Merger Guidelines Consultation
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**Submission to Irish Competition Authority**
**Public Consultation on Draft Merger Guidelines of 13 September 2013**

**FOR THE ATTENTION OF: ANDREW RAE**

## 1 INTRODUCTION

1.1 The Competition Authority is currently in the process of revising its 2002 Guidelines on Mergers[1] and this submission is intended to form part of the consultation process for the drafting of the updated guidance. Competition authorities typically issue Merger Guidelines setting out the framework within which merger assessment is conducted and how the Authority decides whether or not a merger substantially lessens competition under Part 3 of the Competition Act 2002. It is our view that the eventual guidelines adopted should be interpreted in a flexible manner where the circumstances demand it. However, that should not take anything away from their value in setting an analytical framework which provides a basis upon which existing competitors, consumers and potential entrants to the Irish market can identify quickly and efficiently the kinds of issues which are likely to be interpreted as posing a competition problem.

1.2 In this paper we comment on the substance of some of the proposed revisions to the Guidelines, and draw some wider lessons that might be of assistance to the Competition Authority in revising their Guidelines. The Competition Authority's current Guidelines were based on a somewhat limited experience with merger analysis. Since then, however, the Competition Authority has reviewed nearly 600 mergers and acquisitions and many lessons have been learnt in the process. Similarly, there have been new developments in merger analysis, particularly in the US and UK, which many practitioners feel may be appropriate to include in the revised Guidelines.

[1] N/02/004 Notice In Respect of Guidelines for Merger Analysis, http://www.tca.ie/images/uploaded/documents/n_02_004%20Merger%20Analysis%20Guidelines.PDF.

1.3 In recent years there has been a marked increase in the popularity of cross-ownership and interlocking directorship systems of governance in Ireland and around the world. The first part of this brief paper aims to outline how the competition authorities elsewhere have reacted to such measures, which at first glance would appear to foster overly close cooperation between competitors, before looking to how this international best practice could be adopted in Ireland. Firstly, a summary of the most important cases and solutions are presented, before some key commentary in the area is examined.

1.4 Another issue raised here is that of the role played by maverick firms on markets that may otherwise be susceptible to collusion. Agencies around the world tend to block a merger if the firms remaining post-merger would be likely to coordinate with each other to raise prices. Since a 2010 revision to their Horizontal Merger Guidelines, for example, the US agencies have considered eliminating a maverick to be direct evidence of an anticompetitive merger.[2] A second part of this paper will examine the definition maverick firms, their role and the approach taken towards them in this jurisdiction.

## 2 PART 1: PARTIAL ACQUISITIONS, MINORITY SHAREHOLDINGS AND CROSS-DIRECTORSHIPS

2.1 Competition scholarship broadly recognises that partial acquisitions, including by private equity firms, can lead to anticompetitive effects. Even a non-controlling partial acquisition can sometimes lead to anticompetitive effects if it:

- alters the *incentives* of one or both of the relevant firms to compete;
- creates the ability to control or even *influence* any competitive decisions of the acquired firm; or
- facilitates the exchange of competitively sensitive *information*. [3]

2.2 Thus, the real competition question at issue here is not whether an investor seeks or gains control in the traditional sense of the word, it is whether the investor seeks or gains control, participation in, or influence over competitive decision-making. It is our view that bright-line tests cannot adequately address such subtle issues of control and influence over competitive decision-making so the competition authorities and, indeed, courts should approach this question with great caution.

2.3 These three effects are seemingly exacerbated by the harm that can arise because cross ownership arrangements allow firms to internalize part of the harm they impose on rivals when deviating from a collusive scheme.[4] While it is overly simplistic to state

[2] U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (rev. ed. 2010), available at: http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf § 2.

[3] Laura A. Wilkinson & Jeff L. White, Private Equity: Antitrust Concerns with Partial Acquisitions, 20 *Antitrust Law Journal* 28 2006-2007, p 29.

