

Improving Merger Control in Ireland: Proposed Legislative Reforms Four Years On

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1. The Legislative Background

In 2002, the then new Competition Act ("the Act") gave merger review powers for the first time to the Competition Authority ("the Authority"). At the same time, the test for merger review was changed from the prevention or restriction of competition together with a common good test, to that of substantial lessening of competition, or SLC, as it is popularly known. The Authority had been preparing for all of this for some time since although virtually all the provisions of the Act came into effect on 1 July 2002, the merger changes only began in 1 January 2003. The Authority preparation consisted of drafting guidelines and procedures,¹ on which it had consulted widely, and setting up a new division within the Authority, dedicated solely to merger review.

The new regime is, on the whole, working well, reflecting no doubt, not only the Authority's preparation, but also the reliance on European Commission procedures and the SLC test, already tried and tested in a number of countries, particularly the US. The SLC test has so far resulted in the blocking of only two mergers, one in 2004 and the other in 2006, although a number of Phase 2 investigations have been undertaken.² The new regime has also resulted in a number of Phase 2 clearances where substantial conditions were imposed, without which there would have been a prohibition – e.g., UGC/NTL³ and SRH/ FM104.⁴ However, as with all new regimes, there have been some hiccups, and as the years have passed, the Authority has identified several areas in the legislation which either are unclear, giving rise

* Unless otherwise indicated the views in this paper do not necessarily represent those of the Competition Authority. The paper is prepared for the Competition Authority sponsored conference on Merger Control in Ireland: Prospect and Retrospect, Croke Park Conference Centre, 11 April 2007.

¹ See Competition Authority *Notice in Respect of Guidelines for Merger Analysis*, Decision No. N/02/004 16 December 2002 and Competition Authority, *Revised Procedures for the Review of Mergers and Acquisitions*, February 2006. These may be found at www.tca.ie

² Full details maybe found in Competition Authority, *Annual Report*, various issues. These maybe accessed at www.tca.ie.

³ M//05/024.

⁴ M/03/033.

to doubts as to their correct interpretation, or, although clear, do not appear to work as the legislature intended. In this paper I will highlight some of these, look at them in more detail, and consider at the same time what might be done to improve matters. I propose to deal with them under the headings of notification, sanctions, time limits, and review of commitments and conditions, according as they affect one or other of those areas.

I might note here that the Minister for Enterprise Trade and Employment has recently said in public that he is committed to reviewing the Competition Act in 2007. Now is therefore a very good time to consider whether and how the Act should be amended in relation to the merger review function. However, in this paper, I am concentrating on the main changes the Authority thinks would be desirable. The suggestions I make have in the main been agreed by the Authority. In one or two cases, however, the proposed changes are more in the nature of a suggestion, and we would welcome some debate on these issues. I should also point out that, with one exception (the question of "publication") I am not dealing with any problems relating to media mergers: they are the subject of a separate paper prepared by my colleagues Ibrahim Bah and Linda NiChualadh (2007).

2. Notification

Mergers above certain thresholds must be notified to the Competition Authority, and mergers below those thresholds may, at the option of the parties be notified. We will look at problems posed by the thresholds later in this paper, but for now I want to consider the definition of a merger, as set out in the Act.

Definition of a Merger: Section 16(1)(b) – A Slip of the Draftsman's Pen?

What is a merger? The term is defined in the Act itself, at section 16(1). It identifies three situations that will give rise to a merger for the purposes of the Act. Situation (a) is straightforward: it is where two or more previously independent undertakings merge. Situations (b) and (c) give rise to some difficulties. We will take them one by one.

Situation (b) is described in the Act as follows:

A merger or acquisition occurs if [...] One or more individuals or other undertakings who or which control one or more undertakings acquire direct or indirect control of the whole or part of one or more other undertakings.

This provision, which did not exist in Irish merger law prior to the Act, is clearly influenced by Article 3.1(b) of the 1989 EC Merger Regulation, ("the 1989 ECMR") which provides as follows:

A concentration shall be deemed to arise where:

[...]

