

# ARTHUR COX

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## BY EMAIL

FAO Geoffrey Gray  
Simplified Procedure  
Competition and Consumer Protection Commission  
Bloom House  
Dublin D01 C576

**Re: Public consultation on a simplified procedure for the review of certain mergers and acquisitions (the “Consultation”)**

Dear Geoffrey,

Arthur Cox welcomes the opportunity to respond to the Consultation. We agree with the CCPC that now is an opportune time to review the process by which merger reviews are conducted and to consider whether the introduction of a simplified procedure would make the process more effective.

We have reviewed the consultation document published by the CCPC on 7 November 2018, and have set out below our observations on the six questions raised in that document.

### **Introduction of a simplified procedure**

- 1. On the basis of your experience of the Irish merger control regime, and considering the analysis presented in the background section of [the consultation document], do you consider that there is currently scope for simplification of the Irish merger control procedure, without impairing the merger regime’s objective of preventing harmful effects on competition. Please explain your answer.**

We agree that the merger control process under the Competition Act 2002 (as amended) (the “2002 Act”) needs to operate efficiently in order to ensure effective protection of consumer welfare, while at the same time not imposing undue burdens on businesses. We also agree that the merger review process should allow the CCPC the flexibility to approve notifiable transactions which clearly raise no substantive competition concerns in an expeditious manner.

Since the current merger regime came into effect, the CCPC has, in our view, generally taken a reasonable and pragmatic approach when assessing mergers which raise no competition

concerns. In our experience, once the notifying parties have provided the relevant information in the Merger Notification Form, and the window for third parties to comment on the proposed transaction has closed, the CCPC has typically moved quickly to issue a determination and avoided issuing extensive information requests where no (or minimal) overlaps arise. As a result, we have noted that, in many transactions in which we have been involved where no substantive concerns arose, the CCPC has issued a final determination in as little as 15-20 working days following notification.

In addition, in cases where there have been limited overlaps between the parties to a transaction, we have found the CCPC to be reasonable and pragmatic about requests for waivers in respect of completion of certain parts of the Merger Notification Form where warranted and where the case for a waiver is substantiated. Such an efficient review process for straightforward transactions compares favourably with other competition authorities, particularly when coupled with the fact that pre-notification engagement is not required by the CCPC and does not regularly form part of a notification process in Ireland.

While the existing regime works well, in our view there would be merit in putting on a clear footing the basis on which the CCPC would expedite the review of transactions which are unlikely to raise competition concerns, and the level of information required from notifying parties in order to allow the CCPC to come to such an expedited determination. As noted in the consultation document, this would bring the CCPC process in line with the practice of the European Commission and the majority of national competition authorities across the EU. We have set out in response to the questions below our views as to how such a regime may operate in practice, and the potential benefits and risks involved.

2. **In your view, what are the potential benefits and risks associated with the introduction of a simplified procedure? Please explain your answer.**

*Potential benefits*

In its 7 November 2018 consultation document, the CCPC highlights that a simplified procedure could lead to a more efficient review process for transactions that pose no competition concerns, and a more “effects-based” and “outcomes-focused” regime in general.

We agree that an efficient process for reviewing mergers which give rise to no competition concerns is a critical feature of a modern and effective *ex ante* merger control system. Taken together with the revised jurisdictional thresholds which came into effect on 1 January 2019, a simplified procedure system, properly implemented, could allow the CCPC to focus time and resources on the transactions which are of greatest competitive impact and of most relevance to consumer welfare. A simplified procedure could also significantly reduce the burdens on businesses (particularly small businesses), in terms of management time and costs, in preparing Merger Notification Forms for transactions which raise no, or no significant, concerns.

*Potential risks*

The CCPC’s consultation document notes that the potential risks of introducing a simplified procedure are that a merger may not undergo sufficient levels of assessment or that it may be “incorrectly” cleared (or incorrectly cleared without commitments).

