



OECD Competition Committee Working Party 3

Submission to the Roundtable on the Investigation of Consummated and Non-Notifiable Mergers

Date 14 February 2014



The Competition Authority
An tÚdarás Iomaíochta

This submission has been prepared by the Irish Competition Authority ("the Authority") for consideration at the OECD Competition Committee Working Party 3 meeting on 25 February 2014. The Competition Authority's answers to the questions in the Chairman's letter of 20 November 2013 are provided below.

Pre-Merger Notification Regime

Question 1. Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)

- 1.1 Ireland has a mandatory notification regime for mergers and acquisitions exceeding specified thresholds which are set out in the section 18 of the Competition Act (2002) ("the Act").
- 1.2 Notification of a proposed merger which satisfies the thresholds must be filed *"within 1 month after the conclusion of the agreement or the making of the public bid"*.¹
- 1.3 A merger or acquisition required to be notified *"shall not be put into effect"* until the Authority has determined that it may be (or has failed to act within the specified time)² Furthermore *"any such merger or acquisition which purports to be put into effect, where that putting into effect contravenes subsection (1), is void."*³

Review of Mergers Falling Below Notification Thresholds

Question 2. For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

- 1.4 Section 18(3) of the Act provides that parties to a proposed merger or acquisition that is not subject to mandatory notification may file a voluntary notification within a month after concluding their agreement or the making of a public bid.
- 1.5 The Authority welcomes any voluntary notification, and has stated that such a notification *"is desirable for mergers and acquisitions that do*

¹ The Competition Act 2002, section 18.

² Ibid section 19(1).

³ Ibid section 19(2).

not meet the financial thresholds but have the potential to substantially lessen competition in the State."⁴

- 1.6 Mergers and acquisitions that are notified, whether mandatorily or voluntarily, are subject to the same review by the Authority, which is obliged by the Act to determine whether the result of a notified merger or acquisition will be *"to substantially lessen competition in markets for goods or services in the State"*.⁵ For every notified transaction, the Authority must determine whether the transaction (a) may be put into effect, (b) may not be put into effect, or (c) may be put into effect subject to specified conditions.
- 1.7 Part 3 of the Act, which addresses mergers and acquisitions, sets out a review process applicable to all notified transactions (whether mandatory or voluntarily notified). The test of whether the transaction substantially lessens competition ("SLC") applies only to those transactions which are notified. While Part 3 of the Act does not provide for the application of the SLC test to non-notified transactions it does not prevent the Authority from reviewing them under its other powers provided for in the Act.
- 1.8 The Authority may review non-notified transactions under sections 4 and/or 5 of the Act, which are equivalent to Articles 101 and 102.⁶ Although the merger-specific remedies applicable to notified transactions would not apply to non-notified transactions, the Authority considers that a court would have broad discretion to act to prevent harm to competition (if a transaction is challenged in advance) or to restore competition (in other cases).

Question 3. If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

- 1.9 Although, as noted above, the Act's merger-specific remedies apply only to notified mergers, the courts have broad discretion to take appropriate action to respond to a valid challenge to a non-notified merger or acquisition.
- 1.10 The Authority has intervened to challenge a non-notifiable transaction only once to date, in Autumn 2012. The matter involved the proposed acquisition of Argosy Libraries Limited by Eason and Son Limited, the only two Irish-based wholesalers of new books in Ireland. (Eason is also the leading retailer of new books in Ireland.) Although the parties did not voluntarily notify, they did inform the Authority of the proposed transaction.
- 1.11 The Authority conducted an intensive investigation of the proposed transaction, including extensive interactions with the parties and the obtaining of views of a large number of third parties (e.g. publishers, UK wholesalers and retail customers). The Authority was concerned that the proposed transaction would result in increased prices and a reduction in the range of new books available to Irish consumers.

⁴ See Competition Authority, "When to Notify", at <http://www.tca.ie/en/Mergers--Acquisitions/When-to-Notify.aspx>.

⁵ The Competition Act, 2002 sections 21 and 22.

⁶ Note that where appropriate the Authority is also able to enforce Articles 101 and 102 through the Irish Courts.

1.12 In view of these concerns, the Authority decided to initiate court proceedings against Eason and Argosy for infringement of at least section 4 of the Act (which prohibits agreements that restrict competition). However, when the parties were informed of this, they abandoned the proposed transaction and also committed, for a period of one year, to give the Authority 30 days advance notice of any similar arrangement.

Question 4. Are there differences in practice or procedures for the investigation or challenge of a consummated or non-notifiable transaction?

1.13 As noted above, the Act's specific merger-review procedures apply only to notified transactions. The notification process, the deadlines, the two phases of investigation, the authorisation of certain information gathering, the requirement that the Authority determine whether a transaction may be put into effect, may not be put into effect, or may be put into effect with remedies – all apply by their terms only to notified transactions.

1.14 For transactions that are not notified (whether consummated or not), the Authority would rely on the normal procedures available to it to investigate concerted practices and alleged abuses of dominance under sections 4 and 5 of the Act. Because the Authority does not enforce sections 4 and 5 of the Act directly but must instead pursue such actions in the courts the imposition of “remedies” for a non-notified transaction could be achieved only by agreement or order of the court.

