Submission to the European Commission Public Consultation: Towards more effective EU merger control

Irish Competition Authority Submission

S/13/04

September 2013

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1. INTRODUCTION

1.1 The Competition Authority (the 'Authority') welcomes the opportunity to make a submission to the European Commission (the 'Commission') on the public consultation set out in the Commission Staff Working Document "Towards More Effective EU Merger Control" together with the annexes thereto (the 'consultation document'). The Authority commends the work undertaken by the Commission in the area of review of the Merger Regulation[1], both in this and in previous reviews.[2] The Authority supports the work undertaken by the Commission thus far and the general direction taken in this current initiative.

1.2 The Commission in the consultation document stated that: "the objective of the present consultation paper is to propose a reflexion and seek comments from stakeholders on two main issues:

- *whether to apply merger control rules to deal with the anti-competitive effects stemming from certain acquisitions of non-controlling minority shareholdings;*
- *the effectiveness and smoothness of the case referral system to transfer cases from Member States to the Commission both before and after notification.*

Finally, there may be scope for further technical improvements to the current Merger".

1.3 This submission addresses only the issue of non-controlling minority shareholdings.[3] The Authority hopes it would be possible to comment at a later date on the proposed changes to the referral system.

1.4 In preparing this submission we have imported only the relevant sections of the questionnaires set out in the consultation under each heading. In each case, the original questions are grouped, reproduced and answered in the same order as set out in the consultation document.

1.5 The views expressed in this submission are the views of the Authority alone and do not purport to be the views of the Department of Enterprise Jobs and Innovation (the "Department") or the Irish Government. The Authority would be happy to discuss the contents of this submission in greater detail with the Commission, should the Commission deem it necessary.

1.6 The Authority generally welcomes the proposals outlined in the consultation document, to (i) expand the remit of the merger control function to enable the Commission examine the acquisition of non-controlling minority shareholdings as appropriate; and (2) to modernise and update the referral mechanisms of the Merger Regulation to ensure a smoother and more effective referral system.

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[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1.

[2] The Merger Regulation was first adopted as Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1). Council Regulation (EEC) No 4064/89 was later amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1). The re-casting of the Merger Regulation in 2004 led to the adoption of Council Regulation (EC) No 139/2004, the current Merger Regulation.

[3] For the purposes of our response to the questions posed in the consolation document we use the term non-controlling minority shareholdings and structural links interchangeably.

2. STRUCTURAL LINKS

Introduction

2.1 The Irish merger control regime (the 'Irish regime') is set out in Part 3 of the Competition Act 2002 (as amended) (the '2002 Act'). The Irish regime operates a mandatory system for the notification of proposed transactions, provided certain defined thresholds are met, to the Authority. However it is also open to the parties involved in a transaction to notify the Authority on a voluntary basis where the transaction falls below the defined thresholds (although in practice this rarely occurs). The substantive test applied under the Irish regime in the review process is whether the proposed merger would substantially lessen competition in markets for goods or services in the State.[4]

2.2 The trigger for a notification within the Irish regime is based on a change of control either by transfer or acquisition.[5] Under the current Irish regime the Authority has no mandate to review the acquisition of non-controlling minority shareholdings. It is only where 'decisive influence' over an entity is acquired, or where a straightforward acquisition of control takes place, that the Irish regime is applied.

Questions 1 to 3 and the Responses

1. In your view would it be appropriate to complement the Commission's toolkit to enable it to investigate the creation of structural links under the Merger Regulation?

2.3 The Authority is of the opinion that there is currently an enforcement gap and that there are situations where non-controlling minority shareholdings can harm competition. The proposal to extend the Commission's toolkit to investigate the creation of structural links under the Merger Regulation would effectively close this gap. The Authority therefore supports the view that it is appropriate for the Commission to complement the current toolkit to enable it to investigate the creation of structural links under the Merger Regulation.

2.4 There are two issues here – can structural links significantly impede competition, and should the Commission be able to address them with a new option.

