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Revising Merger Guidelines: Lessons from the Irish Experience[1]

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Abstract: Competition authorities typically issue Merger Guidelines setting out the framework within which merger assessment is conducted. Ireland is no exception. The Competition Authority is currently in the process of revising its 2002 Guidelines. In this paper we not only comment on the procedure that is being used to revise these Guidelines as well as the substance of the proposed revisions to the Guidelines, but also draw some wider lessons that might be of assistance to other competition authorities, particularly smaller competition authorities, in revising their Guidelines. The lessons include: carefully distinguishing between proposals for revising the Guidelines that incorporate existing merger assessment custom and proposals that mark a significant departure from current Guidelines as well as existing custom and practice. Proposals for revising the Guidelines, particularly when referring to existing custom and practice, should be specific rather than general; and, if multijurisdictional mergers are important particular attention should be paid to the Guidelines in jurisdictions that are commonly included in such multijurisdictional mergers.

Keywords: Merger Guidelines; Competition Authority; Competition Act 2002

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Revising Merger Guidelines: Lessons from the Irish Experience

1. Introduction

Merger Guidelines ("the Guidelines") perform a number of valuable functions in facilitating a smooth, efficient and transparent merger control regime. They can not only minimise compliance or transaction costs for merging parties in dealing with a competition authority or agency, but also reduce the volume of public resources devoted to merger control. At the same time the Guidelines, if appropriately structured, should only prohibit – or cause to be abandoned at an early stage – mergers that are likely to damage competition and consumer welfare, while permitting, not to say encouraging, mergers those that are likely to be pro-competitive and promote consumer welfare.[2]

Every so often Guidelines need to be updated. Ireland is no exception. Almost inevitably changes over time in merger analysis and administrative practice will necessitate reconsideration and debate. The changes come from a variety of sources. The Competition Authority's current Guidelines, which date from 2002, ("the 2002 Guidelines"),[3] were based on a limited experience with merger analysis.[4] Since assuming control of the merger function from 1 January 2003 the Competition Authority has issued close to 500 merger determinations.[5] There have been new developments in merger analysis, particularly in the US and UK, which it may be appropriate to include in the revised Guidelines such the use of measures of upward price pressure.[6]

Ireland has been at the forefront in the International Competition Network ("ICN") in developing guidelines for substantive merger analysis. The Competition Authority is co-chair of the ICN Merger Working Group together with the US Department of Justice Antitrust

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2 In some jurisdictions, such as Canada, the merger test is not consumer but total welfare. However, the same point applies.

3 Competition Authority (2002).

4 Under the merger legislation prior to the Competition Act 2002, the Minister of Enterprise, Trade and Employment made occasional merger references to the Competition Authority to evaluate mergers using a series of broad public interest criteria, including whether or not the merger would "prevent or restrict competition." The Competition Authority's reports, which were made public, however, were advisory only with the Minister making the final decision, but without any reasoned published decision explaining the rationale for the Minister's decision. For further discussion of this procedure see Massey and O'Hare (1996, pp.234-244). In drawing up the 2002 Guidelines the Competition Authority relied on the expert legal, business, economic submissions as part of a consultation process as well as the Guidelines of other competition agencies, particularly those in the US.

5 Of course, not all of these mergers required extensive analysis and application of the 2002 Guidelines and as a result that are not all equally relevant in considering the revision of the 2002 Guidelines. In earlier work Gorecki et al (2007, Table III, p. 356) came to the conclusion that over the period 2003-2006 of the 311 merger notifications 22 or 7 per cent required extensive analysis.

6 See Section VI below for further discussion.

Division.[7] One of the objectives of the working group is to diffuse best practice in merger control through, for example, recommended practices. To the extent there is success in such diffusion it reduces transaction costs for mergers, especially those that need to be notified in more than one jurisdiction.

Finally, leading competition authorities have recently issued new Guidelines: the EU in 2008, the UK and US in 2010.[8] Like Ireland, these jurisdictions employ the substantial lessening of competition ("SLC") test or a variant which is very similar.[9] In drawing up the 2002 Guidelines considerable reliance was placed on the US Guidelines. Furthermore, it is not uncommon for mergers notified to the Competition Authority also to be notified to the UK, such as Kingspan's proposed acquisition of Xtratherm (Competition Authority, 2006a) or more recently ESB's proposed acquisition of NIE (Competition Authority, 2010f; OFT, 2010). It is therefore important that cognisance is taken of UK Guidelines in order to ensure – to the maximum extent possible – that the two sets of Guidelines are consistent with each other.

The Competition Authority's December 2010 *Consultation on Competition Authority Guidelines for Merger Analysis* ("Consultation Paper"),[10] which contains a series of proposals for revising the 2002 Guidelines is therefore timely. The purpose of this paper is twofold: first, a review of the procedures and processes as well as the methodology or approach used for making substantive proposals for revising the 2002 Guidelines; and, second, to determine what lessons can be learnt from the Irish merger review experience that will be of wider applicability for other jurisdictions, particularly smaller competition authorities.[11] It is hoped that these lessons will be useful for such authorities in considering how to go about revising Guidelines, what to include in proposals for revised Guidelines and, how to structure such proposals. Thus the purpose of the paper is not to set out what should be in the optimal set of Guidelines, but rather to inform the debate on how to go about deriving such a set of Guidelines.

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7 For details see: http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx. Accessed 6 January 2011.

8 CC&OFT (2010); USDoJ&FTC (2010); and EC (2008). Note that the US Guidelines referred to horizontal mergers, the UK to both horizontal and non-horizontal, the EC to non-horizontal. The EC has separate 2004 horizontal Guidelines (EC, 2004b). The 2002 Guidelines refer to both horizontal and non-horizontal mergers.

9 The UK and the US use the SLC test, the EU since 2004, uses a similar test, the significantly impeding effective competition test.