We do not consider that the introduction of a simplified procedure would materially increase the risk, in practice, of so-called ‘Type II errors’ arising, nor are we aware of this being a significant issue under the current Irish merger control regime. Moreover, under either a simplified or standard review procedure, there are a number of safeguards which can effectively mitigate this risk, notably: (i) the notifying parties are under an obligation to provide accurate and complete information to the CCPC as part of the Merger Notification

Form; (ii) the transaction is open to comment from third parties who are free to raise concerns directly with the CCPC; and (iii) the CCPC may at any point seek to obtain further information (formally or informally) if it has concerns or is unclear about any aspect of the transaction.

In our view, a more significant potential risk with the introduction of the simplified procedure outlined in the CCPC's consultation document is that it may ultimately result in the opposite outcome to the one intended in terms of creating an efficient and outcomes-focused review process. There are two risks we would flag in particular:

- The introduction of a market share-based test for engaging the simplified procedure potentially adds complexity and uncertainty and could undermine the purpose of introducing a simplified procedure in the first place; and
- The market share-based criteria may necessitate the notifying parties engaging in detailed and lengthy pre-notification engagement with the CCPC to establish whether the simplified procedure is available, which may have significant timing implications. This is particularly the case given the risk for notifying parties, as outlined in the consultation document, that the CCPC may declare the notification invalid, or issue a formal Requirement for Information resetting the Phase 1 clock, if a transaction notified under the simplified procedure is ultimately found not to fulfil the market share-based criteria for eligibility.

As outlined in response to Question 1 above, in our experience the CCPC already adopts an efficient approach to assessing mergers which are of limited or no competitive impact, and in practice has shown that it is readily capable of clearing those transactions on an expedited basis without the need for extensive (or indeed any) pre-notification discussions. In this respect, the CCPC's practice has tended to differ from that of the European Commission and certain other national competition agencies, where pre-notification engagement even on straightforward cases is commonplace, and the introduction of a simplified procedure was designed to streamline what had become an unduly burdensome process.<sup>1</sup>

While any measures which would enhance the efficiency of the Irish merger regime would be welcome, it is important to note that the starting points in terms of the review process between Ireland and other regimes including the EU are different, and that any simplified procedure introduced into the Irish regime should take account of this. In particular, if the introduction of a simplified procedure resulted in candidate cases tending to be subject to detailed and lengthy pre-notification engagement on whether the transaction in question meets the criteria, this would militate against achieving the objective of introducing a more efficient and streamlined procedure for transactions that do not give rise to competition concerns.

### **Simplified procedure criteria**

3. **In your opinion, what criteria should be applied to select a merger or acquisition for assessment under a simplified procedure? Please make specific references to the CCPC's proposed approach, outlined [in the consultation document]. Please explain your answer.**

The CCPC's consultation document outlines three grounds on which transactions may be eligible for review under a simplified procedure:

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<sup>1</sup> See European Commission Notice of 5 December 2013 on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, which came into effect on 1 January 2014 as part of the Commission's Merger Simplification Package (the "EU Simplified Procedure Notice").

- Where none of the parties are active in the same product or geographic markets, or in any upstream or downstream market from one another, i.e. no horizontal overlap or vertical relationship arises between the merging parties.
- Where two or more of the merging parties are active in the same product or geographic market, but their combined market share is less than 15%, or, where one or more parties is active in a market which is upstream or downstream to a market in which another party is active, but the market share of each of the parties involved in each market is less than 25%.
- Where a party which already has joint control over a company acquires sole control of that company.

We agree with the CCPC's view that transactions falling under the first and third grounds outlined above are generally unlikely to raise any significant competition concerns (given the lack of competitive overlap and/or change in the dynamics of competition on relevant markets), and therefore ought to be assessed under a simplified or expedited procedure.