[4] Section 21(2) and 22(3) of the Competition Act 2002
[5] Section 16 of the Competition Act 2002

2.5 Regarding the first point it appears to be universally accepted that partial ownership short of control can harm competition, as illustrated in the Commission Annex, Economic Literature on Non-Controlling Minority Shareholdings ("Structural Links"). In truth, this point has already been established. For example, the Commission is familiar with the approaches of Austria, Germany and the UK. Outside of the EU the potentially harmful effects of partial acquisitions are comprehensively addressed in the merger guidelines of Australia,[6] Canada,[7] Japan,[8] New Zealand[9] and the U.S.[10] (The U.S. has long recognized that partial acquisitions can substantially lessen competition, as is set out in a standard reference work.[11])

2.6 With respect to the second point in paragraph 2.4 the Authority believes there is a compelling argument that the Commission should be able to intervene in such cases and that its current options to do so are not sufficient. The Authority recognises that although in certain circumstances it may be possible to pursue a case involving the acquisition of a non-controlling minority shareholding or the creation of structural links under Article 101 or Article 102 of the Treaty of European Union ('TEU'), such cases would be fraught with pitfalls and difficulties. Article 101 for example at the very outset requires an 'agreement' (whether written or not) to exist and such a situation would not arise where shares are built up in a company based on the acquisition of shares traded freely on a stock exchange, whereas a private share purchase agreement for shares in a private company may constitute an 'agreement' for the purposes of Article 101. With respect to Article 102, the requirement, at the outset to prove the existence of a dominant position and then to prove that this dominant position has been abused through the acquisition of structural links can make challenging a partial acquisition difficult, as the Commission has set out.

2.7 Nor does it seem sufficient to rely on national enforcement agencies. It appears that only three Member States - not including Ireland – can challenge these transactions. Even though the other States could revise their governing rules, it seems likely that the most problematic partial acquisitions would involve multiple Member States and be most appropriately addressed by the Commission.

2.8 However the Authority is mindful that extending the Merger Regulation in this manner will require the development of a proportionate policy to balance effectively the need to address potentially adverse economic effects while minimising the regulatory burden on undertakings and at the same time providing legal clarity and process transparency to all stakeholders involved in the process.

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[6] Australian Competition and Consumer Commission, Merger Guidelines [2008], pages 59-62 (setting out five "of the anti-competitive effects of shareholdings below a level delivering control").

[7] Competition Bureau Canada, Enforcement Guidelines [2011], Part 1 (merger defined to include acquisition of a "significant interest" in another business).

[8] Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination [2010], part I(1)A (minority shareholdings requiring review).

[9] Commerce Commission New Zealand, Mergers and Acquisitions Guidelines [2013], attachment C (describing "three ways that an acquisition of partial ownership/control of a firm may substantially lessen competition").

[10] U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines [2010], section 13 (setting out "three principal effects" on which the agencies generally focus).

[11] ABA Antitrust Section, Antitrust Law Developments (Sixth) [2007], pages 368-69 (citing 12 cases).

2.	*Do you agree that the substantive test of the Merger Regulation is an appropriate test to assess whether a structural link would lead to competitive harm?*

2.9 The Authority agrees that the substantive test of the Merger Regulation i.e. the 'significant impediment of effective competition' (SIEC) test is an appropriate test to assess whether a structural link would lead to competitive harm.

3.	*Which of the three basic systems set out above do you consider the most appropriate way to deal with the competition issues related to structural links? Please take into account the following considerations:* *a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions,* *b) the administrative burden on the parties to a transaction,* *c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;* *d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;* *e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.*

2.10 If limited to the three proposals put forward in the consultation document -- (i) notification system, (ii) self-assessment system, and (iii) the transparency system -- the Authority prefers the proposed 'transparency system' as it could, if implemented correctly:

(a) provide the Commission with the basic information concerning the acquisition of a structural link;

(b) enable the Commission to make an informed decision on whether to investigate the acquisition;

(c) provide the Member States with sufficient information to enable them to decide whether to seek a referral of the acquisition;

(d) avoid imposing unnecessary administrative burdens on undertakings; and

(e) permit the Commission to identify and challenge some of the presumably relatively small number of potentially anti-competitive transactions that may raise concerns.

2.11 The Authority takes the view that a 'mandatory notification system', requiring all relevant structural links (where the thresholds are met) to be notified to the Commission coupled with a standstill provision, would

be unlikely to strike the right balance of burden and benefit. A criterion such as 10% would presumably result in a very large number of notifications of transactions that are not problematic. Yet were the number of notifications limited by imposing a demanding criterion, such as a 30% shareholding, it seems likely that too many potentially problematic acquisitions would escape commission review and challenge. The Authority takes the view that undertakings could well violate the spirit of any such system. Also where a high criterion is used and is supplemented by a more qualitative standard (such as used by Germany and the UK), there would be questions about whether sufficient legal certainty could be achieved.

2.12 Likewise, the Authority would not be in favour of a pure 'self-assessment' system as it believes such a system could be difficult to administer and relies on market intelligence or complaints by third parties regarding the existence of a problematic non-controlling minority shareholding or structural link. A 'self-assessment' system *would* accomplish the fundamental purpose of establishing the Commission's right to challenge problematic acquisitions, and the Commission presumably would become aware of some such acquisitions. But relying solely on Commission intelligence would create a bias favouring review of high profile and/or hostile transactions, and it is not clear how closely this correlates with cases that exhibit competitive concerns.