10 Competition Authority (2010a).

11 In recent survey involving 257 participants in 60 jurisdictions, competition authorities were ranked in terms of their institutional efficiency of merger control, using indicators under headings such as 'Independent', 'Predictable', 'Reliable', and 'Unbiased'. It found that Ireland ranked second to Canada in terms of institutional efficiency of merger systems. For details see Ganslandt (2010).

The paper is structured as follows. Section II discusses the objectives, origin and audiences of Guidelines, which apply to virtually all jurisdictions and hence have wider applicability. Section III deals with the content of the Consultation Paper and the steps and procedures taken and expected to be taken in revising the 2002 Guidelines. Section IV provides general comments on the Consultation Paper before attention turns in Section V to comments on several of the specific proposals made in the Consultation Paper. An issue not raised in the Consultation Paper is discussed in Section VI. A concluding section brings together the threads of the paper by drawing lessons from the Irish experience that are likely to have wider applicability.

2. Objective, purpose and audiences of guidelines

The Irish Competition Authority's current Guidelines set out the way in which it evaluates the mergers notified to it under the Competition Act 2002 ("the Act"). These 2002 Guidelines state that they "offer guidance on how the Authority decides whether or not a merger substantially lessens competition …" (Competition Authority, 2002, para 1.1). While the Act specifies the SLC test to be applied to mergers, the interpretation and application of the competition test is left to an expert body, the Competition Authority, which has a considerable degree of discretion in this regard. Since it is not obvious what the competition test means in practice, the 2002 Guidelines fill this lacuna.

The Guidelines are aimed at a number of different audiences. *First*, and most obviously, the merging parties to a transaction. This includes not only the businesses involved in the merger, but also their legal and economic advisors. The Guidelines permit the merging parties to make the case as to why a merger does not lead to SLC in terms readily understood by the Competition Authority, while at same time not initiating mergers that are likely to lead to SLC. The merging parties thus concentrate their resources on the salient factors, rather than issues that may have little relevance. Resources are used in an optimal way, provided, of course, the Guidelines are clear and readily accessible.

Second, the Guidelines are used by the Competition Authority to ensure that it employs a consistent approach to merger analysis. As in any organisation there is staff turnover. For example, between 1 January 2003, when the Competition Authority assumed responsibility for merger control under the Act, and 1 January 2011, four different members of the Competition Authority have been charged with responsibility for mergers, with

varying backgrounds.[12] The Guidelines assist in ensuring the same methodology is applied over time. They provide the template for Competition Authority merger analysis. This is re-enforced by the fact that all merger determinations of the Competition Authority are published on its website, with references to the 2002 Guidelines used to justify a particular approach taken.[13] If these determinations depart from the 2002 Guidelines in a material way then merging parties would likely use these precedents in arguments concerning SLC, thus undermining the credibility and usefulness of the 2002 Guidelines.

Third, the Courts, to which Competition Authority merger determinations can be appealed. Of course, in an ideal world there would few, if any, appeals since the Guidelines and their application would be clear and transparent so that prior to a decision of a firm to merge, the merging parties would be able to predict, with a reasonable degree of certainty, the outcome of the merger review process.[14] Since the Competition Authority has assumed responsibility for merger control in 2003 there has been only one appeal concerning a merger determination.[15] Given the infrequent nature of such appeals, the Guidelines may be of use in assisting the Courts in reviewing a merger determination.[16] Since it is, of course, the Courts that have the final say in what terms such as SLC mean, any judgment of the Court could be used to revise the Guidelines. However, one would expect that the Courts would show some curial deference to a specialist expert body such as the Competition

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12 Terry Calvani (January to August 2003), Edward Henneberry (September 2003 to January 2006), Paul K. Gorecki (February 2006-December 2008), and Stanley Wong (January 2009 to February 2011). Furthermore these individuals came from different backgrounds, some legal and others economics. Two came from the US, one from Canada, one the UK.

13 For example, reference is often made to the fact that the 2002 Guidelines state that entry must be timely, likely and sufficient in order to constrain a post-merger price increase. For the reference to entry in the 2002 Guidelines see Competition Authority (2002, paras 5.1 to 5.5); for an example of the application of these criteria see Competition Authority (2008a, paras 3.71 to 3.75) in the Kerry/Breeo merger.

14 This, of course, abstracts from the third parties to a merger that may bring appeals for strategic reasons unrelated to the clarity of the Guidelines and the quality of the merger determinations. However, under the Act third parties have very limited opportunities to appeal Competition Authority merger determinations.

15 This concerned the Kerry/Breeo merger (Competition Authority, 2008a) in which the Authority's prohibition determination was declared null and void by the High Court. This latter decision is under appeal to the Supreme Court.

16 In the Kerry/Breeo High Court judgment there are several references to the 2002 Merger Guidelines: the substance of the 2002 Guidelines are set out (paras 3.10 to 3. 12); the observation is made that the structure of the Competition Authority's merger determination in the case followed the 2002 Guidelines (para. 4.2); one of the grounds for appeal was that the Competition Authority did not follow its 2002 Guidelines in dealing with the issue of supply side substitutability (para 6.1.B), the fact that the Competition Authority relied on demand side substitutability as set out in the 2002 Guidelines (para 7.19); and, on the issue of supply side substitutability the issue of the 2002 Guidelines are cited in the Competition Authority defence (paras 8.8 and 8.9), with which the Court appears to agree (paras 8.22 & 8.23). It would seem reasonable to assume that the Court accepts the 2002 Guidelines as a basis for merger assessment. The High Court judgment, *Rye Investments Ltd and the Competition Authority*, which was delivered on 19 March 2009, may be found at: http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/44ebbaf105a4ed34802575a1004c97d1?OpenDocument.