1.15 As a practical matter, however, parties to a transaction that has not been notified may nonetheless voluntarily cooperate with an Authority investigation. This occurred in connection with the proposed sale by Bord na Mona of its oil distribution business (Suttons Oil) to Corrib Oil, about which the Authority received a complaint in September 2013.

1.16 In this case the Authority once again conducted a substantial investigation of the proposed transaction, including informally requesting information from the parties and obtaining the views of a large number of third parties including competitors and customers of both parties. Following its investigation, the Authority informed the parties that, based on the information available to it, it did not intend to challenge or object to the completion of the proposed transaction.

Review of Mergers that Should Have Been Notified but Were Not

Question 5. If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

1.17 A merger of acquisition that purports to have been put into effect in contravention of the statutory requirement to notify and wait until the

Authority has made a determination (or has failed to make one within the specified time) is deemed to be "void".⁷

- 1.18 In addition, it is an offence to fail to make a mandatory notification of a transaction that satisfies the thresholds. Section 18(9) stipulates that *"the person in control of an undertaking which has failed to notify the Authority within the specified period . . . shall be guilty of an offence"* and furthermore shall be subject *"on summary conviction, to a fine not exceeding €3,000"* and *"on conviction on indictment, to a fine not exceeding €250,000"*.
- 1.19 If this contravention of the Act continues for a period of time, then there is the possibility of the imposition of daily fine of up to between €300 and €25,000 per day.⁸
- 1.20 As noted above the Authority is able to challenge a non-notified merger or acquisition under sections 4 and/or 5 of the Act. This presumably extends not only to transactions that were not required to be notified, but also to ones that should have been notified – although in the latter case the Authority would have to address the consequences of the statutory provision making such a transaction "void".
- 1.21 Alternatively, if the parties to a transaction that should have been notified were permitted to make a belated notification, the Authority could review it following the normal procedures for notified transactions. The Competition Act does not set out any time limit for Authority action against non-notified transactions.

Question 6. If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

- 1.22 As noted section 19(2) of the Act provides that a merger that should have been notified but was not is void. In addition as noted section 18(9) makes a failure to notify a merger an offence. However to date the Authority has never sought a statutory fine for failure to comply with an obligation to notify.
- 1.23 Since 2003 the Authority has had experience with a number of cases of implementation prior to notification (or notification and clearance). Several such cases involved relatively small transactions and parties who were not aware of the Act's requirements. In all of the cases, the Authority informed the parties of their breach of section 19 but continued to carry out its statutory duty to review the transactions. It has been the Authority's standard practice to mention any breach of section 19 in the official published Determination for the merger in question.
- 1.24 Although there has been some inconsistency with the timing of press releases in the past the Authority, in July 2013 on foot of the most recent example of parties completing a transaction without waiting as required, clarified its policy:

⁷ The Competition Act, 2002 section 19(2).

⁸ Ibid section 18(10).

"The Authority has decided that in future cases where, in its opinion, there has been a purported implementation of a notified merger prior to clearance, the Authority will normally issue a press release announcing the fact that the merger is void without waiting for the conclusion of the merger investigation."⁹

Subsequent Review of Previously Cleared and Consummated Mergers

Question 7. If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

- 1.25 These questions could relate to any of three situations: (a) where a notification (mandatory or voluntary) contained false or misleading information; (b) where a non-notifiable transaction was investigated but not challenged; and (c) where a notified transaction was cleared or cleared with conditions. Each is addressed in turn.
- 1.26 Where a notification to the Authority contains false or misleading information then under section 18(12) of the Act the notification is considered invalid. Section 18(12) also provides that "*any determination . . . made on foot of such a notification is void*".
- 1.27 Where a transaction has not been notified, the Authority's right to seek redress under sections 4 and/or 5 of the Act continue even if the Authority has investigated the transaction and decided not to take action. (Parties wishing to have more certainty may voluntarily notify a transaction.) Thus, in the Corrib Oil/Suttons Oil matter discussed above, the Authority informed the parties that since the transaction was not notified the Authority retained and reserved all rights to consider under the Act at some future date issues related to the acquisition, its implementation, and the activities of Corrib Oil and Suttons Oil. The Act does not set out any specific deadline by which time the Authority would have to act.
- 1.28 On the other hand, where the Authority has determined that a transaction may be put into effect because in the Authority's view it will not substantially lessen competition (or will not given specified conditions), the Act does not provide for any subsequent challenge to the transaction.

⁹ Press release, Acquisition by Top Snacks Limited of the KP Snacks business from United Biscuits (UK) Limited (8 July 2013), available at <http://www.tca.ie/EN/News--Publications/News-Releases/Acquisition-by-Top-Snacks-Limited-of-the-KP-Snacks-business-from-United-Biscuits-UK-Limited-.aspx>. The clarification was reflected in a revision of the Authority's Mergers Communications Policy, available at <http://www.tca.ie/images/uploaded/documents/Communications%20Policy%20July%202013.pdf>.