

Submission to the Competition Authority in Response to the Draft
Merger Guidelines for Consultation

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It is important that policies are reviewed from time to time to reflect new thinking, new administrative practices and other new developments. This is particularly the case for the current Merger Guidelines, which were developed in 2002 prior to the Competition Authority assuming responsibility for merger control on 1 January 2003. Over a decade later and after several hundred merger determinations is an appropriate time to circulate for comment the *Draft Merger Guidelines for Consultation* (Draft Merger Guidelines), issued on 13 September 2013.

The Draft Merger Guidelines are the second stage in preparing revised merger guidelines. In 2010 the Competition Authority issued *Consultation on Competition Authority Guidelines for Merger Analysis* (Consultation Paper), which raised questions and issues as well as making some suggestions for revision of the current Merger Guidelines.¹ Ten comprehensive responses were received. The Draft Merger Guidelines build on this earlier consultation.

The overall thrust of the Draft Merger Guidelines is largely consistent with the current Merger Guidelines. However, the current Merger Guidelines have been extensively rewritten, with scarcely a sentence remaining unchanged. While we comment on these changes below, which in general improve the quality and precision of the current Merger Guidelines, in terms of the overall structure of the Draft Merger Guidelines, it might be better to place 'Countervailing Buyer Power' before 'Efficiencies,' since the former is an inherent part of the competitive effects analysis of mergers.

The Competition Authority, in the press release accompanying the Draft Merger Guidelines, refers to the close to 600 mergers it has reviewed. However, in the Draft Merger Guidelines reference to these determinations is conspicuous by its absence. In many cases particular merger determinations illustrate points in merger assessment and could have helpfully been referred to in the Draft Merger Guidelines. In other instances there are lessons from these merger determinations that might usefully have been incorporated. For example, the current Merger Guidelines state in paragraph 5.17 that the conditions for a failing firm test may "rarely

¹ For a discussion see Paul K Gorecki, 2011, "Reviewing Irish Merger Guidelines: Lessons." *European Competition Law Review*, 32(10), pp. 500-506.

be met in practice.” I think I am correct in saying that this has been the case in practice. It would be useful if this experience was reflected in the discussion in the Draft Merger Guidelines.

The Draft Merger Guidelines are substantially longer than the current Merger Guidelines. In terms of pages, 50 per cent longer, in words probably a 100 per cent. The increased length is due to a number of factors. There is a substantial amount of new material. In contrast to the current Merger Guidelines, the Draft Merger Guidelines detail the types of evidence that are relevant to particular aspects of merger assessment. This is a useful addition to the current Merger Guidelines. However, there is in general little reference to quantitative evidence that employs statistical and econometric methods. Since the Competition Authority and merging parties have employed such methods in relation to, for example, market definition, it would have been useful if this type of evidence had been referred to more extensively in the Draft Merger Guidelines and the relevant merger determinations cited.

The Draft Merger Guidelines also differ from the current Merger Guidelines by providing greater discussion and elaboration of merger assessment. This applies, for example, with respect to the discussion of non-horizontal mergers and countervailing market power. Again such elaboration and the setting out in greater detail the Competition Authority’s thinking and approach is useful for practitioners and others concerned with merger control and assessment. However there are a number of concerns with respect to the provision of such elaboration.

First, in some cases it could be argued that more is less. For example, the current Merger Guidelines contain a crisp short definition of SLC,

1.3 The SLC test is interpreted in terms of consumer welfare. Consumer welfare depends on a range of variables including price, output, quality, variety and innovation. In most cases, the effect on consumer welfare is measured by whether the price in the market will rise. The conclusion that an SLC will result from a

merger is thus based on whether the price to buyers is expected to rise (or output to fall). Where price is not the appropriate variable, welfare is measured by the changes in the relevant variables.

It is not obvious that the elaboration in the Draft Merger Guidelines in paragraphs 1.4 to 1.11 is an improvement.

Second, it is not always clear whether the elaboration in the Draft Merger Guidelines is breaking new ground in terms of the Competition Authority's thinking or whether it is merely restating, albeit in greater detail, the current Merger Guidelines and subsequent custom and practice. For example, the failing firm test contains four elements in both the current Merger Guidelines and the Draft Merger Guidelines. While in some cases the wording remains the same, in others it has changed, while the order of the conditions has also changed. It would have been useful more generally if the Competition Authority had provided some commentary highlighting where substantial change from the current Merger Guidelines was intended and where the purpose was only to provide greater clarity.

Another example is efficiencies. Reference is made in the current Merger Guidelines to three conditions that need to be met,² while the Draft Merger Guidelines also have three conditions.³ These conditions are those that are required for whether or not the claimed efficiencies can be considered for the purposes of merger control. However, while the first condition is the same in both the current Merger Guidelines and the Draft Merger Guidelines, the other two appear to be different. No longer is it necessary to show that the efficiencies cannot be achieved by a less restrictive means or that they will be achieved within a reasonable time frame. Instead it is argued that they should be verifiable and benefit consumers. Surely the latter is the net price test set out in the current Merger Guidelines at paragraph 5.9 and is not properly part of whether efficiencies should be considered for merger control. In other words, is there some

² Paragraph 5.16.

³ Paragraph 6.7.

conflation between which valid efficiencies are to be considered for the purposes of merger assessment and how any valid efficiencies are to be used as part of the SLC test?

Third, in a number of instances it is clear that the Competition Authority's Draft Merger Guidelines have broken new ground. The thresholds for screening mergers using the HHI have been revised as set out in paragraph 3.11 of the Draft Merger Guidelines. These differ from the proposals raised in the Consultation Paper at paragraph 2.7. It would have facilitated a full and proper consultation on the Draft Merger Guidelines if the Competition Authority's thinking on this proposed revision had been set out in an accompanying document. Absent this it is difficult to comment. Was the change due, for example, to the 10 responses to the Consultation Paper, which do not appear to have been posted on the Competition Authority's website?⁴

It seems to me that the consultation process would have been a lot more productive if the Competition Authority had held a briefing session outlining its thinking in relation to each of the topics covered in the Draft Merger Guidelines. Such an approach was adopted with respect to the Consultation Paper and led to a much greater shared understanding of the Competition Authority position.

Detailed Comments

We do not repeat those made above with respect to particular paragraphs.

2.1 The reference in the third sentence to "The Authority will also identify ..." seems misplaced since market definition is concerned with products in a market not firms.

2.19 The second sentence is a little opaque.

3.10 "A perfect HHI measures ..." Perfect does not seem appropriate, perhaps well defined, fully defined, or complete.

4.6(b) Might mention that can be either tacit or explicit.

5.11 Surely the word 'mostly' in the first line should be dropped in view of the catch all category (d)?

⁴ <http://www.tca.ie/EN/News--Publications/Public-Notices/03-Dec-2010.aspx>

5.12 (d) I presume that this means that such regulation operates asymmetrically between existing firms and new entrants, such that the existing firms are grandfathered with respect to some new regulations.

6.4, bullet point at bottom of page. Surely a conglomerate merger involved products that are unrelated.

7.11 Excellent point.