Authority,[17] which is referred to as a margin of appreciation in the parlance of the European Courts.[18]

Fourth, the general public, legislators and others interested in public administration. In the interests of openness and accountability agencies such as the Competition Authority set out how they go about their business. Guidelines and the merger determinations are important part of this process for the Competition Authority. However, there is frequently a need to supplement these Guidelines and determinations with presentations concerning the merger control regime to these broader audiences to answer questions and dispel misperceptions that may arise. In some instances merger determinations have been associated with subsequent plant closures and job losses[19] neither of which is considered as part of the merger review process and are more appropriately dealt with through other policy instruments relating to the labour market and growth.[20]

Fifth, to the extent that bodies other than the Competition Authority are charged with administering merger law in Ireland, particularly if they lack the necessary in-house expertise, the Guidelines may be useful informing their deliberations. In 2008, in response to the financial crisis, legislation transferred responsibility for mergers which concerned the stability of the financial system to the Minister of Finance.[21] Furthermore, the Minister is allowed to set aside any finding he might make that the merger would lead to SLC, in the interests of the stability of financial system. The Department of Finance is not an expert in competition policy. However, the 2002 Guidelines are available to the Department of Finance to assist in ensuring consistent application of the competition test across all sectors of the economy.[22]

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17 On the issue of curial deference in the Kerry/Breeo High Court judgment see Gorecki (2009a).

18 For a discussion see Whish (2009, pp. 879-885).

19 See, for example, the Heineken/Scottish & Newcastle merger (Competition Authority, 2008b).

20 Such a perception could arise since under the merger control regime prior to 2003, whether to permit a merger depended on broad public interest or common good criteria which included 'level of employment,' 'employees,' and 'shareholders and partners.' For further discussion see references in footnote 2 above.

21 For further details see Competition Authority (2009d, p. 36; 2010g, p. 36) and Gorecki (2009b, p. 223-224). The Government could have course followed the UK example where the competition analysis is conducted by the competition agency (i.e. the Office of Fair Trading) and the decision concerning wider concerns taken separately by the relevant Minister. Since the Minister of Finance might also be party to the merger in the first place, the Minister will act as a promoter of the merger and then assessing it under both competition test and the financial stability concerns, which might give rise to conflicts of interest.

22 There is legislative provision for the Department of Finance to seek the assistance of the Competition Authority, which is ready to provide such assistance.

3. The Consultation Paper

The Competition Authority's Consultation Paper[23] was issued on 3 December 2010. In the news release accompanying the Consultation Paper, the Competition Authority stated that: "by carrying out a public consultation on the merger guidelines at this stage, the Competition Authority hopes to be able to publish new merger guidelines without delay after any legislative amendments relating to the Act come into force" (Competition Authority, 2010h). Hence it appeared that after considering all the submissions made in response to the Consultation Paper, new Guidelines would be issued, subject to legislative timing considerations. However, the position was subsequently clarified.[24] Instead of proceeding directly to new Guidelines, draft Guidelines would be issued first for comment and discussion. This is a sensible decision, particularly in view of the shortcomings identified below in the proposals contained in the Consultation Paper. However, irrespective of these shortcomings, exposing the draft Guidelines to comment is a sensible step before finalisation of the Guidelines takes place.

The Consultation Paper sets out twelve elements for comment relating to:

- Measurement of market definition;
- Market structure;
- SLC;
- Theories of harm;
- Failing firms;
- Competitive constraints;
- The counterfactual;
- Entry;
- Countervailing buyer power;
- Efficiencies;
- Maverick firms; and,
- Remedies.

These elements are undoubtedly very important for merger analysis. Indeed, they go to the core of merger analysis. The 2002 Guidelines already cover most of these elements, although in two instances, theories of harm and the counterfactual, implicitly rather than

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[23] Competition Authority (2010a). It may be accessed at: http://www.tca.ie/images/uploaded/documents/2010-12-03%20Notice%20of%20Consultation%20on%20Competition%20Authority%20Merger%20Guidelines.PDF.

[24] See the Competition Authority's annual report for 2010 (Competition Authority, 2011, p. 3).

explicitly. In only one instance, remedies, the topic is not referred to at all in the 2002 Guidelines. Thus to a considerable extent the proposals would appear to be a refinement of 2002 Guidelines rather than a radical departure, at least in terms of the topics identified for discussion and comment.

For each of the twelve elements the Consultation Paper provides a paragraph or two of by way of background on the issue or element and then makes a proposal(s) for revising the 2002 Guidelines. In only one instance, market structure, is a specific question raised with respect to the proposals. Apart from citing two merger determinations in discussing the failing firm defence, reference to Competition Authority merger determinations in the Consultation Paper are conspicuous by their absence. In this paper numerous references are made to merger determinations to illustrate Competition Authority thinking and practice. Nevertheless, reference is made, in tabular form, in the Consultation Paper to developments in other jurisdictions by citing relevant passages from the Australian, UK and US Guidelines.[25] An examination of the proposals confirms that they mark a refinement and evolution in the Competition Authority's approach to merger analysis rather than a radical departure.

4. Some General Comments

In examining the specific proposals relating to the twelve elements, the Consultation Paper suggests that respondents address the following questions. First, to what extent is the approach taken the right one; and, second, what additional or alternative proposals should be considered.[26] Before turning to the proposals themselves in Section V, the first question with respect to the approach taken by the Consultation Paper as a whole is addressed in this section. Several general comments on proposals in the Consultation Paper can be made. These can be divided into two broad groups: the overall approach taken by the Competition Authority in framing the proposals; and certain common themes or concerns that arise in several of the proposals. The first two comments below fall into the former category; while the remaining four comments into the latter category. There is inevitably, however, some overlap between the two.

First, it is not obvious that the approach of the Consultation Paper of couching the proposals "in fairly general terms in order to provide a basis for discussion" (Competition Authority, 2010a, para 1.6) is appropriate. While it is clearly important to encourage debate

[25] The Australian Guidelines are dated 2008. For details see Australian Competition & Consumer Commission (2008).

[26] Competition Authority (2010a, p. 3). A third question is posed asking for alternative proposals to those set out in the Consultation Paper. However, this is not a general question and will be dealt with in considering the twelve elements mentioned in the text.

and discussion in reviewing the 2002 Guidelines, it is not readily apparent that general as opposed to specific proposals are likely to elicit more or less discussion. Since the Guidelines represent the way in which the Competition Authority administers the competition test based on its custom and practice it would seem more useful for it to put forward in concrete terms how it thinks matters have evolved (or should evolve) and ask for comment on its proposals. There is nothing to prevent respondents disagreeing and putting forward additional or alternative proposals.

