MASON HAYES & CURRAN

Competition and Consumer Protection Commission (CCPC)

Consultation on a Simplified Merger Procedure for the Review of Certain Mergers & Acquisitions

Mason Hayes & Curran welcomes the CCPC's consultation on a simplified merger procedure and submits its observations below.

1. **On the basis of your experience of the Irish merger control regime, and considering the analysis presented in the Background section of this 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.**

   Yes. As the CCPC has pointed out, an appropriately designed simplified procedure should:

   - significantly reduce CCPC time and resources needed to review mandatorily notified transactions;
   - potentially have a positive impact on the Irish economy, as merger review periods would be shorter;
   - reduce unnecessary burden on notifying parties; and
   - bring Ireland in line with the majority of EU Member States.

   Ex-ante regulation should always go no further than is necessary to achieve its goals. However, the current one-size-fits-all approach clearly in many cases (c.55% of cases) imposes a disproportionate burden on notifying parties. Accordingly, the potential introduction of a simplified procedure is to be welcomed.

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

   In terms of benefits, please see our response above.

   In terms of risk, the obvious risk is that a problematic merger is not picked up by the CCPC as a result of the simplified procedure. The existence of such a risk assumes that the information provided pursuant to the simplified procedure (and including in pre-notifications) may be insufficient to flag such a merger. However, we believe this risk can be sufficiently managed through the design of the simplified procedure and, worst case scenario, through some degree of *ex-post* monitoring.

   Ireland, unlike the majority of its European counterparts, has already taken an overly conservative approach to merger control and we believe continuing to do so unnecessarily reduces the benefits that could otherwise be achieved through a simplified procedure.

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

   At paragraph 2.12 of the consultation document, the CCPC has proposed the introduction of a simplified procedure for three categories of merger. We agree with the three categories proposed. As is the case in other Member States (and under the European Commission's simplified procedure), the CCPC can choose to expand upon these categories over time.

   We set out below some observations on each of the categories proposed.

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Category 1 (no overlap): Mergers of this type are clearly prime candidates for a more proportionate approach to merger control. Indeed, the European Commission has mooted the idea that such mergers could be exempt from *ex-ante* scrutiny altogether.

Category 2 (overlap but below threshold): It is not clear to us why the CCPC is proposing to take a conservative approach to the market share thresholds for mergers in this category. We feel this is unfortunate given that Ireland already has one of the most conservative merger control regimes in the EU. This is an excellent opportunity for Ireland to take a more progressive, proportionate and business-friendly approach to merger control and for the CCPC to focus its resources on those mergers most likely to raise competition concerns.

We note that the European Commission raised the thresholds below which it considers transactions do not raise competition concerns to 20% for horizontal mergers and 30% for vertical mergers as far back as 2013. Also, many of the Member States whose thresholds are currently set at 15% and 25% had introduced those thresholds prior to the European Commission's 2013 revision. Indeed, it is noteworthy that the French Autorité de la concurrence in 2018 proposed the introduction of market share thresholds for the first time at 25% for horizontal overlaps and 30% in the case of vertically linked markets.

Practically speaking, it is difficult to see how choosing a 20% threshold instead of a 15% threshold for a horizontal merger is likely to cause type II errors or false negatives (i.e., the CCPC incorrectly clearing a transaction, or incorrectly clearing a transaction without commitments). Something more fundamental is likely to have caused such an outcome, such as an erroneous market definition which is clearly already within the CCPC's scope of assessment for mergers in this category.

In addition, choosing either a 25% or 30% threshold for a vertical merger is very unlikely to cause false negatives. Vertical mergers are generally less likely to significantly impede effective competition than horizontal mergers (noting also that vertical mergers are rarely, if ever, blocked).

We therefore suggest that the CCPC take this opportunity to align Ireland with the approach taken by the European Commission by setting the thresholds at 20% for horizontal mergers and 30% for vertical mergers. In respect of vertical mergers, this would also align the CCPC's merger control policy with the European Commission's Guidelines on non-horizontal mergers and, indeed, with the European Commission's and CCPC's safe harbours for vertical restraints.

In any event, and particularly if a more conservative horizontal threshold is to be used, we believe the test should be augmented to allow for a higher threshold where the increment is small. This approach, which is used in other Member States, is appropriate because the change in market concentration resulting from a merger clearly better reflects the potential effect of a merger on competition than absolute market shares. For example, the threshold below which horizontal mergers are considered to benefit from the simplified procedure could be increased by 10% where the increment is not higher than 2%. We see little downside to such a proposal given that such marginal increases are highly unlikely to negatively affect competition.

Category 3 (joint to sole control): As noted by the European Commission in its Notice on a simplified procedure, a merger involving a change from joint to sole control only exceptionally requires closer scrutiny. Accordingly, it is appropriate to include this category in the simplified procedure.

