the effect of entry on the 'intensity of competition'.

6.5. Para. 6 – There is no mention of 'out of market' efficiencies although this concept is mentioned in certain US cases.

6.6. Para. 6.12 – It will be difficult to provide support for any efficiencies argument for all sources listed in Para. 1.21.

6.7. The Guidelines state at Para. 7.10 that the onus is on merging parties to provide credible evidence to show that countervailing buyer power will prevent harm to competition post-merger. It may not be appropriate to stress here that the evidentiary burden is on merging parties. In some of the categories set out in sub-para.'s (a) to (e), much of the relevant evidence will be what the CA finds through its own market investigation (e.g. merging parties will not have documentary evidence to support the proposition that a given customer can enter a particular market).

6.8. Para. 9 – In the current CA guidelines (as well as US guidance), there is a requirement for the 'failing firm' to make a good-faith effort to elicit alternative offers that would be less of a threat to competition than the proposed merger. The IBA-WG queries why this provision has been removed. Also, in practice, it will not always be possible to show that the entirety of the assets of the failing firm will exit the relevant market. The IBA-WG recommends that the CA moderate this language by saying, for example, "relevant assets of the failing firm".

6.9. Para. 8.11 of the Guidelines states that the ability of a merged entity to harm a downstream competitor depends on various factors. For example, harm to competitors is more likely if an input comprises a significant proportion of the downstream competitor's cost of production than if the input is of a small proportion of production costs. The IBA-WG recommends that the CA add that the market share of the merged entity in the downstream market would normally need to be significantly high in order for harm to a downstream competitor to be likely to occur.

6.10. Para. 8.15 of the Guidelines states that the ability of a merged entity to harm an upstream competitor through customer foreclosure depends on a number of factors. For example, harm to competitors is more likely if the merged entity is a significant customer. For the sake of completeness, the IBA-WG recommends adding that harm to an upstream competitor is not likely unless the market share of the merged entity in the upstream market is significant (e.g. 30% or more).

7. CONCLUSION

The IBA wishes to express its gratitude to the CA for providing the opportunity of participating in the debate regarding proposed changes to its merger guidance. As

described, the IBA-WG welcomes many of the CA's proposed changes. The suggestions herein for additions and revisions are offered in the spirit of making the Irish merger control system function even better for the CA, merging parties, the wider business community and legal practitioners. Of course, the IBA-WG would be pleased to discuss any questions that you may have in relation to this submission in greater detail with you.

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ANNEX 1 - WORKING GROUP MEMBERS

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