Second, there are issues relating to the usefulness of responses in relation to proposals of a general nature. This in turn has implications for the efficiency and efficacy of revising the 2002 Guidelines. Consultation is not a cost free exercise either for the Competition Authority or those responding. It requires time and resources to carefully consider responses and for the Competition Authority to then respond. Reading the Consultation Paper it is clear that the Competition Authority has in mind certain quite specific changes when it talks about amending, updating, clarifying, defining, describing, providing more details and so on. Why are these not presented as part of the Consultation Paper? The difficulty with general proposals is that the discussion is likely to be unfocussed since it is not always clear what the Competition Authority has in mind. Indeed, there is nothing wrong with the Competition Authority having rather specific and detailed changes for consultation. It will not be until the Competition Authority issues new draft Guidelines, based on the responses to the Consultation Paper, that comment and discussion can be made on precisely what the Competition Authority has in mind.

Third, it is not always clear in the Consultation Paper whether the proposals incorporate the existing practice of the Competition Authority, as it has evolved since 2003, or whether the proposal is a change to current practice. In other words, the distinction between what is and what ought to be or what could be. This is important. As noted above the purpose of the Guidelines is to set out the way in which the Competition Authority assesses mergers under the competition test, SLC. That changes overtime as set out in the determinations of the Competition Authority. Hence updating and revising the Guidelines is a useful exercise.

This is not to say that the Consultation Paper should not make proposals that presage a change in practice. The Consultation Paper proposes to drop the 3 per cent price threshold in discussing the issue of substitutability, despite the fact that it is in the 2002 Guidelines and has been employed by the Competition Authority in recent merger determinations (Competition Authority, 2008a, para 5.65). The Consultation Paper proposes

another new departure: estimating the distribution of efficiency gains to consumers, staff and shareholders in the analysis of efficiencies However, it is important that these proposals for change are labelled as such, since there is likely to be much more flexibility in the position of the Competition Authority compared to a situation where it is updating the Guidelines to reflect current practice.

Fourth, in a number of instances the proposals lack sufficient precision. In some instances this is because the proposal is incomplete. For example, the Consultation Paper proposes under SLC, "to define what is meant conceptually by the term "substantially lessen competition"' (Competition Authority, 2010a, para 2.10). However, no definition or discussion follows. Presumably in making such a proposal the Competition Authority has a sense of what this term means, beyond what is already in the 2002 Guidelines (Competition Authority, 2002, para 1.3), which refers to a consumer welfare test and the various dimensions of competition such as price, quality, etc that might be affected adversely by a merger leading to a finding of SLC. Furthermore, the response to the Consultation Paper's proposal in this and other instances might depend in part on what definition is supplied by the Competition Authority. It may, for example, confuse or complicate the situation compared to the current discussion. Furthermore, there is a danger that by providing too much detail and discussion that the Competition Authority may compromise itself in future merger determinations should new anticipated situations arise which the current formulation would have been capable of covering.

In other instances it is not at clear what the proposal means. It is too vague. For example, reference under competitive constraints, the proposal is made to "provide a more complete discussion of competitive constraints, within the context of competitive effects analysis" (Competition Authority, 2010a, para 2.17). This suggests that something is missing from the current discussion in the 2002 Guidelines, primarily in Section 4, 'Analysis of Immediate Competitive Effects.' But this raises the question of what the Competition Authority thinks is missing from the 2002 Guidelines. The Consultation Paper is silent on this issue.

The same criticism can be applied to the discussion of theories of harm. Here the proposal is to "provide a more detailed and nuanced description of the various theories of harm, addressing for example, harm from unilateral effects, co-ordinated effects and effects from non-horizontal mergers" (Competition Authority, 2010a, para 2.12). Again it is not clear what will change here given the existing discussion in 2002 Guidelines (Competition Authority, 2002, Section 4 and Section 6), apart from a richer discussion of non-horizontal

mergers based on the Commission's Guidelines in this area,[27] the formulation of which the Competition Authority participated in the development of and which has been applied by the Competition Authority in its merger decisions (e.g. Competition Authority, 2007d). Furthermore there are a number of merger decision in which quite extensive theories of harm have been developed (e.g. Competition Authority, 2007a), but no reference is made to this experience in the Consultation Paper.

The same comment can be made of the proposals on entry where the somewhat tentative proposal is made that the 2002 Guidelines, "could be amended to include a more complete discussion of the underlying factors that can affect timeliness, likelihood and scale of entry" (Competition Authority, 2010a, para 2.21). There is no suggestion that the current approach set out in the 2002 Guidelines is to be changed (Competition Authority, 2002a, paras. 5.3-5.6). What are the underlying factors that the Competition Authority thinks could be added and perhaps which merger determinations could be used to illustrate the factors mentioned? The Consultation Paper is silent on both of these issues and so it is difficult, if not impossible, to comment.

Fifth, in a number of instances it is not at all clear that some or all of the proposals made in the Consultation Paper are not already included in the 2002 Guidelines. In other words, the proposal is redundant, irrelevant. For example, under market definition, there is a proposal to amend and update to clarify the 2002 Guidelines that "market definition and the SSNIP test, while useful analytical tools for merger review, cannot by themselves identify the competitive impact of a merger" Competition Authority (2010a, para 2.6). However, there is no suggestion in the 2002 Guidelines that market definition can or should be used for this purpose. On the contrary the opposite is the case. For example, the 2002 Guidelines state that the relevant product and geographic markets "establish the framework in which the analysis of competition takes place" (Competition Authority, 2002, para 1.6(a)) and later it is stated the market definition framework "provides a basis for analysis in which existing competitors and consumers who are likely to provide the most immediate and timely competitive constraint are identified …" (*ibid*, para 2.1). Equally, as discussed below in Section V, reference is made in discussing the failing firm to proposals made by the ICN, one of which is exactly mirrored in the 2002 Guidelines.