[4] Paolo Buccirossi & Giancarlo Spagnolo, *Corporate Governance and Collusive Behaviour*, Chapter XX in W.D. Collins (ed.), *Issues in Competition Law and Policy*, ABA Section of Antitrust Law, 2008.

that any increase in the level of cross-ownership or cooperation in an industry will necessarily facilitate tacit collusion, such arrangements have been shown to affect the incentive of each firm to collude in a complex and subtle way.[5] For example, an increase of a given firm's stake in a rival tends to facilitate collusion where each firm in the industry holds a stake in at least one rival, an industry maverick firm[6] has a direct or an indirect stake in the acquiring firm and the target firm is not an industry maverick. While this may appear to be a fanciful theoretical problem, as with the other situations referred to above, its real-world potential for harm comes clearly into focus in times of economic downturn when companies tend to consolidate to ensure their survival or, indeed, 'mutually assured destruction'.[7]

2.4 Competitive concerns can arise from close relationships between competitors because there is an almost ever-present risk of competitively sensitive information being exchanged between them, or just accessed by one of the parties alone.[8] This concern can arise even in situations where the investing firm does not own a controlling stake in their competitor, but simply obtains the power to place a representative in a position to act as a conduit for the flow of information by virtue of its investment.[9] Investigation and enforcement is rendered difficult by the fact that, beyond the obvious sales, marketing and product information, the relative value and competitive sensitivity of different kinds of information can vary between industries, markets and even firms.[10] Of course, the swapping of this kind of knowledge or insight is heavily punishable under current competition rules, but the risk of infringement and the difficulty of detection rise manifold when competitors are so intimately linked.

2.5 There are separate but interrelated ways in which either unilateral or coordinated effects may arise from such acquisitions of influence falling short of control in a competitor. Very simply, the first concern raised is that the obtaining of an interest in a rival will change the unilateral incentive for one or both firms to compete. This is based on the presumption that the firm making the investment can control the intensity with which one or the other competes, and sees the firms incentivised to compete less vigorously because they will recoup a portion of their lost sales through the customers that switch to their supposed rival. In fact, this effect can arise even where the acquiring firm has no direct voting influence over the target because it

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[5] David Gilo, Yossi Moshe & Yossi Spiegel, Partial Cross Ownership and Tacit Collusion, Rand Journal of Economics, Vol. 37, No. 1 (Spring, 2006), pp. 81-99, at p 82.

[6] Typically defined as the firm with the strongest incentive to deviate from a collusive agreement.

[7] See, Mark Robichaux, "Cable Cowboy: John Malone and the Rise of the Modern Cable Business" (New York : John Wiley and Sons Ltd, 2002) a biography of John Malone, the largest shareholder and chairman of Liberty Global a major player in the cable television sector. Cited by the Competition Authority in Determination M/05/024 UGC (Chorus) / Ntl, 4th November 2005, para 121, discussed further below.

[8] This was recognised in a European level merger decision where the Commission only approved the concentration on condition that there were no common directors on the parties' boards for fear of information passing between them, Case IV/M.1712 *Generali/INA* of 12 January 2000.

[9] Laura A. Wilkinson & Jeff L. White, Private Equity: Antitrust Concerns with Partial Acquisitions, 20 *Antitrust Law Journal* 28 2006-2007, p 30.

[10] Leuz, Christian, Proprietary versus Non-Proprietary Disclosures: Evidence from Germany (2003), available at http://ssrn.com/abstract=99861.

relates to their individual incentives and as such can be hard to detect without long and exhaustive price- and market-inquiries.

2.6 Secondly, and perhaps even simpler, is the argument that the acquisition of any interest in a competitor also could lead to anti-competitive effects where the acquirer gains the ability to control or influence the competitive decisions of the target company. As above, the obvious fear here is that the power would be exercised in a way that would lead to a reduction in the pre-transaction levels of rivalry. In situations where the transaction is sufficient to confer majority control, competition authorities will analyse the transaction as if it were a complete merger between the firms. The problems arise because investments or arrangements where the stake given up is less than majority ownership, the investigation must look to the indirect governance rights or other means of influence.