(b) one or more persons already controlling at least one undertaking,

or

(c) one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.⁵

It is clear that what is at issue in both the EU and the Irish provisions is the acquisition by an individual/s or an undertaking/s of control in some other undertaking/s. Yet clearly, if I, who have no previous business interests acquires control of, for example, Ryanair, that can hardly be a merger. Who is Ryanair merging with in those circumstances? It is simply a case of Noreen Mackey buying up all the shares in Ryanair and ensuring a nice little provision for her old age. In order, therefore, to ensure that such a transaction would not be caught by the merger laws, both the EU and the Irish provisions specify that where an individual acquires control of an undertaking, it will only be regarded as a merger if that individual already controls some other undertaking.

The matter is somewhat different, however, if the acquirer is itself an undertaking. There cannot be any doubt that if Aer Lingus acquires control of Ryanair, that will be a merger. For that reason, the EU provision makes a clear distinction between individuals and undertakings. Let's look again at what it says:

the acquisition, by one or more persons **already controlling at least one undertaking**, or by one or more undertakings [etc.]
[emphasis supplied]

And now let's look again at the provision in section 16(1)(b) of the Act:

⁵ Council Regulation (EEC) No 4064/89. The provision appears again, with slightly different wording, but to the same effect, in the current Council Regulation (EC) No 139/2004

A merger or acquisition occurs if [...] one or more individuals or other undertakings **who or which control one or more undertakings** acquire direct or indirect control [etc.] [*emphasis supplied*]

Here, even where an undertaking acquires control of another undertaking, it will not amount to a merger unless the first undertaking is already in control of some other undertaking. We are puzzled as to the thinking behind this provision, which deviates so remarkably from the EU position, and we can only conclude that it must have resulted from a slip of the draftsman's pen. We believe it could have serious consequences, as businesses could organise themselves cleverly in such a way as to bring themselves within this provision (by the creation of a special stand-alone company for the purpose of an acquisition, for example) – and thus avoid the duty of notification that might otherwise arise. The Competition Authority would therefore like to see this provision amended so that the requirement of prior control related only to an acquiring individual.

Definition of a Merger: section 16(1)(c) – is Goodwill just Another Asset?

Section 16(1)(c) provides as follows:

For the purposes of this Act, a merger or acquisition occurs if –
[...]

The result of an acquisition by one undertaking (the “first undertaking”) of the assets, including goodwill, (or a substantial part of the assets) of another undertaking (the “second undertaking”) is to place the first undertaking in a position to replace (or substantially to replace) the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

The uncertainty this provision gives rise to derives from the ambiguity inherent in the phrase “assets, including goodwill.” We have been asked by legal advisers to an undertaking involved in a proposed merger whether this means that an asset acquisition will not constitute a merger unless the goodwill is also acquired, or is it simply indicating that goodwill is to be counted as an asset?

I think the answer is that it means both. It is true that the wording is ambiguous, but I think that when we break the provision down we can understand it better. The provision envisages two types of acquisition:

- (a) an acquisition of all the assets; or,
- (b) an acquisition of a substantial part of the assets.

Under (a), goodwill must also be acquired; under (b) it need not. Therefore if all of the assets except goodwill are acquired, the acquisition falls under heading (b) – one has not acquired the assets including goodwill, one has rather acquired a substantial part of the assets.

While I believe this to be the most probable interpretation, it would nevertheless be helpful to have the matter put beyond doubt in the legislation.

Definition of a Merger: section 16(2) – Control: Active Involvement Short of Decisive Influence?

As we have seen, a merger is defined in section 16(1)(b) as the acquisition of control. In section 16(2), “control” is defined as the capability of exercising decisive influence. However, it seems to us that control might also exist in circumstances where decisive influence is not capable of being exercised, but the acquiring party intends to do its utmost to influence strategic decisions. This would be similar to the concept of “material influence” in the UK, which, as Whish points out, “would seem to import a test that is wider than the [EU test of] ‘decisive’ influence”.⁶

Take the following example: NewCo, a competitor of TargetCo, acquires 25% in TargetCo. It has no seats on the board, and no rights of veto, but it declares that it intends to try to influence the strategic decisions of TargetCo. Should this share acquisition be susceptible to merger review? As things stand, it would not amount to a merger under Irish or EU law, although it would probably be caught under the UK rules. It is not clear that a departure from EU practice in this regard would be justified and so the Authority would be interested in the views of practitioners and others on this issue.