Sixth, the Consultation Paper makes numerous references to its proposals being consistent with international best practice and draws to only a limited extent on the merger review experience of the Competition Authority. Indeed, reference is made to only two of

[27] European Commission (2008).

the close to 500 merger determinations that the Competition Authority has made since 1 January 2003. This is not to deny that cognisance has to be taken of international best practice. Clearly for a small agency such as the Competition Authority developments elsewhere will inform its practice. However, the Consultation Paper should spell out in more detail why international best practice should be followed, if it differs from current Competition Authority practice and how that can be expected improve the 2002 Guidelines.

5. Specific Proposals: Getting Down to Brass Tacks

In this section attention is paid to the twelve specific topics on which the Consultation Paper makes specific proposals. However, for several of these topics – SLC, theories of harm, and entry – comment has already been made above in Section IV so that there is no need to rehearse that discussion. As a result only a subset of the topics are considered: measurement of market definition; market structure; failing firms; competitive constraints; the counterfactual; countervailing buyer power; efficiencies; maverick firms; and, remedies.

Measurement of Market Definition

The Consultation Paper proposals with respect to the measurement of market definition sensibly set out some aspects of existing Competition Authority custom and practice as well as restating, as noted above, rather less sensibly material that is already in the 2002 Guidelines (Competition Authority, 2010a, paras 2.3–2.6). Market definition is not always necessary in practice in considering whether or not a notified merger leads to SLC. The activities of the merging parties may be quite disparate, with no overlap either horizontal or vertical. A review of Competition Authority determinations provides many examples such as the acquisition of twenty-four health and fitness clubs by Barclays Bank (Competition Authority, 2010b). Equally, the merger may not lead to SLC on any reasonable market definition, thus the Competition Authority does not need to come to definitive view as to market definition. For example, in considering a merger in the retail supply of agricultural inputs to farmers, the Competition Authority did not have to consider whether the geographic market was regional or national since the conclusions as to the impact of the merger were unaffected by this choice (Competition Authority, 2009a, para 30). In contrast, where there is significant overlap in the activities of the merging parties then defining the market is the norm. In some instances this can be an elaborate exercise, with alcoholic beverages being a particularly striking example (Competition Authority, 2008b).

Although not listed as an explicit proposal, the Consultation Paper intends to update the types of evidence required in defining relevant markets "in the light of both

international best practice and also the Competition Authority's experience" (Competition Authority, 2010a, para 2.5). Presently the 2002 Guidelines contain little or nothing on the types of evidence that can and should be used to define markets. The Competition Authority has built up considerable experience in its various merger determinations in the use of different types of evidence to define markets. The types of evidence include:

- Internal documents (e.g. Competition Authority, 2004a, 2008b, 2007c).
- Authority questionnaires/surveys of business and consumers (e.g. Competition Authority, 2008b, 2004a).
- Correlation analysis (e.g. Competition Authority, 2008b, 2007b).
- Demand estimation (e.g. Competition Authority, 2007b, 2008a).

There is also the issue of the value of documents and other evidence that are created post-consideration of the merger compared with that created before any obvious consideration of the merger, an issue discussed further below under 'Countervailing Buyer Power.' In structuring and framing the discussion of evidence the Competition Authority might like to follow the US Guidelines where the useful distinction is drawn between types and sources (USDoJ&FTC, 2010, pp. 2-6). Neither the UK nor Australian Guidelines discuss the issue of evidence. As the Competition Authority quite rightly states it has considerable experience on which to draw some of which has already been analysed (Gorecki *et al*, 2007).

The US (USDoJ&FTC, 2010, pp. 13-15) and UK (CC&OFT, 2010, pp. 36-38) Guidelines in defining the relevant geographic market, draw the distinction between markets based on location of suppliers and location of customers. This is a useful distinction that should assist in resolving on what on occasion can be a difficult issue.

Effects of Merger on Market Structure

The Consultation Paper raises the issue of whether or not the thresholds and the delta for screening mergers using the Herfindahl-Hirshmann Index ("HHI") should be revised (Competition Authority, 2010a, para 2.7). In the 2002 Guidelines Zone C mergers are those which "occur in already highly concentrated markets and more usually be those that raise competitive concerns" (Competition Authority, 2002, para 3.10). The post-merger Zone C threshold is an HHI above 1800, with a delta of greater than 100, where delta is the change in the HHI as a result of the merger.[28] Reference is made in the Consultation Paper to the 2010 US Guidelines where the safe harbour post HHI threshold level was raised from 1800 to

[28] In other words, if a merger results in 5.5 equal sized firms each with more than 18 per cent of the market and a firm with 20 per cent of the market acquiring one with at least 2.5 per cent then it may raises competitive concerns.

2500 and the delta was raised from 100 to 200.[29] These changes, as one commentator remarked, "likely brings the proposed [US] Guidelines more in line with actual practice than existing [US] Guidelines" (Carlton, 2010, p. 10). If this is the case for the US then it suggests that the Competition Authority carefully review its past merger determinations in coming to a view as to whether or not the merger thresholds should be reviewed. Mergers subject to review in the US may be quite different in terms of industry composition and type (unilateral vs. co-ordinated), necessitating different thresholds. Unless the Competition Authority can make a solid case for change based on its own record, the existing thresholds should be retained.