2.7 Again, this is a painstaking context- and fact-specific analysis in practice because a stake that constitutes control can vary greatly. Amongst the factors that should be looked at are the presence of one party on the board of directors of the other and the type of voting rights available. In particular, the possibility of existence of veto rights or the need for unanimity or qualified majorities for decisions on budgets, business plans, or capital expenditures should raise some red flags.[11] In such cases, however, the appropriateness of the authorities investigating, and then intervening, has been questioned at the European level as the corporate rights of shareholders can vary between member states and the Luxembourg courts have recently shown a reluctance to get involved in resolving investor disputes through the medium of competition law.[12]

## 3 CASELAW AND LESSONS

3.1 We can see from the above analysis, brief though it is, that the kinds of arrangements that are considered here are far from problem free. Without doubt, these forms of cooperation can result in great efficiencies and help instigate technological advancements, but the under-the-radar way in which the relationships are sometimes fostered is alarming and throws into question whether the benefits outweigh the apparent risks. Below we discuss some situations where these issues have been encountered under the current competition framework in Ireland and beyond.

3.2 Beginning with the Competition Authority here, in the *UGC Chorus)/Ntl*[13] case, it stated that the impact of the cross ownership and cross management on the incentives of the merged entity to compete was a primary concern in those particular circumstances. These potential impacts were discussed in significant detail and the Authority imposed a number of conditions on the acquirer and the merged entity in order to alleviate its concerns regarding the impact of the cross ownership/management on the incentives of the merged entity. This is interesting

[11] Laura A. Wilkinson & Jeff L. White, Private Equity: Antitrust Concerns With Partial Acquisitions, 20 *Antitrust Law Journal* 28 2006-2007, p 30; see also Aer Lingus/Ryanair

[12] Case T-411/07, Aer Lingus Group plc v. European Commission and Ryanair Holdings plc, 6 July 2010, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007A0411:EN:HTML , at paragraph 68.

[13] Determination of the Competition Authority November 4, 2005 M/05/024.

starting point because it shows the serious nature of the problems raised by such cross participation structures while also highlighting the fundamental flaw – perhaps beyond the scope of this submission and the Draft Guidelines – whereby the Authority only became entitled to act on its misgivings because the notified transaction came before it.

3.3 Going back to first principles, briefly, if a minority participation does not entail a significant change in control then the only legal instrument applicable remains Article 101 TFEU or Section 4 of the 2002 Act, at least for agreements between undertakings. Although the European Commission's interpretation of the competitive effects of minority participation has changed over time, given the small number of cases it has dealt with, one can argue that a uniform Commission approach to minority acquisitions is yet to emerge and so the Competition Authority and market players may struggle for guidance on this issue.[14]

3.4 Looking to the foundations of this area of law, the landmark, if by now dated, judgement of the ECJ in *Philip Morris* stated that "[a]lthough the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business . . . in particular where . . . the investing company obtains legal or de facto control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or create[s] a structure likely to be used for such cooperation. That may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan."[15] The ECJ also stated that the acquisition of a minority shareholding in a competing company could constitute an infringement of Article 102 if it confers some influence on the commercial policy of the competitor although the Court did not enter into specifics so we must look to the Commission's decisional practice to see what guidance we can glean.

3.5 In *Warner-Lambert/Gillette*,[16] the Commission examined a minority participation in a competitors' equity capital and decided that it could constitute an abuse of dominance and a restriction of the competitiveness of the market and clarified that a minority acquisition can be anticompetitive as a horizontal agreement and in the context of a single dominant firms. Through a series of financial transactions using investment vehicles, Gillette obtained 22 per cent of its rival's capital and, although it did not have

[14] Francesco Russo, Maarten Pieter Schinkel, Andrea Gunster & Martin Carree, European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases, Cambridge University Press (2010).

[15] Joined Cases 142/84 and 156/84 BAT v. Commission [1987] ECR 4487. This judgement was endorsed by the Competition Authority under the 1991 Act, see for example Competition Authority Decision of 4 August 1992, Notification No. CA/10/92 - Woodchester Bank Ltd./UDT Bank Ltd. See also, Vincent Power, The Mergers & Acquisitions Dimension, in J. Brown (ed.) Competition Law and Regulation in Ireland; Competition Press, Dublin (1991).

[16] Warner-Lambert/Gillette and Bic/Gillette and others, Commission Decision 93/252/EEC [1993] OJ L 116/21

voting rights, it held crucial pre-emption and conversion rights and options in the holding company used to make the investment.