⁶ Whish (2001 p.805 ff). The examples he gives would not appear to be very different from similar examples giving rise to decisive influence in EU law – low shareholdings where nevertheless the other shareholdings were widely fragmented, etc.

Definition of a Merger: section 16(2) – Control: Passive Investment Short of Decisive Influence?

A recent paper by Ezrachi and Gilo (2006) raises some interesting arguments in support of this point. They discuss the concept of passive investment, point out the competition problems it causes and debate whether merger review or the application of antitrust law are best suited to dealing with those problems.

Passive investments arise when the investing firm shares the profits of the firm in which the investment has been made but exerts no influence over its activities.

Among the possible anticompetitive effects that may arise, the authors identify the following:

If, in an oligopolistic market such as the cigarette market, firm A passively invests in firm B, it could cause prices to go up relative to what they would without passive investment. If it had not invested, firm A would hesitate to raise the price of its brand, out of fear that such an increased price would cause firm A to lose too many customers to firm B. But if firm A passively invests in firm B, a price raise may become profitable, because even if some of the customers switch, firm A will share some of firm B's profits.

The above example would not give rise to a merger under either EU or Irish law, because firm A will not have acquired decisive influence. The authors go on to examine how the anticompetitive effects of passive investment can best be dealt with, and conclude that out of the three possible tools that could deal with passive investments (the ECMR, Article 81 and Article 82), the ECMR provides the most comprehensive application. They note that the European Parliament Committee on Economic and Monetary Affairs has considered the possibility of widening the scope of the ECMR to cover passive investments, and has taken into account the need to refrain from overregulation and excessive burdens on undertakings, on the one hand, while echoing concerns over the anticompetitive effects of passive investment, on the other.

Taking these matters into account themselves, Ezrachi and Gilo (2006, p.348) warn against any attempt to stretch the notion of "decisive influence" so as to include passive investments. They say that to do so would "blur the criteria for prior notification of the transaction under the ECMR and would affect the legal certainty for undertakings. Additionally, it would result in

superfluous, unnecessary prior notifications, adding burden to the Commission and the undertakings involved." In that light, they propose the following solution: to widen the ECMR's jurisdiction by providing for an exclusive appraisal route for passive investments falling short of control. This appraisal would, exceptionally under the ECMR, be *ex post* rather than *ex ante*, and would only be available in markets in which the level of concentration and the level of passive investment exceed a pre-defined threshold.

They point out that the benefits usually attributed to an *ex ante* mechanism are less relevant to passive investments, as the remedies imposed by the Commission would not involve a difficult de-merging exercise, but rather just a sale of the minority shareholding.

Would such an extension of the merger jurisdiction be useful in Ireland? Is this a widespread problem? It would, of course, require a radical amendment to the definition of "control" in the Act.

Trigger Event for Notification

At present, parties involved in a merger which meets the thresholds for mandatory notification must notify the Competition Authority within one month after the conclusion of the agreement or the making of the public bid. This again is a provision influenced by the 1989 ECMR, which provided for notification to be made following the conclusion of an agreement or the announcement of a public bid.

However, many businesses find it more convenient and efficient not to conclude a merger agreement until shortly before implementation, and the inability to notify prior to that date therefore poses problems for them. The Council of the European Union has recognised this in the new Merger Regulation (139/2004) ("the 2004 ECMR") by the addition of the following paragraph:

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement [...] provided that the intended agreement [...] would result in a concentration with a Community dimension.

The Authority suggests that when the legislature next amends the Act it might consider adding a similar provision, so as to bring us into line with EU practice.

A New Trigger Event: A Scheme of Arrangement?