However, as noted in response to Question 2 above, the introduction of a market share-based test for the application of the simplified procedure potentially raises significant risks, and would need to be considered carefully before being introduced. In particular, there are important procedural differences between the Irish and EU merger regimes which should be taken into account in considering whether to include a market share-based test:

- Questions concerning relevant market definitions (including plausible alternatives), market shares and the identification of "affected" markets are often addressed in extensive pre-notification engagement with the European Commission, typically involving the submission of several drafts of the Form CO. It is difficult to envisage how these issues could be addressed under the Irish regime without similar levels of pre-notification engagement, particularly if the CCPC proposes to adopt an approach under which it will assess whether the parties' shares on any other "*conceivable*" market definition<sup>2</sup> would exceed the thresholds for standard notification.
- Even for transactions benefitting from the European Commission's simplified procedure, pre-notification is a standard and expected part of the review process, which notifying parties factor into their timelines. However, the position is different in Ireland, where pre-notification engagement is not required and not regularly used.

In light of these procedural differences, and given the complexity inherent in determining market shares and the fact that the CCPC's existing procedures for assessing cases which raise no competition concerns allow for determinations to be issued in an expeditious manner, the inclusion of a market share-based test for the application of the simplified procedure may result in a less efficient and more protracted review of straightforward transactions than is currently the case. This is particularly true where the review would result in lengthy pre-notification engagement on whether the test has been met. While it may be possible to mitigate this risk to some extent by the CCPC adopting a reasonable and pragmatic approach to the application of a market share-based test to candidate cases, this would not remove it altogether.

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<sup>2</sup> The proposed "any conceivable markets" standard is higher than that adopted by the European Commission under the long and short Form CO (which refers to "plausible" alternative market definitions) and by the UK Competition and Markets Authority's Merger Notice, which also refers to "plausible" alternative candidate markets. In our view, the adoption of an "any conceivable markets" standard would be likely to place a significant burden on notifying parties, and would undermine the objective of expediting the review of cases that do not give rise to competition concerns. We would recommend the adoption of a "plausible alternative markets" standard in line with international best practice.

4. **What type of screening tools/procedures do you think the CCPC should consider to ensure that the correct transactions are selected for review under a simplified procedure? Please explain your answer.**

In our view, one of the most important characteristics of the Irish merger control regime is that the thresholds for notification are clear and based solely on the turnover of the undertakings involved. Merging parties can therefore quickly establish whether or not a transaction meets the thresholds for notification under the 2002 Act, providing certainty for businesses in the context of transaction planning. We believe that this important aspect of the regime should be maintained.

As such, and as a general point, care needs to be taken in relation to the criteria by which transactions are eligible for review under any proposed simplified procedure and the use of screening tools/procedures for this purpose. Overly-complex screening tools risk placing significant burdens on parties to establish that their transaction does in fact meet the criteria for simplified review, and may lead to significant delays if the CCPC is ultimately not satisfied that the criteria have been met.

In our view, the eligibility criteria for a simplified procedure should, like the jurisdictional thresholds under Section 18 of the 2002 Act, be clear, objective and easily determinable. We believe that the first and third grounds identified by the CCPC in its consultation document (referred to in the response to Question 3 above), i.e. where no horizontal overlap or vertical relationship arises and where the transaction involves the move from joint to sole control in the context of a pre-existing joint venture meet these criteria. The use of more complex screening tools inevitably raises the prospect of delays before notification in assessing whether a transaction qualifies for simplified/expressed review.

The consultation document states that, in line with simplified procedures in other EU Member States and with the EU Commission's simplified procedure, the CCPC will reserve the right to revert to the standard procedure at any point, but does not set out guidance on the circumstances in which this may occur. We believe that it would be important to provide clear guidance on the circumstances in which a case that meets the criteria for simplified procedure may nonetheless not benefit from its application. We note in this regard that the EU Simplified Procedure Notice sets out guidance of this nature in the section entitled "Safeguards and Exclusions".