3.6 It was the Commission's appraisal that Gillette had abused its dominant position by influencing the structure of the relevant market, thus restricting competition. As Gillette became not only a major shareholder but also the largest creditor of the target company, it was deemed that the target company could not reasonably be expected to ignore this financial dependence, and so Gillette would have had at least some influence on its commercial policy. Interestingly, the Commission deemed the kind of financial inter-dependence created by a loan as equivalent to a cross-shareholding between the firms, which appears to be in recognition of the strong impact that a reciprocal interest in the economic success of another company can engender.

## 4 COMMENT

4.1 Small shareholdings and passive interests short of control can benefit some consumers by allowing some rivals to cooperate and charge lower prices, for example, and their very existence as a strategic option can be a driving force of competitor collaborations, which could benefit consumers. [17] Speaking in 2011, Commissioner Almunia seemed to indicate that potential solutions to this enforcement gap are being considered Commission.[18] Any major changes to the Merger Regulation would not only require the approval of the Council and the Parliament but may also lead to increased difficulties given the added burden on business that any reform may cause.[19] Another route would possibly be for the European and national competition authorities to seize opportunities, such as that before the Authority now, to adopt guidelines which deal fully with the issue. We recognise that the Authority may be reluctant to do so for fear of reducing its own margin of manoeuvre in individual cases, but we would argue that it may have something to gain in providing more guidance to firms because this would, at the very least, allow the transacting parties to offer more timely and suitable remedies.[20] We would thus suggest that more guidance be provided to spell out the situations in which the powers as they currently stand under Section 4 will be availed of to assess and intervene regarding non-controlling minority holdings. This exercise will, in our view, serve the Authority and the Irish business community well in the future – especially as it may also help to inform the debate on when and how any new powers vested in the Authority as part of any eventual reforms of the overall Merger Regulation framework will be used to combat the problems posed by non-controlling stakes.

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[17] Arghya Ghosh & Hodaka Morita, Competitor collaboration and product distinctiveness, International Journal of Industrial Organization 30 (2012) 137–152, p.148.

[18] J. Alumunia, EU merger control has come of age, speech at conference "Merger Regulation in the EU after 20 years", Commission/IBA, Brussels 10 March 2011, p. 6. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/166&format=HTML&aged=0&language=EN&guiLanguage=en.

[19] Christian Riis-Madsen, Sophia Stephanou, & Killian Kehoe, Reform of the EU Merger Regulation: Looking Out for the Minority, CPI Antitrust Chronicle, January 2012 (1), p.5.

[20] See also, Nicolas Petit, Remedies for Coordinated Effects under the EU Merger Regulation, Competition Law International, vol. 6 no2, September 2010, 29-37, p.35.

5 **PART 2: MAVERICK FIRMS**

5.1 The maverick label attaches when several competitors would prefer to collude to raise prices or reduce innovation but one or more firms play a special role in making that impossible.[21] For instance, if one firm has a unique incentive to cut prices it will resist otherwise prevailing industry trend to cooperate on price setting.[22] The theory goes that this resistance requires all the other firms to keep their prices low or else suffer losing their customers to that maverick firm. If it is always the same firm that plays this maverick role, it is to be taken as evidence that the remaining parties would coordinate in their absence.[23]

6 **APPLICATION OF THE THEORY**

6.1 Maverick firms are typically smaller and more aggressive competitors. Identifying whether a firm is acting as a maverick can be difficult, but will usually revolve around whether they have a higher proportion of new customers, have sought out more new customers than other firms or tend to take up a high share of the business "lost" by their rivals.

6.2 The European Commission and certain national competition authorities have recently begun to shown a marked interest towards ensuring the survival of mavericks, most particularly in concentrated post-liberalization markets. Looking to an EU level example, the *T-Mobile Austria/tele.ring* Commission decision saw a finding that the deal resulted in the elimination of a firm which, pre-merger, had exerted considerable competitive pressure on the pricing behaviour of T-Mobile Austria and its main competitor Mobilkom.[24]

6.3 This theory has also been applied by the Commission where neither of the merging parties was themselves actually a maverick, but the merger threatened the survival of a third party which was considered as such. In another telecoms case, the Commission took a dim view of a joint venture that endangered the survival of the smallest relevant operator which, despite its size, was a 'leader in pricing and service innovations' and, therefore, was 'an important driving force for competition' on the market.[25]

[21] M. Ivaldi, B. Jullien, P. Rey, P. Seabright and J. Tirole, 2003, The Economics of Tacit Collusion, Final Report for DG Competition, European Commission, http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf.