A recent innovation remarked by the Competition Authority has been the increasing practice of merger by Scheme of Arrangement, where the parties are mainly based in the UK.⁷ This gave rise to a difficulty: as this is neither an agreement nor the making of a bid, what is the triggering event? Because it is not provided for at all in the Act, we were obliged to try to make an analogy with either an agreement or a public bid. Having examined the whole notion of a scheme of arrangement, it seemed to us that it was closer in nature to the making of a public bid than to an agreement, so, since the posting of the bid is the triggering event in the case of public bids (as it is the moment when the bid is “made”) we take the view that the posting of the scheme is the triggering event in the case of schemes of arrangement. However, this rather ad hoc way of accommodating an unforeseen form of merger is not satisfactory, and we would like to see specific provision in the Act for Schemes of Arrangement.

Problems Posed by the Turnover Thresholds and the Carrying on Business Test.

Under the law as it currently stands, mergers must be notified where, in the most recent financial year, the worldwide turnover of at least two of the undertakings involved and the turnover in the State of at least one of them is not less than €40,000,000, and at least two of them carry on business in any part of the island of Ireland. This gives rise to two problems: on the one hand, certain mergers which pose competition concerns escape mandatory notification; on the other, certain mergers which have little or no nexus to the jurisdiction must be notified.

Turnover Thresholds Too High?

The turnover thresholds are rather high given the size of Ireland, and the result is that some mergers which pose competition concerns are not mandatorily notifiable. While the Competition Authority has adopted a certain procedure in regard to such mergers where we become aware of them – we will contact the parties and suggest voluntary notification – this is a far from satisfactory state of affairs. First, the parties are free to reject our suggestion, which leaves a section 4 investigation as the only route, and second, there may be many such mergers that simply never come to our attention at all. We would like to see the turnover thresholds lowered to a

⁷ See, for example, Babcock & Brown/Esot/eircom, M/06/035.

level which would be more realistic in relation to the Irish economy. We have thought about this, and would suggest, to encourage discussion and debate, two possible options:

- (a) a worldwide turnover of at least €25 million for each undertaking involved, with a combined turnover of the undertakings involved in the State of at least €15 million; or
- (b) a combined worldwide turnover of the undertakings involved of €75 million with a combined turnover in the State of between €15-25 million.

Carries on Business and Local Nexus

The test which requires that at least two of the undertakings involved should carry on business in Ireland has posed a different sort of problem, arising from the failure of the Act to define the term "carries on business". We struggled with this during our preparation for the exercise of the merger review function, and finally, on 18 February 2003, we issued a notice entitled *Notice In Respect Of Certain Terms Used In Section 18 Of The Competition Act 2002*, in which we explained that we understood the term "carries on business" to include any undertaking which had sales into the island of Ireland without having a physical presence there. This later brought its own problems, as, since there was no *de minimis* provision in the Notice, mergers were being notified where the only nexus with the jurisdiction was sales of a tiny quantity into Ireland. In one case, the value of the sales of one the undertakings involved into the country was less than the fee for notifying the merger.

To deal with this, after a public consultation, the Competition Authority amended the Notice⁸. The Notice now describes the Authority's understanding of the term as follows: an undertaking carries on business in Ireland if it: (a) has a physical presence on the island of Ireland and makes sales and/or supplies services to customers on the island of Ireland, OR, (b) it has made sales into the island of Ireland of at least €2 million in the most recent financial year.

The Competition Authority hopes that this will cure in large part the problems that arose under the Notice in its unamended form, but it is very conscious of the fact that the Notice has no legal effect. We would like to hear some

⁸ Competition Authority, *Notice in respect of certain terms used in Part 3 of the Competition Act, 2002*, Decision No. N/02/003, as amended 12 December 2006. This maybe accessed at, www.tca.ie.

debate on whether it would be better to have a definition enshrined in the legislation itself, or whether it would be less problematic to continue as we are, with the possibility of again revising the Authority's view if its understanding of the term continues to cause problems. The choice seems to be between legal certainty on the one hand and convenience and efficiency on the other.

Problems Posed By Definition of "Publication" in Notification of Media Mergers

All proposed mergers where at least one of the undertakings concerned carries on a media business in Ireland must be notified to the Competition Authority, regardless of the turnover of the parties.⁹ "Media business" is defined in section 23 (10) of the Act, as meaning, *inter alia*, "a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs". The word "publication" itself is not defined in the Act.