2.13 The problem would not necessarily be solved by the contemplated optional voluntary notifications (although this option would provide legal certainty to firms that require it). Where there is not a tradition of voluntary notification, it is not clear that this would be embraced. The Irish regime operates a mandatory notification system for mergers but also makes provision for the parties involved in a transaction to make a voluntary notification. However, between 2003 and 31 August 2013, of the 590 notifications received by the Authority only three (less than 1%) were voluntary notified. In the context of the Irish regime, where the thresholds are not met under the mandatory system merging parties rarely make a voluntary notification.

2.14 In conclusion, of the three options outlined above, the Authority would prefer a system along the lines of the 'transparency system' as the most appropriate. Such a system would balance the need for information on potential transactions of concern without significantly increasing the general regulatory burden on undertakings. This is of course provided that the information the undertakings are obliged to provide under such a system is not too burdensome and should not be as extensive as that required in the current Form CO.

Alternative Proposal

2.15 In addition to the views expressed above, the Authority would like to tentatively propose an additional option that the Commission might consider as an alternative to the three options set out in the consultation document. This option is essentially a compromise between a pure mandatory system and a voluntary system. It could be described as a 'self-assessment plus' system.

2.16 The basic idea of the 'self-assessment plus' approach is to enable the Commission to challenge the acquisition of a non-controlling minority shareholding or the creation of a structural link either by requiring

parties to notify particular transactions or by relying on voluntary notifications. As in the 'self-assessment' system, the fundamental point is establishing the Commission's right to challenge problematic acquisitions of non-controlling minority positions. This would be supplemented by requiring that the Commission be informed of a relatively small number of transactions. This would ensure that the Commission is not overly reliant on media reports and/or reports from hostile interests and help to establish a culture of Commission review of the most problematic of such transactions.

2.17 For this system to work effectively it will be necessary to identify the relatively small number of cases to be mandatorily reported. This could be achieved by establishing the criteria upon which mandatory reporting will be required.[12] For example it could be based on a relatively high share holding, such as 20-25% and/or the conferring of rights such as board membership, veto rights over strategic decisions, or the ability to obtain confidential information. It could be limited to transactions involving some horizontal overlap. Any such notice must make clear that any such defined list is simply establishing the types of transactions that must be mandatorily reported. The Authority has not developed its thinking on exactly which information would have to be included in the contemplated report.

2.18 Under the 'self-assessment plus' system the normal thresholds under the Merger Regulation should apply as this would enable jurisdictional certainty for the parties. In addition a referral mechanism should also be in place to enable Member States to seek to refer the case where it is appropriate to do so.

2.19 In conclusion, the Authority is of the view that this 'self-assessment plus' option could be a workable option and offers a compromise that would balance the benefits on the one hand of mandatory notification system with the lower administrative burden of a voluntary system. It would rely on a voluntary system that would establish the Commission's right to challenge problematic transactions, but supplement this with a mandatory element for cases most likely to cause competition problems. The option of voluntary reporting would provide needed legal certainty The Authority's views remain preliminary and the concept requires further development, but the basic concept of blending the 'notification' and the 'self-assessment' systems appears desirable.

[12] The Commission could set out notification criteria in a Commission Notice which should also make it clear that the list is not 'exhaustive'.

Questions 4 to 9 and the Responses

> 4. *In order to specify the information to be provided under the transparency system:*
>
> a) *What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets concerned)?*
>
> b) *What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?*

2.20 This is a difficult question. The level of information an acquirer should be obliged to provide under the 'transparency system' will involve a careful balancing of the information required for the Commission to assess whether the structural link merits further investigation while not significantly increasing the regulatory burden on the entities concerned.

2.21 As stated above, the Authority takes the view that any obligatory information required should not be too burdensome, nor should it be as extensive as that required in the current Form CO. Where information is publicly available, much can be accomplished by relying on this. The key, beyond information about the parties and contact details, will be the setting out of the linkages between undertakings and then information sufficient for an appreciation of competitive issues. Whether this would best be done through reliance on NACE codes, lists of countries where there are sales or service, or narrative descriptions of overlaps, will require careful work consistent with the purpose of the system chosen.

> 5. *For the acquirer of a structural link, please estimate the cost of filing for a full notification (under the selective system in case the Commission decides to investigate a case, or under the notification system). Please indicate whether the costs of a provision of information under the transparency system would be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned.*

2.22 The Authority has no information with respect to the cost of filing a notification nor could it estimate the costs of filing of notifications under any current or proposed system.