[22] Taylor M. Owings, Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor, *Vanderbilt Law Review* Vol. 66(1) 323.

[23] Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, Antitrust, Summer 2008, at 29.

[24] Case COMP/M.3916, T-Mobile Austria /tele.ring, 26 April 2006.

[25] Case COMP/M.5650, Orange/T-Mobile, 1 March 2010.

## 7 PART 3: PROPOSALS FOR REFORM - GENERALLY

7.1 Any proposals for reform should take into account today's concerns of over-regulation and increased burdens for undertakings already under unprecedented strain.[26] The rules should attempt to provide a flexible regulatory mechanism applicable to different types of passive investments in order to increase both legislative efficacy and legal certainty for those affected.[27]

7.2 Similarly, any proposed amendments to the Draft Guidelines should also include space for taking the structure of the industry into account. Generally, we can say that the larger the linked firms' market shares the more likely the relationship will raise anticompetitive worries as the unilateral effects of such arrangements depend on firms possessing market power prior to it. Likewise, the number, market shares and capacities of rival firms not involved in the cross-shareholding or alliance is important because the more significant these rival firms are the smaller the anticompetitive concerns.[28] The same is true for the assessment of passive investment. As regards maverick firms, again we would stress the importance of having mechanisms in place to take the real-world market dynamics into account. A prerequisite for this is, however, the presence of sufficiently detailed guidance materials to allow this process to be done in a way that is as transparent and predictable as possible.

## 8 EU APPROACH TO MINORITY SHAREHOLDINGS AND POTENTIAL REFORM

8.1 In its 2001 Green Paper on revising the EUMR, the Commission downplayed the importance of the issue and concluded that, as very few such arrangements raise competition concerns that fall outside of Article 101 and 102, it was disproportionate to recalibrate the Merger Regulation to catch all such minor acquisitions.[29] However, the European Commission has recently recognized the unsatisfactory situation whereby acquisitions of minority stakes that take place after the examination of a merger fall outside of its competence under the EUMR to investigate and possibly intervene.[30] Indeed, the Commission is currently examining possible ways of improving the EUMR by extending its scope to the acquisition of non-controlling minority shareholdings without creating an undue burden for businesses.[31]

8.2 It has been argued that under any reformed regulation the Commission or national authority must have the right to explore innovative remedies because the basic Article

[26] European Parliament Committee on Economic and Monetary Affairs Hearing on the Green Paper on the Review of Council Regulation 4064/89, April 15, 2002

[27] Ariel Ezrachi & David Gilo, EC Competition Law and the Regulation of Passive Investments Among Competitors, 26 OXJLST 327, 344

[28] Ariel Ezrachi & David Gilo, EC Competition Law and the Regulation of Passive Investments Among Competitors, 26 OXJLST 327, 346

[29] Michael Reynolds & David G. Anderson, Acquisitions of minority interests in competitors: The EU perspective, American Bar Association, Section of Antitrust Law Spring Meeting 2005, 31st March, 2005

[30] Commission Staff Working Document, Towards more effective EU merger control, Brussels, 25.6.2013

SWD(2013) 239 final.

[31] European Commission Press Release IP/13/584, Mergers: Commission consults on possible improvements to EU merger control in certain areas, 20/06/2013, http://europa.eu/rapid/press-release_IP-13-584_en.htm.

101(2)-style approach whereby the transaction is automatically voided would be too imprecise. In particular, the authorities should be able to take the position of the target company into account in a situation where its shares have been bought by a competitor or trading partner on the open market, and not see them automatically branded as co-conspirators.

8.3 Even before this period of consultation and reflection began, certain academics had observed that a potential solution may be found in widening the EUMR's jurisdiction for passive investments and inter-relationships falling short of control. However, Ezrachi and Gilo, for example, warned that an attempt to simply broaden the current definition of control within the EUMR framework to include such arrangements is inadvisable because it would affect the legal certainty for undertakings and lead to an unnecessary increase in the notification burden on undertakings and the authorities alike.[32] Rather, the changes should aim to avoid disproportionate regulation that cuts unjustifiably deep into the freedom of investment. With minority shareholdings and alliances, the ties between firms are not as difficult to undo as a complicated de-merger operation, so the use of ex-ante assessments may not be as crucial as it is under the EUMR proper.