Up to now, the Authority has understood the word "publication" in the broad sense in which it is used in the law of defamation, i.e., something is "published" wherever it is read. As a result, we have found that undertakings were carrying on a media business in Ireland where the newspaper published by them is on sale in Ireland. This has resulted in our requiring mandatory notification of mergers that have little or no nexus to Ireland. For example, when understood in this way, the publishers of *Le Monde* and the publishers of *Corriere della Sera* would be carrying on a media business in Ireland, and if they merged, the merger would be mandatorily notifiable here - a clearly ludicrous proposition.

In the course of our ongoing review of its interpretations of words and phrases in the Act, we are now reconsidering our interpretation of "publication" in the context of merger notifications. A dictionary definition of the word "publish" is: "prepare and issue for public distribution or sale." It seems to us therefore that a better understanding of the term would be that a "business of the publication of newspapers" is carried on in the place where the newspaper is produced and from which it issues for distribution or sale. Indeed, the fact that a newspaper is sold in a particular place is an indication of a different type of business being carried on - namely, the business of the distribution and/or the retailing of the newspaper.

⁹ Competition Act 2002 (Section 18 (5)) Order 2002 (S.I. No. 622 of 2002)

We put forward our proposal here, namely, that the business of publication of a newspaper is carried on in the place where the newspaper is produced and from which it issues for distribution or sale, and invite comment and debate on whether it would be an appropriate, and more importantly, a better interpretation.

Lack of Express Power to Process Late Notification

Section 18(1) of the Act provides that mergers which meet the thresholds must be notified "within 1 month after the conclusion of the agreement or the making of the public bid". The Act makes no provision as to what, if any, power the Competition Authority has to review mergers which are notified after the one-month deadline. However, we take the view that we must be able to review late notifications, and I will explain why.

First of all, there are two circumstances in which the Competition Authority might seek to review a merger outside the time limit.

The first circumstance arises where the merger has not yet been implemented, and for whatever reason, has not been notified in time. The policy of the Act is that mergers above a certain threshold will be reviewed by the Competition Authority, and prohibited if their effect would be to substantially lessen competition. This policy would be frustrated if a proposed merger could not be reviewed even where the parties clearly wished it to be, simply because it was notified later than the 1-month time period.

Further, it is important to note that the Act does not provide that a late notification is invalid. It provides instead that a merger implemented without clearance is void, which is a different matter, and one that we will examine in a moment. It is clear that the Authority's jurisdiction to review a merger comes from notification. Section 20(1) provides:

In respect of a notification received by it, the Authority shall [do various things, including forming a view as to whether the merger would substantially lessen competition]

Similarly, section 21(1) provides that in respect of a notification received by it, the Authority shall inform the undertakings of the determination it has made. So once the Authority has received a valid notification, it has a statutory duty, imposed by section 21, to reach a determination within a month (or within 45 days, where there has been a statutory requirement to provide further information). Indeed, if the Authority does not do so, the

merger may be implemented without more ado (section 19(1)(c)).¹⁰ It is clear therefore that the Authority must reach a determination once a merger has been notified, otherwise there will be serious consequences. This means that the Authority must do so even when the notification is late.

The second circumstance that arises is where the Authority is notified late of a merger that has already been implemented. Examples of such cases are *Radio Two Thousand Limited/News 106 Limited*,¹¹ *Radio County Sound/Dooley & Feeney*¹² and *CRDH/Syncotec*.¹³ The Authority considered whether to prosecute for failure to notify within the time limit in the first two cases above, but in the end did not have sufficient evidence of a “knowing and wilful” contravention of the Act, as would have been required under section 18(11). We believe that we can review such mergers also, and indeed, went on to do so in each of the cases referred to.