**What procedures should be simplified?**

5. **Under a simplified procedure, what current CCPC merger procedures do you believe should be simplified/eliminated? Please explain your answer.**

As the CCPC notes in the 7 November consultation document, notifying parties are required to provide a substantial amount of information as part of the Merger Notification Form, including contact details for suppliers, competitors and customers, internal documents analysing the transaction, important agreements relating to each area of overlap and detailed market share information. However, where no competitive overlap arises, or where the transaction is unlikely to raise competition concerns, our experience is that the CCPC has adopted a pragmatic approach in relation to such material, including granting waivers as appropriate. As such, it is often the case that notifying parties in clear-cut cases that pose no substantive concerns are required to provide much less detailed information that is formally required in the Merger Notification Form.

In our view, in cases which qualify for the simplified procedure, the parties should not be required to provide the information requested in Sections 4.5-4.11 of the current Merger Notification Form. In addition, to minimise undue burdens on businesses, the obligation to

produce market share data and internal documents under Sections 5.2 and 7.3 respectively should be circumscribed insofar as possible.

As noted in response to Question 2 above, the consultation document proposes a range of measures which the CCPC may take if it considers that the transaction does not meet the criteria for simplified review. These options include declaring the initial notification invalid and issuing a formal RFI under Section 20(2) of the 2002 Act, which would have the effect of resetting the Phase 1 timetable from the date of compliance with the RFI. In our view, these measures would be inappropriately severe and entirely disproportionate in the context of a simplified procedure regime, particularly where parties are already under an obligation to provide accurate and complete information and the transactions involved are unlikely to raise competition concerns. Instead, where it is uncertain that the simplified procedure applies, the CCPC could simply retain the right to require notifying parties using the simplified procedure to provide all of the information required in the standard Merger Notification Form and to assess the transaction on that basis.

More generally in terms of procedure, we believe that the Irish merger process would benefit from greater clarity in relation to the progress of the CCPC's review, e.g. by introducing the possibility of the notifying parties having an informal "State of Play" call with the CCPC case team around the mid-point of the review timetable. Such a step, which is a standard in many other jurisdictions, would allow parties to take stock of any issues (or potential issues) emerging from the review, and give the case team an opportunity to provide an indicative, non-binding view on the substantive and procedural aspects of the case. In our experience, notifying parties often feel removed from the Irish merger review process when compared to their experience in other jurisdictions, and a greater level of transparency (even in clear-cut cases raising no issues) would give stakeholders additional confidence in the procedures being undertaken by the CCPC.

6. **Should the CCPC provide a shorter notification form for transactions which qualify for assessment under a simplified procedure? If so, what sections of the current notification form do you believe should be amended/eliminated? Please explain your answer.**

As set out in our response to Question 5 above, in cases which qualify for the simplified procedure, we consider that the parties should not be required to provide the information requested in Sections 4.5-4.11 of the current Merger Notification Form. In addition, as set out above, the obligation to produce market share data and internal documents under Sections 5.2 and 7.3 of the Merger Notification Form should be circumscribed insofar as possible in any simplified procedure.

We do not have any strong views as to whether a separate "short form" Merger Notification Form is necessary. While there may be some merit in keeping the simplified and standard review processes separate and distinct, including in relation to the notification form used, it would also be relatively straightforward for notifying parties following the simplified procedure to use the current Merger Notification Form and omit data not required under the simplified procedure, provided there is clear guidance for what is and is not required. Whatever approach is taken by the CCPC, it is important that there is the facility for parties to make clear on the face of the notification form that they are in fact using the simplified procedure, and are not inadvertently failing to provide information otherwise required as part of the notification form.

As noted at the outset, we welcome the opportunity to provide our feedback on the Consultation, and would be happy to engage further with the CCPC if we can be of further assistance. Please contact Richard Ryan (telephone: (01) 920 1240; email: [richard.ryan@arthurox.com](mailto:richard.ryan@arthurox.com)), Florence Loric (telephone: (01) 920 1149; email: [florence.loric@arthurox.com](mailto:florence.loric@arthurox.com)), and Patrick Horan (telephone: (01) 920 1063; email: [patrick.horan@arthurox.com](mailto:patrick.horan@arthurox.com)).

Yours sincerely,

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