Failing Firm

The Competition Authority has rarely, if ever, cleared a merger based solely on the failing firm defence.[30] Its use has also been infrequent in other jurisdictions.[31] Indeed, although the merging parties have on occasion argued the failing firm defence the merger has been cleared by the Competition Authority on other grounds (e.g. Competition Authority, 2009b, 2010c, 2010d, and 2010e).[32] The Consultation Paper's proposal to clarify that even if the firm is failing it may not be necessary to assess whether it meets the 2002 Guidelines criteria for a failing firm, since the merger may be capable of being cleared on the SLC test alone (Competition Authority, 2010a, para 2.14). In other words, the counterfactual is that the acquired or target firm will continue in business. In terms of the resources of the Competition Authority as well as the merging parties, it might prove far less onerous to assess the merger in terms of its competitive effects, than having to determine if one or both of the merging parties satisfy the failing firm criteria, with the possibility of a Phase II referral. If mergers cannot relatively easily meet the failing firm defence in the midst of the worst recession since the Great Depression then it is not clear that the test will ever be met.[33]

The 2002 Merger Guidelines specify four conditions that must be satisfied in order for the failing firm defence to be met (Competition Authority, 2002, para 5.17) and remarks

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[29] In other words, if the merger results in four equal sized firms each with 25 per cent of the market and a firm with 20 per cent of the market acquires a firm with at least 5 per cent of the market.

[30] One reason may be that the target of the merger transaction, seeking to maximise the value of the sale, has little incentive to stress it may be failing firm nature, since that would lower its expected return from the sale.

[31] See Oxera (2009) which refers to successful examples of the failing firm defence in the UK, the EU, France, New Zealand and Germany.

[32] See also the discussion in the Competition Authority's annual report for 2010 on rescue mergers (Competition Authority, 2011, p. 35).

[33] However, it could be argued, that this does not necessarily follow. It may be, for example, that during a recession the number of mergers declines and that defensive mergers become much more important.

with some prescience that such "conditions may rarely be met in practice" (*ibid*, para. 5.17). The Consultation Paper proposes to update the Merger Guidelines in view of recent international developments including the ICN's Recommended Practice on 'Failing Firm/Exiting Assets.' (Consultation Paper, 2010a, para 2.13). The Competition Authority then proposes to indicate what constitutes a failing firm and identify any issues specific to failing firms that the Competition Authority would likely address including whether the exit would occur absent the merger (*ibid*, para 2.14). It could be argued that the 2002 Merger Guidelines already cover some of the material that the Consultation Paper says will be added. There is already a definition of a failing firm – "if part or all of the merging assets are certain to exit the market" (Competition Authority, 2002, para 5.17). The Consultation Paper proposal will elaborate this somewhat by adding "thereby reducing the quantity of choices of goods and services available to consumers." Furthermore the four conditions that need to be satisfied under the 2002 Merger Guidelines with regard to the failing firm defence (*ibid*, para 5.17) match the four conditions in the ICN Recommended Practice almost exactly.[34] Hence it is not clear what is being added. It would have been helpful if the Consultation Paper had clarified matters in this regard.

Competitive Constraints[35]

In considering mergers in differentiated products it is important to consider the extent to which the products of the merging parties, A and B, are close substitutes as the 2002 Merger Guidelines notes (Competition Authority, 2002, para. 4.6). The closer the degree of substitution the greater the incentive for the merged entity to raise prices of product A since consumers of product A that decide to switch will mainly move to product B and thus these sales will not be lost to the merged entity. The 2002 Guidelines address the issue of determining whether substitutes are close, by posing the question whether it would be profitable for the merged entity to raise the price of A by 3 per cent, which as noted above in Section IV is a threshold that the Competition Authority has employed in recent merger determinations. The 3 per cent threshold is lower "than the test for substitutability at the market definition level ..." (*ibid*, para. 4.6).

The Consultation Paper proposes to abolish the 3 per cent threshold since international best practice does not specify a magnitude measure of substitutability

[34] See http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf. The 'Failing Firm/Exiting Assets' are Recommended Practices VIII and VIII.B is the recommended practice referred to in the text. Accessed 18 January 2011.

[35] The other proposals with respect to competitive constraint concerning the move to "provide a more complete discussion of competitive constraints, within the context of competitive constraints analysis" (Competition Authority, 2010a, para. 2.17) are discussed above.

(Competition Authority, 2010a, para. 2.16). The ICN Recommended Practice V.B in considering mergers in differentiated products comments that competition authorities "should assess whether the merger would allow the merged firm profitably to increase price on one or more products after the merger, or whether sufficient customers would switch to products of other competitors so as to render such a price increase unprofitable for the merged firm" (ICN, 2010, p. 20). Thus the Competition Authority is proposing to retain the concept of a considering a price increase but removing the threshold. In other words, there will be a degree of discretion and judgment. However, that will always be the case, given the precision with which these things can be measured. The issue thus turns on whether the Competition Authority finds the 3 per cent threshold useful in merger analysis, the extent to which it is used and whether its removal would assist its analysis. However, none of these things are discussed.

The Counterfactual

In merger analysis two states of the world are being compared in the period following the merger: the world with the merger; and, the world without the merger. The latter situation is referred to as the counterfactual, it is what would happen absent the merger. Merger analysis is then concerned with whether or not, by comparing these two states of the world, the merger will result in SLC. The world absent the merger is usually approximated by pre-merger market situation in merger analysis, unless there are good reasons for concluding that this is inappropriate. The 2002 Guidelines, for example, refer to the use of prevailing prices "unless such prices are not a relevant counterfactual" (Competition Authority, 2002, para. 2.6). The 2002 Guidelines continue, however, by stating that "[A]lternately, likely future prices, absent the merger, may be used when they can be predicted with some confidence, such as, for example, upcoming changes in regulations that affect prices directly, or indirectly via costs and demand" (*ibid*, para. 2.6). Equally the 2002 Guidelines in considering a merger that eliminates a firm that is about to enter the market state that the "merger removes a competitive constraint relative to the counterfactual situation of greater rivalry" (*ibid*, para 4.26 (b)).

An examination of the Competition Authority merger determinations again demonstrates how the status quo or prevailing situation is considered the relevant counterfactual. In the Grafton/Heiton merger, for example, substantial efforts were made to determine the degree to which entrants in local markets were likely to enter absent the merger (Competition Authority, 2004a, paras 5.10-5.11). In the Heineken/Scottish & Newcastle merger, complex licensing arrangements of brands meant that it was not clear at

first sight what was the relevant counterfactual, a situation that evoked much discussion and analysis in the merger determination (Competition Authority, 2008b, paras 5.2-5.13).