Note here that under section 19(2) it is the completed merger that will be void. The agreement to merge, upon which the notification was made, is not invalidated. Therefore, a valid notification has been made. Since the purported implementation of the merger is void, the undertakings involved are still separate undertakings in law and the Authority is faced with a notification in respect of two undertakings which wish to merge, and can, in our opinion, treat it like any other late notification. If we clear the merger, it can then validly be implemented, which may necessitate the redoing of any legal acts it may have attempted to previously accomplish as a merged entity. If we block it, of course, different considerations will arise, as practical steps taken will have to be undone, in order to restore so far as possible the two undertakings to their prior separate condition.

Notwithstanding our belief that this is the correct legal position, it would greatly improve the clarity and transparency of the law if an amendment were made to the Act explicitly providing that the Authority can review late notifications in the two circumstances outlined above.

¹⁰ This occurred once, in 2006. For further discussion see Competition Authority (2007, pp. 28-32).

¹¹ M04/003

¹² M05/079

¹³ M/06/017

3. Sanctions

The Act provides for criminal sanctions in respect of certain breaches of the merger provisions, and I will now consider whether it might not be more appropriate to have civil sanctions in those cases. I will then go on to look at one area where no sanction at all is provided, and consider whether it would be desirable to have one.

Failure to Notify and to Respond to Requirement for Further Information

Section 18(9) of the Act makes it a criminal offence for a person in control of an undertaking either to fail to notify a mandatory merger, or to fail to respond to requirement to provide further information under section 20(2) of the Act. We wonder whether a criminal conviction is perhaps a disproportionate penalty in such cases, but we also wonder whether in any event these sanctions provide sufficient incentive in either case, as the offence cannot be proved unless it can also be proved that the person knowingly and willfully authorized or permitted the contravention.

A substantial civil fine would however provide a significant incentive, and because there would be no requirement of criminal intent, or *mens rea*, it would not be necessary to show that the default was willful and knowing. Negligence could suffice. As a result, the threat of a financial sanction imposed on the undertaking would be likely to cause those in control to be very careful to ensure compliance with the law.

We also suggest, as an additional incentive, that in the case of a section 20(2) requirement to provide further information, an officer of the company should be required to certify that any response has been substantially complied with and that no documents or other information have been withheld, unless pursuant to a claim of legal privilege.

One drawback to the abolition of the criminal offence provision might be the loss of automatic disqualification from acting as a company director which follows upon conviction of an indictable offence. However, this is no great loss, given the difficulty of securing a conviction in any event. A suggestion for the way forward might be to take a leaf from section 204 of the UK's Enterprise Act 2002, which allows the Office of Fair Trading to apply to court for a disqualification order against a director of a company which has committed a breach of competition law. Two conditions must be met: (a) the company of which the person is a director must have committed a breach of

competition law; and, (b) the court must consider that the conduct of the person as a director makes him unfit to be concerned in the management of a company.¹⁴

Gun-jumping

Section 19(1) of the Act provide that a merger cannot be put into effect until cleared, either by a determination of the Authority, or by default, where the Authority has not made a determination within the time limit. Section 19(2) provides that such a merger, if implemented, will be void. No other sanction is provided.

Implementation of a merger prior to clearance by the Competition Authority can arise in two different circumstances. First, there can be implementation in a case where there has also been a failure to notify. In that case, at least some sanction exists apart from that of voidness, although it attaches to the failure to notify rather than to the implementation. Second, a merger may be implemented after it has been notified but either before a determination allowing implementation, or before the time limit has elapsed without any determination having been made. In that case, the only sanction is the voidness of the merger.

The Authority has reviewed a number of mergers that had already been implemented prior to notification. The first such merger was *Radio 2000/Newstalk*¹⁵, which was notified as soon as the parties became aware of their oversight. The Authority cleared the merger. Similar previously-implemented mergers were *Radio County Sound/ Dooley & Feeney*¹⁶, *CRH Deutschland/Syncotec*¹⁷ and *EMC/RSA*.¹⁸

Is the voidness of the merger a sufficient deterrent? We do not believe it is. Notwithstanding that the merger is legally void, it may continue in being in a zombie-like condition, without any knowledge that it is dead. In practical terms, the voidness of a merger does not become a reality unless and until it is challenged. In the meantime, the undertakings can continue to act on the market as a merged entity, and be treated as such. There may in some cases be a significant lessening of competition, but if the merger escapes detection, the undertakings involved will suffer no ill consequences.