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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.

Pre-notification discussions

As noted in the consultation document, pre-notification discussions could be a useful tool, particularly for mergers in Category 2. However, it is crucial that this does not, in practice, have the effect of undermining the benefits of a simplified procedure.

Given we are dealing with transactions which, on their face, do not raise concerns, one would hope that pre-notification discussions in respect of the simplified procedure would be facilitated, perhaps through a dedicated CCPC team, through focussed questions on the draft notification form, and within specified timelines, similar to the procedure followed by the European Commission.

Market definition

At paragraph 2.13 of the consultation document, the CCPC proposes to take a cautious approach to market definition, in which it will assess "*any other conceivable markets*". The meaning of the term "*conceivable*" should be explained, in particular, as to how it differs, if at all, from the term "*plausible*" used by the European Commission, or indeed how it differs from the information normally required under section 5.1 of the CCPC's Merger Notification Form (the "**Notification Form**").

We assume that "*conceivable markets*" should include only those markets which are economically realistic from the industry's perspective. Otherwise, the simplified procedure could quickly become overly burdensome and unworkable in respect of Category 2 mergers, whereby the notifying parties would be better served by simply reverting to the standard Notification Form.

We note the CCPC's view in paragraph 2.6 of the consultation document that it would intend to reserve the right to revert to the standard procedure at any point – specifically by invoking the provisions of section 18(12) of the Act, or by issuing a request for information under section 20(2) of the Act. The CCPC repeats this view in paragraph 2.8 of the consultation document. Reverting to the standard procedure must, of course, be an option open to the CCPC. However, as a practical and business-friendly matter, we think the CCPC should, in those circumstances, express a preference for proceeding down the section 20(2) request for information route, rather than invoking the provisions of section 18(12), which would require the CCPC to establish that the information provided etc. is false or misleading in a material respect, or that full details have not been provided. This also highlights the importance of a structured and meaningful pre-notification process where, in particular, the information and data requirements are fully articulated and understood.

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

Commitment on faster clearance

We welcome the CCPC's proposal to introduce a shortened determination for mergers which qualify under the simplified procedure. However, this will clearly not, in itself, benefit notifying parties in the absence of faster clearance times. In that connection, the CCPC has noted that the introduction of a simplified procedure in Ireland could significantly reduce the time and resources

needed for it to review mandatorily notified transactions and that this should lead "*to faster review times*".

In that light and given the extremely low risk posed by mergers in Categories 1 and 3, we believe that stakeholders would welcome a (even a non-binding) commitment from the CCPC to endeavour to clear such mergers in a shorter waiting period, e.g., within five (5) working days after the deadline for third parties to make submissions has expired. Otherwise, we feel that the current proposals may be of limited overall benefit to notifying parties.

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.**

We set out below some observations on the sections of the Notification Form which are relevant to each category of merger. These exemptions could either be agreed in pre-notification discussions or, ideally, formally provided for under the CCPC's simplified procedures.

Category 1 (no overlap): The current version of the Notification Form already confirms that "*It is not necessary to complete Section 4 of the Notification Form….where there is neither a horizontal overlap nor a vertical relationship between the activities of the undertakings involved on the island of Ireland*". Accordingly, in such a scenario, notifying parties are already exempt from having to complete section 4 in its entirety and not just sections 4.5-4.10. In that connection, it is not clear what additional benefit, if any, is being afforded to notifying parties under this category.

It perhaps makes sense for mergers in this category that section 5.1 of the Notification Form relating to relevant market(s) be completed, to the extent possible, to support the view that there is no horizontal overlap or vertical relationship. However, in the absence of a horizontal overlap or vertical relationship, sections 5.2 (market share), 5.3 (competition assessment) and 7.3 are redundant. Therefore, notifying parties should be explicitly exempted from having to complete these sections. Whilst these exemptions would, in practice, have little impact on the existing regulatory burden on notifying parties for mergers in this category, they would be a step in the right direction in terms of ensuring the credibility of the simplified procedure.

Accordingly, we suggest that, for mergers in this category, notifying parties should be exempt from having to respond to section 4 in its entirety (as is already currently the case) and sections 5.2, 5.3 and 7.3.

Category 2 (overlap but below threshold): We agree with the CCPC's proposal to exempt notifying parties from having to complete sections 4.5-4.10 for this category. However, given that the trigger for the simplified procedure under this category concerns the assessment of market definition and market share, notifying parties should also be exempt from having to complete section 5.3 (competition assessment).

Category 3 (joint to sole control): Given the very low competition risk attached to these types of mergers, we would suggest that notifying parties are exempt from completing sections 4.5-4.10 and section 5 of the Notification Form.

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