Similarly in merger determinations concerning failing firm, the counterfactual may not be obvious. In the Metro/Herald AM merger for example three counterfactuals are outlined, two by the merging parties and one by the Competition Authority (Competition Authority, 2009c, paras. 5.2-5.7). However, the Competition Authority does not appear to come to a view as to which is the most likely counterfactual nor that it is not necessary to take such a decision, since the competitive effects analysis is unaffected by the choice. Instead, it is not clear that these three counterfactuals play any role in the subsequent analysis of the merger determination. Hence, it is important that if more than one counterfactual is proposed that the analysis takes this into account in any competition analysis.

The Consultation Paper proposes that the 2002 Guidelines should be amended to describe the concept of the counterfactual, illustrate the use of the counterfactual in Competition Authority merger determinations and highlight the importance of identifying the relevant counterfactual, which will usually be the situation prior to the merger (Competition Authority, 2010a, para. 2.19). These suggestions usefully state current practice by the Competition Authority and make explicit what is implicit in the 2002 Guidelines. The discussion could be incorporated into the 2002 Guidelines when discussing SLC at the very beginning of the revised Guidelines. However, it is important in revising the 2002 Guidelines to stress that merely identifying alternative counterfactual(s) is only a necessary first step and is not sufficient. A judgment is needed as to which is the most likely counterfactual to occur, absent the merger, which can then used in subsequent analysis or if the competitive effects analysis is the same irrespective of the counterfactual selected then a choice among the different counterfactuals is not necessary. While in most merger cases the pre-merger world is the appropriate counterfactual this will not always be the case, particularly in the current recession.

Countervailing Buyer Power

Countervailing buyer power is frequently argued by merging parties as a reason why a merger will not lead to SLC. Large and powerful buyers, such as retailers, will, it is argued, neutralise any price increase of the merged entity. However, although countervailing buyer power is often claimed in merger notifications to the Competition Authority, after careful investigation, the Competition Authority rarely concurs. The treatment of countervailing buyer power in the 2002 Guidelines is confined to a single paragraph which argues that large buyers are “not sufficient to conclude that market power is effectively constrained”

(Competition Authority, 2002, para. 4.10). Rather "[E]ffective buyer power requires that buyers have alternative sources of supply, or are capable of credibly threatening to set up alternative supply arrangements" (*ibid*, para. 4.10). The Competition Authority has applied this approach in considering claims of countervailing buyer power, in, for example, the Kerry/Breeo merger (Competition Authority, 2008a).

The Consultation Paper proposes that the 2002 Guidelines "could be amended to include a greater level of detail" including examples of countervailing buyer power (Competition Authority, 2010a, para. 2.23). While the criticism made above in Section IV concerning vagueness and lack of precision applies to these proposals, there is one respect in which current Competition Authority practice in relation to countervailing buyer power could be incorporated in the revised Guidelines. Furthermore it has a more general application in terms of evidence and hence could be incorporated into the earlier discussion on evidence. This refers to the probative value of post-merger evidence compared to pre-merger evidence. This reflects the general point that internal documents, memorandum, communications with customers, competitors and suppliers pre-consideration of the merger are less likely to be tainted or influenced by the proposed merger. In contrast, post-consideration of the merger, especially post-notification, documents and communications are much more likely to be influenced by the merger and hence need to be treated accordingly. While this issue arose in the case of a specific merger, Kerry/Breeo, which hinged on the issue of countervailing buyer power, the point is more general.[36]

Efficiencies

The 2002 Guidelines discuss the question of efficiencies at some length (Competition Authority, 2002, paras 5.9-5.16). Like countervailing buyer power, merging parties frequently claim efficiencies will offset any likely anti-competitive effects of a merger. However, in close to 500 merger determinations since 2003, the Competition Authority has never cleared a merger on the grounds that the efficiencies are sufficient to offset the anticompetitive effects of the merger. Furthermore, apart from the Kerry/Breeo merger (Competition Authority, 2008a), it is difficult to think of a merger where the parties furnished extensive evidence of efficiencies. While there are a variety of reasons for this state of affairs (Gorecki *et al*, 2007, pp. 365-366), lack of clarity in the 2002 Guidelines do not seem to one of these. Nevertheless, the Consultation Paper proposes "a more complete discussion of efficiencies" providing three examples of what it has in mind (Competition

[36] The issue, in the context of Kerry/Breeo merger is discussed in Gorecki (2009a).

Authority, 2010a, para. 2.25). However, it is not clear the extent to which the issues raised by two of the three examples are not already covered by the 2002 Guidelines, a general criticism of the Consultation Paper made in Section IV above. In the case of the third example, its relevance and rationale needs to be specified, otherwise it is likely to make providing credible evidence on merger related efficiencies even more onerous that it already is by imposing an additional evidentiary burden on the notifying parties to a merger, but without any accompanying gain in terms of evaluating a merger.

The Consultation Paper proposes that greater elaboration could be furnished of "the extent and probability of cost efficiencies" and "the evidence (including the level of specificity of efficiencies) that the parties should submit" (Competition Authority, 2010a, para 2.25). However, these issues are already discussed in the 2002 Guidelines (Competition Authority, 2002, paras 5.10-5.15 and para 5.16, respectively). It would therefore have been helpful if the Consultation Paper had been more explicit as to what the Competition Authority proposed to add to the 2002 Guidelines. The third example in the Consultation Paper of where more discussion is merited concerns "the distribution of efficiency gains to consumers, staff and shareholders" (Competition Authority, 2010a, para 2.25). This is certainly a departure from current practice. At the present time in the 2002 Guidelines, "an increase in the price-cost margin resulting from a merger may be compensated by a reduction that leaves the eventual market price unchanged or lower … . In essence, it uses a 'net price test:' by considering whether the price paid by consumers will rise or fall as a result of the merger" (Competition Authority, 2002, para 5.9). Hence what is relevant is the degree to which efficiencies are able to offset or more than offset the price enhancing impact of the merger, not whether consumers have 10 or 50 or 80 per cent of the efficiency gains. The idea that consumers should have a fair share of efficiency gains is relevant in considering under Section 4(5) of the Act, for agreements that may breach Section 4(1).[37] However, it is not at all clear what purpose is served in estimating the allocation of efficiency gains by consumers, staff and shareholders in the analysis of efficiencies in merger cases. A reference to the US (USDoJ&FTC, 2010, pp. 29-31), UK (CC&OFT, 2010, pp. 55-58), and Australian (ACCC, 2008, pp. 51-52) Guidelines provides no clues as to why the distribution is important.[38] The Competition Authority needs to make a case as to why this should be included, before imposing an added burden in merging parties in filing an efficiency defence.