¹⁴ For more on disqualification of directors for breaches of competition law, see David McFadden (2007).

¹⁵ M/04/003

¹⁶ M/05/079

¹⁷ M/06/017

¹⁸ M/06/050

It is our belief that a substantial civil fine would provide a much greater deterrent, serving to focus the minds of those in control of undertakings before they take the serious step of implementation, although we do not suggest that it should take the place of voidness, but rather apply in addition. In our view, it is essential that a merger which has been unlawfully implemented should be void, so that the Competition Authority can then review it *ex ante*. Alternatively, if the voidness consequence was removed, it would be necessary to give the Authority the power to review such a merger *ex post*.¹⁹

4. Time Limits

Proposals and Commitments

Section 20(3) of the Act allows parties to a proposed merger to submit proposals at any stage during the merger review. These proposals become commitments that are binding on the parties if the Authority states in writing that they form part of its determination, whether that is a Phase 1 or a Phase 2 determination.

If parties submit such proposals, it is clearly important that the Authority should have time to consider them carefully, as they may make all the difference between, at Phase 1, clearance or the undertaking of a Phase 2 investigation, and at Phase 2, clearance or blocking. In some cases, it may be desirable to market-test the proposals, and of course this all takes time.

Section 21(4) recognises that this may well be a problem during the 1-month period of a Phase 1 investigation, and provides that if proposals are submitted during Phase 1, the time limit for review becomes 45 days instead of 1 month. Even under Phase 1 we need some time to market test, so it is important that undertakings make their proposals in sufficient time to enable us to do this. Otherwise, the only alternative is to go to Phase 2.

However, no such provision is made in respect of Phase 2, possibly because the legislature considered that the three month period was sufficiently lengthy. Our experience has been different. Given that fair procedures require that the parties to a merger have access to the file following the issuing of an Assessment, and given the undesirability of introducing new matters at a late stage, when neither the parties nor the Authority have much time to consider it, we would very much like to see the Phase 2 time limit extended where proposals have been made during that Phase. In

¹⁹ For a further discussion of this topic, see Rosemary O'Loughlin (2006).

respect of commitments made to the Commission, the 2004 ECMR provides for an extension of 15 working days at Phase 2, notwithstanding that the Commission's Phase 2 stage is already one month longer than its Irish equivalent.²⁰ We would like to see a provision in our own Act similarly adding 15 working days to Phase 2.

Requirements to Provide Further Information

Section 20(2) of the Act allows the Competition Authority in certain circumstances to make a formal requirement upon any of the undertakings involved to provide further information. Section 19(6)(b) provides that if such a requirement is made within 1 month from the date of receipt of notification, the clock is stopped, reset, and begins again when either the requirement has been complied with or when the time limit has passed without compliance. No such provision applies where a section 20(2) requirement is made during Phase 2, although the nature of the information sought may well require considerable amounts of time to consider and analyse. Again, the 2004 ECMR does not distinguish between Phase 1 and Phase 2 in the case of such a requirement: the clock stops when, owing to circumstances for which one of the undertakings involved is responsible, a formal requirement is made.²¹ We take the view that it would be desirable to have a similar provision inserted in the Act. Another circumstance not covered by the Act is where a section 20 requirement is made during the extended Phase 1 consequent upon the making of proposals. Again we suggest that the clock should stop in those circumstances, thereby opening the possibility of not needing to move to Phase 2.

Days and Months

Time periods in the Act are expressed in terms of days and months. The Interpretation Act requires "month" to be interpreted as "a calendar month" and although "day" is not defined in that Act, "week-day" is defined as a day which is not Sunday, thus giving rise to the implication that "day" simpliciter must include Sunday. This means that days and months, when referred to in the Act, include Sundays and other holidays. This effectively shortens the time limits where they fall on a weekend, a bank holiday, or during an extended holiday period, such as Christmas. The 2004 ECMR has dealt with this difficulty by expressing all time limits in working days, and we believe it is desirable to adopt a similar approach in our own legislation. Using working

²⁰ Regulation 139/2004, Article 10.1 and 10.3

²¹ Reg. 139/2004, Article 10.4

days throughout would also make the time limits more transparent and accessible, as at present, one has to consider which month the appropriate date falls in before one can know precisely how long the time limit will be.