8.4 Thus, a set of criterion and objective thresholds could be set down whereby the authorities would have a right to intervene based on the level of shareholding in a competitor and the level of market concentration, regardless of the lack of a transfer of control. Essentially then it would see the Commission or national authority act only in exceptional cases, where concentrated markets are suspected of being substantially harmed by passive investments.[33] This would, admittedly, see risks arise where the exercise of such powers becomes subject to non-competition elements such as the strategic or social importance of the market in question. Such widening of the competition authorities' jurisdiction may therefore assist in safeguarding the integrity and overall efficacy of the competition rules, but in the absence of clear objective thresholds it risks opening another door for manipulation and lobbying.

## 9 IRISH APPROACH AND SUGGESTIONS: MAVERICK FIRMS

9.1 The 2002 Merger Guidelines contain several references to the concept of a maverick firm (paragraphs 3.11(d), 4.8, 4.14(e), 4.24, 6.6 and 7.2). The Consultation Paper[34] notes that in the 2002 Guidelines reference is made to the maverick firm in several contexts, including competitive effects (para 2.26). It also states that international best practice suggests that the effects of a maverick firm are most likely to be relevant in analysing coordinated effects. The Consultation Paper then proposes that the 2002 Guidelines could be amended "to include a more complete discussion of the

[32] Ariel Ezrachi & David Gilo, EC Competition Law and the Regulation of Passive Investments Among Competitors, 26 OXJLST 327, 348

[33] Ariel Ezrachi & David Gilo, EC Competition Law and the Regulation of Passive Investments Among Competitors, 26 OXJLST 327, at 348.

[34] Consultation on Competition Authority Guidelines for Merger Analysis, 3 December 2010, http://www.tca.ie/images/uploaded/documents/2010-12-03%20Notice%20of%20Consultation%20on%20Competition%20Authority%20Merger%20Guidelines.pdf.

significance of maverick firms … including that the loss of a maverick firm is most relevant in the context of potential coordinated effects" (para. 2.27).

9.2 Paul Gorecki, himself a former member of the Authority, points to this as an example of proposals being made in Consultation Papers that are too vague because there is no elaboration on what is meant by a more complete discussion while the reader is left to wonder whether the Competition Authority has already received complaints that the 2002 Guidelines were inadequate in the discussion of the maverick firm.[35] The Consultation Paper is silent on these questions and hence it is difficult to come to a view as to the direction in which the Authority feels a more complete discussion should proceed.

9.3 Some merger determinations, particularly *Heineken/Scottish & Newcastle*[36] do contain further discussion of the concept of the maverick firm and its application to merger analysis. In that case, the Authority was invited to see one of the firms as a maverick because it was claimed to have a history of undercutting its competitors. However, despite seeming open to the idea initially, the Authority found that the evidence did not support that view since it interpreted the relevant pricing strategies as being consistent with those of their equivalent competitors. In another case, the proposed consolidation of the market for independent radio stations has held not to involve the elimination of a maverick firm because the Authority's analysis indicated that neither radio station in question, FM104 and Q102, fulfilled that role. Interestingly, the Authority also seemed to take the fundamental nature of the market into account because it noted that the tight limits on market players tended to prevent the emergence of any maverick on the market because no operator was really in a position to expand output.[37]

9.4 Although these cases give us some insight into the Authority's thinking on the issues, the fact that it is dealt with so rarely and always subject to the precise conditions in which it is found means that there is a need for some further objective guidance on the issue. The difficulty in dealing with these situations was neatly set out by the Authority's submission to the OECD working Group whereby, in a hypothetical case study, it noted the complexity of how to predict whether or not the newly combined entity (having subsumed the prior maverick) would actually go on to become the new maverick player in the market.[38]

9.5 In this direction, the 2013 Draft Guidelines note that a merger that falls below the HHI thresholds may still raise competition concerns where one of the merging parties is a maverick firm or has recently experienced a rapid increase in market share, has driven innovation or has been charging lower prices than its competitors in the market

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[35] Paul K Gorecki, Revising Merger Guidelines: Lessons from the Irish Experience, ERSI Working Paper No. 379, March 2011.