> 6. *Do you consider the turnover thresholds of the Merger Regulation, combined with the possibility of case referrals from Member States to the Commission and vice versa, an appropriate and clear instrument to delineate the competences of the Member States and the Commission?*

2.23 The Authority considers that the turnover thresholds set out in the Merger Regulation together with the possibility of case referrals from Member States to the Commission and visa versa could be an appropriate and clear method of delineating the competencies of the Member States and the Commission.

> *7. Regarding the Commission's powers to examine structural links, in your view, what would be an appropriate definition of a structural link and what would constitute appropriate safe harbours?*

2.24 The Authority has not formed a clear view on what would be an appropriate definition of a structural link or what could be considered as an appropriate safe harbour in this context. It is not simply a matter of defining a percentage shareholding. In some cases for example, a very small shareholding of shares of a particular class, may grant the holder the right to board representation and/or provide veto rights over strategic decisions concerning the direction of the undertaking concerned.

2.25 With respect to safe harbours, the Authority notes that the United States[13] exempts acquisitions that are both "solely for the purpose of investment" and not resulting in the holding of ten percent or more of outstanding voting securities (15% for certain institutional investors)[14]. Without advocating the adoption of this specific criterion, the Authority believes it would be worth considering.

> *8. In a self-assessment or a transparency system, would it be beneficial to give the possibility to voluntarily notify a structural link to the Commission? In answering please take into account the aspects of legal certainty, increased transaction costs, possible stand-still obligation as a consequence of the notification, etc.*

2.26 The Authority considers that in either a self-assessment or transparency system (or a 'self-assessment plus' system) it would be beneficial to make provision for the possibility of voluntary notifying the Commission. This could provide legal certainty to entities who have elected to voluntary notify where they consider that the Commission may have some interest or concerns with respect to the proposed acquisition of the structural link. It could be designed with an automatic stand-still, no stand-still at all, or stand-still at the option of the Commission, as is most appropriate. The risk to the Commission, either in terms of burden or in terms of the risk of mistakenly immunizing or partially immunizing a transaction, would appear acceptable but is difficult to quantify.

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[13] Ireland also has special exemptions for certain firms trading in securities. See section 16(6)(d) of the Competition Act, 2002.
[14] 16 C.F.R. §§ 802.9, 802.64

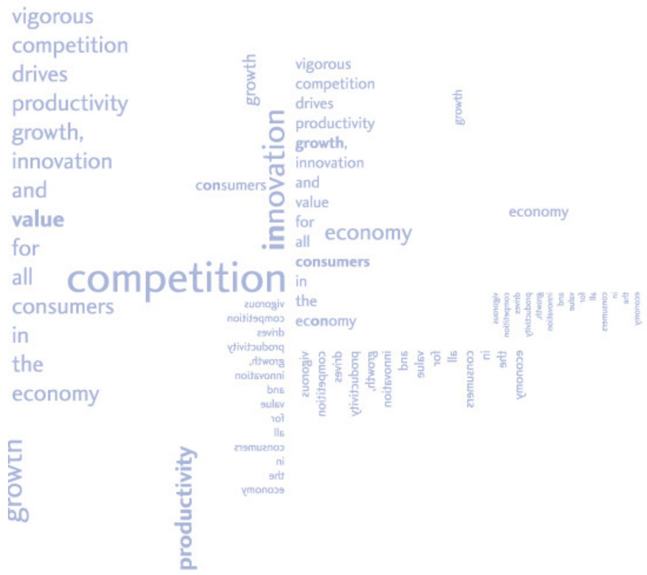
9.	*Should the Commission be subject to a limitation period (maximum time period) after which it can no longer investigate/intervene against a structural link transaction, which has already been completed? If so, what would you consider an appropriate time period for beginning a Commission investigation? And should the length of the time period depend on whether the Commission had been informed by a voluntary notification?*

2.27 The Authority has not formed a clear view whether or not the Commission should be subject to a limitation period within which to investigate or intervene against a structural link that has already been completed.

2.28 The Authority believes that care is needed in setting out any constraint on the Commission's ability to investigate or intervene. For instance, would the Commission be limited to a review under the Merger Regulation, or would it also apply to Articles 101 and 102? Would it immunize the establishment of the structural link only as an isolated event, or also as part of a pattern of conduct?

Conclusion

2.29 The Authority wishes to express its support the work undertaken by the Commission in preparing the consultation document and for the consideration it has given to the need for reform of the Merger Regulation. The Authority supports the general direction taken by the Commission in its current initiative on the introduction of a mechanism to permit the Commission to review the acquisition of non-controlling minority shareholdings or the creation structural links.



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