5. Review of Commitments and Conditions

As we have already see, the Competition Authority when making its determination (either in Phase 1 or Phase 2) may impose obligations (known as "commitments") on parties by relying on proposals made by them. Obligations of another, though similar, kind may be made only in Phase 2 determinations, and these are known as "conditions". Recently, such commitments were imposed at Phase 1 in Premier/ RHM.²²

Since obligations of both kinds are imposed in order to ensure that there is no substantial lessening of competition in the relevant market, it is very important that they be adhered to. Indeed, section 26(4) of the Act makes it a criminal offence to breach a commitment, or contravene a determination (including a conditional determination). But nowhere does the Act say that the Authority may monitor compliance with these obligations. Nevertheless, we have taken the view that the power to monitor them must be implicit in the power to impose them, and, going further again, we believe that the power to monitor them must also include the power to revise them, or to abolish them entirely. This makes both economic and legal sense to us, as from an economic point of view, the market may change, making what may well be burdensome obligations no longer necessary, and from a legal sense, a power to monitor without a power to correct (in the absence of that power lying with any other body) would be an empty one.

Nevertheless, we believe that it is desirable to provide expressly for these powers of monitoring and revision in the legislation itself.

6. Conclusion

In conclusion, we would like to point out that the suggestions we have made in this paper for legislative amendments are made in the context of a general review of the Act to be undertaken by the Minister in the course of 2007. The Authority has many suggestions too for changes in Parts 1 and 2 of the Act. In this paper, and in the context of this conference, we mention only those that relate to Part 3, *Mergers and Acquisitions*.

To summarise, therefore, we would like to see the following amendments to the Act:

²² M/06/098

- Amend section 16(1)(b) so that the requirement of prior control of an undertaking relates only to an acquiring individual;
- Allow notification also on basis of good faith intention to merge;
- Define triggering event for notification where merger takes place by Scheme of Arrangement
- Lower the turnover thresholds;
- Define “carries on business” so that it results in a local nexus;
- Give express power to the Competition Authority to review mergers notified later than the 1-month deadline;
- Abolish criminal penalties and provide civil penalties in respect of failure to notify and failure to respond to requirement to provide further information, and provide civil penalties for gun-jumping, and require officer of company to certify that requirement to provide further information has been substantially complied with;
- Extend time period in Phase 2 by 15 working days when proposals have been made;
- Stop clock where requirement for further information is made at Phase 2, or where a requirement is made during the extension of Phase 1 after the making of proposals;
- Express all time limits in terms of “working days”; and,
- Give Competition Authority express power to monitor and review commitments and conditions

While we would of course welcome comments and suggestions on these proposed amendments to the Act there are a number of instances where we would like feedback and comments before taking a final view on appropriate proposals for change. These are:

- Whether the definition of a merger situation should be expanded to include material influence;
- Whether merger control should be widened to include *ex post* review of passive investments;
- Whether section 16(1)(c) needs to be amended to clarify the phrase “assets, including goodwill” or whether the meaning is sufficiently clear already;

- Given that the financial thresholds for merger control are too high what are the appropriate worldwide and Irish thresholds?
- Whether the Authority should revise its interpretation of “the business of publication” in relation to media mergers to mean that the business of publication takes place where the newspaper is produced and from which it issues for distribution or sale; and,
- Whether the definition of “carries on business” should be enshrined in legislation or whether it would be more appropriate for the Authority to specify its understanding by way of a Notice under the Act.

Indeed the last point raises a more general issue. Statutory amendment would mean that new situations such as Schemes of Arrangement, or interpretation of terms such as “carries on business” would be enshrined in legislation, with consequent difficulty in further revision in the light of experience. Interpretation of terms or explanations of new situations by way of Notice would not have this consequence. As a result, there is an interesting issue of the appropriate balance between the two methods of providing clarity in merger control.

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