[36] Determination in Merger Notification M/08/011 – Heineken/Scottish & Newcastle. See also, Merger Determination M/04/020, The proposed acquisition of Ammado Limited by Uniphar plc, 15 July 2004.

[37] Determination Of Merger Notification M/07/069 – UTV/FM104, 17 January 2008.

[38] Working Party No. 3 on Co-operation and Enforcement, Roundtable On The Standard For Merger Review, With A Particular Emphasis On Country Experience With The Change Of Merger Review Standard From The Dominance Test To The Slc/Siec Test, Ireland, 9 June 2009, http://www.tca.ie/images/uploaded/documents/OECD%20Submission%20-%20%20Standard%20for%20Merger%20Review.pdf.

under review.[39] In a similar vein, paragraph 4.31 also notes that a merger involving a firm that acts as a maverick could imply a disproportionate reduction in competition, depending on the significance of the maverick and the extent to which the merged entity will compete less vigorously than the maverick firm prior to the merger.[40] Likewise, regarding vertical mergers, the 2013 Draft Guidelines note that coordinated behaviour may be facilitated where the merger eliminates or reduces the incentives for maverick-type behaviour such that co-ordination may no longer be prevented.[41]

9.6 We concur that the 2013 Draft Merger Guidelines could be amended to include a more complete discussion of the significance of maverick firms for merger review including a more detailed exploration of the situation where the loss of a maverick firm becomes even more relevant due to potential coordinated effects.[42] We would suggest that particular emphasis could be placed on moving away from the more formalistic tools, like the HHI thresholds and concentration ratios, towards a more holistic viewing of market realities. This would, however, only be appropriate where sufficient guidance on the Authority's approach is provided in documents such as the Guidelines under discussion in order to guarantee the optimum balance between flexibility and predictability.

## 10 IRISH APPROACH AND SUGGESTIONS: MINORITY SHAREHOLDING AND PASSIVE INVESTMENTS

10.1 The Authority itself has recognised that tackling the potential difficulties posed by the presence of minority shareholdings and cross directorships is a particularly onerous task. With this in mind, the Authority asked the Minister, as part of a review of the overall competition legislation, to grant it further powers to review such situations.[43] While the general enforcement powers granted to the Authority under the Irish legislation is beyond the scope of this submission, the Authority is to be commended for recognising the potential gravity of these arrangements and bringing them to the attention of law-makers.

10.2 The Authority should also be commended for its treatment of the situation it was faced with in its probe into the UGC takeover of NTL.[44] The Authority took the step of looking at the various decisions of the Commission in the context of EU merger control where concern was expressed about cross ownership and citing numerous decisions involving situations where one of the merging parties already had a share in a competitor. The Authority found that in those EU cases, although the size of the share held by one of the merging parties in a competitor varied, it was possible to remedy the competition concerns through divestments of the common shareholding and/or a ban on cross management.

[39] TCA, Draft Merger Guidelines for Consultation, 13 September 2013, para 3.13.

[40] TCA, Draft Merger Guidelines for Consultation, 13 September 2013, para 4.31.

[41] TCA, Draft Merger Guidelines for Consultation, 13 September 2013, para 8.19 (f).

[42] Para 2.27, 2010 Consultation Paper

[43] OECD Policy Roundtable, Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates, DAF/COMP(2008)30, 23 June 2009, p 122.

[44] Determination of the Competition Authority November 4, 2005 M/05/024.

10.3 In that case, UGC already owned another cable firm, Chorus, and the Authority had to look at the involvement of UGC's parent, Liberty Media International (LMI), with Chorus's supplier of "must have" premium content and their principal retail competitor, namely, BSkyB. The Authority's concern arose because LMI was run by the chairman of Liberty Media Corporation (LMC) which was the second largest shareholder in News Corporation which, in turn, was the largest shareholder of BSkyB. The Authority held that the merged entity would have less incentive to lower prices, since profits gained by the merged entity through switching would be offset by loss of profits experienced by its chief competitor BSkyB (in which the primary stockholder of the merged entity had an indirect stock holding).

10.4 In the most recent guidelines published by the Authority, there is recognition of their experience that cross-shareholdings and/or other linkages can be generally conducive to coordinated behaviour, especially because exchanging information is easier for connected firms than for unconnected firms – and such links can therefore facilitate coordination.[45] Similarly, we commend the position also taken by the Authority in the 2013 Draft Guidelines whereby they state that their analysis of a notified merger will also consider competitive effects that may arise where any one or more of the merging parties have non-controlling minority shareholdings in relevant third parties prior to the merger.[46]

10.5 In light of the financial difficulties faced by Irish firms over the past number of years, this kind of cross investment and risk sharing has become an essential part of industry's strategic planning but it does not come without some significant anti-competitive dangers. The amended guidelines should, in our opinion, also include space for taking the surrounding economic circumstances and the structure of the industry into account because we have seen how times of lower predictability and demand uncertainty tend to push firms to consolidate to survive. In an uncertain environment firms must also be able to adapt quickly, so forced organisational inertia or the constraints of an overly burdensome notification and clearance regime could make it difficult for them deal their way out of difficulties.

10.6 The above analysis highlights the potential harm caused by such arrangements and we would suggest that the Authority's Guidelines should begin the process of developing an even more robust approach whereby specific, manageable and predictable measures – up to and including divestitures – could be proactively implemented in order to take these elements into account when studying a given market rather than waiting for a merger notification to raise the issues. Amongst Ireland's partners in the European Union, Austria, Germany and the United Kingdom already have national merger control rules that also give them the competence to review structural links so perhaps some inspiration could be sought there.

10.7 We believe that some first steps have already been taken by the Authority in the 2013 Draft Guidelines insofar as there is a recognition (para 1.8) that each transaction must be considered in its own circumstances while elsewhere (para 3.3) the Authority

[45] TCA, Draft Merger Guidelines for Consultation, 13 September 2013, para 4.35(f).

[46] TCA, Draft Merger Guidelines for Consultation, 13 September 2013, para 1.11.

states that market dynamics can and should be taken into account. When read in conjunction with the acknowledgement of the role sometimes played by non-controlling minority shareholdings in how a market functions (para 1.11), this could be seen as opening the door to allowing the Authority to follow international best practice and gradually move towards a more interventionist stance in such situations. However, even before the debate can begin on granting the Authority more powers to pursue solutions in markets characterized by cross-holdings and structural links, it should embark on a fuller discussion on the elements it deems particularly harmful, the weights attached to them and the degree and type of cross-participation that will be seen as acceptable.

## 11 CONCLUSION

11.1 The 2013 Draft Guidelines provide a number of valuable insights into the Competition Authority's practice and should help in facilitating an efficient and transparent merger control regime. While the Guidelines are aimed at a number of different audiences, special attention should be paid, in our opinion, to the businesses involved in the merger and their legal and economic advisors. The final version should bear in mind the need to minimise compliance and transaction costs for merging parties in dealing with a competition authority or agency, as well as a general duty in these straightened times to reduce the burden placed on the public resources by merger control. In other words, the final Guidelines, should only prohibit or, more likely, cause to be abandoned, mergers that are likely to damage competition and consumer welfare, while allowing pro-competitive and pro-consumer welfare to proceed relatively unhindered.

11.2 While the importance of the certainty provided by such guidance instruments should not be underestimated, there is also a need for a degree of flexibility to remain open to the authorities rather than relying purely on more formalistic rules and procedures. We contend that the reformed guidelines should perhaps include the right for the Authority to explore different solutions where the traditional approach would be too imprecise and not in line with the market realities. In particular, the authorities should be able to take into account the special role of maverick firms and the potential influence of subtle links short of control between firms in a market. In the interests of openness and accountability, if and when these elements are indeed taken into account, the Competition Authority should set this out in clear terms that are accessible to the general public, legislators and others interested in public administration.

11.3 For further information on the topics raised above, or in case of any questions or clarifications, please do not hesitate to contact the head of the EU, Competition and Regulated Markets team at LK Shields, Marco Hickey, on +353 (0)1 6371522 and mhickey@lkshields.ie, or Conor Talbot on +353 (0)1 6610866 or ctalbot@lkshields.ie.

Yours faithfully,

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**LK Shields Solicitors**