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[37] These provisions correspond to Articles 101(3) and 101(1), respectively, of the Treaty on the Functioning of the European Union.

[38] The ICN Recommended Practices for mergers have as yet to address the issue of efficiencies.

Maverick Firms

The 2002 Merger Guidelines contain several references to the maverick firm (Competition Authority, 2002, paras 3.11(d), 4.8, 4.14(e), 4.24, 6.6 & 7.2). Some merger determinations, particularly Heineken/Scottish& Newcastle (Competition Authority, 2008b) contain further discussion of the concept of the maverick firm and its application to merger analysis. The Consultation Paper notes that in the 2002 Guidelines reference is made to the maverick firm in several contexts, including competitive effects (Competition Authority, 2010a, para 2.26). It then states that international best practice suggests that the effects of a maverick firm are most likely to be relevant in analysing coordinated effects. The Consultation Paper then proposes that the 2002 Guidelines could be amended "to include a more complete discussion of the significance of maverick firms … including that the loss of a maverick firm is most relevant in the context of potential coordinated effects" (*ibid*, para. 2.27). Again this is an example of the general point made in Section IV above of proposals that are too vague. What is meant by a more complete discussion? Has the Competition Authority has complaints that the 2002 Guidelines were inadequate in the discussion of the maverick firm? The Consultation Paper is silent on these questions and hence it is difficult to come to a view as to whether or not a more complete discussion is useful.

Remedies

The Consultation Paper quite rightly points out the Competition Authority "has applied remedies to address competition concerns arising from a number of mergers" (Competition Authority, 2010a, para 2.28). These include:

- monitoring arrangements, sometimes quite complex (e.g. Competition Authority, 2005a);
- reporting requirements involving another regulatory agency, the Commission for Communications Regulation (Competition Authority, 2005b);
- inform and when requested notify mergers[39] to the Competition Authority in a specific market (Competition Authority, 2004a; 2005c);
- conditions on how the merged entity conducts aspects of its business (Competition Authority, 2005d);
- divestiture of a business, together with arrangements for a trustee and hold separate obligations (Competition Authority, 2007c); and

[39] This refers to mergers below the notification threshold which can be voluntarily notified under the Act.

- divestiture of a business that consisted largely of a brand (Competition Authority, 2006b).

In some instances the Competition Authority has conducted extensive market testing on the merger remedies offered by the merging parties (Competition Authority, 2007c).

The 2002 Guidelines are silent on the issue of remedies, while at the same time there is no separate existing guidance on the topic of remedies from the Competition Authority. Hence the Competition Authority in assessing issues relating to merger remedies often draws on the experience and guidance issued by the European Commission (2004a) and the UK Competition Commission (2004). The Consultation Paper proposes the 2002 Guidelines "could be amended to provide a more complete discussion of remedies" (Competition Authority, 2010a, para. 2.28). The more complete discussion would include why the Competition Authority would prefer a remedy in contrast to blocking the merger and provision of examples of behavioural and structural remedies. The revised Guidelines would also set out the Competition Authority's approach to remedies in "addressing competition concerns arising from a merger" (*ibid*, para. 2.28).

It would be useful for the revised Guidelines to develop the Competition Authority's approach to remedies. This appears to be a preference for structural over behavioural remedies, but at the same time the remedy should be proportionate to the competition concern being addressed. As a result in some instances, a behavioural or conduct remedy may be more appropriate than a structural one. However, the discussion of remedies in the revised Guidelines should not preclude the Competition Authority from either developing its own guidance note on remedies in a separate document or else stating that reliance will be placed on (say) European Union guidance but subject to some adjustment and adaption.

6. Some Additional Considerations

One of the hallmarks of modern merger analysis is the rise in importance of mergers with unilateral as opposed to coordinated effects (Shapiro, 2010, p. 60). Ireland is no exception to this trend (Gorecki *et al,* 2007, Table III, p. 356).[40] In response to this there has been a development of merger assessment methods that build on the degree to which the merging firms' products or services are close substitutes for each other, captured by the degree to which consumers will switch from products of one of the merging parties to products of the

[40] Shapiro is referring to the period 1992 to 2010. Data for Ireland for such a period does not exist. However, for the shorter period 2003-2006 the evidence shows that the vast majority of mergers that required extensive analysis by the Competition Authority the concerns were unilateral rather than coordinated. See references in text for details.

other, in the event of a price rise in the former. This is referred to the displacement effect; and the profit margin of the merging parties, where the latter can be used as an indication of the degree of competition. Thus a merger involving high degree of displacement and high margins indicates a situation where competitive concerns are more likely to arise. As a result various measures have been developed to take into account this possibility, the latest generation of which is referred to as measures of upward pressure on prices ("UPP") measures.[41]

The 2002 Guidelines refer to the concept of displacement (Competition Authority, 2002, para. 4.6) while Competition Authority merger determinations typically refer to the concept of closeness of competition (Competition Authority, 2008b) which underlies the concept of displacement. The 2002 Guidelines also point out that if the merging parties produce close substitutes for a differentiated product that there may be competition concerns even though the market shares "are not particularly high" (Competition Authority, 2002, para, 4.14(a)). Indeed, using the usual HHI thresholds referred to above a merger in such a situation might not indicate prima facie competition concerns. However, there is no mention in the 2002 Guidelines of the gross margin and it is not typically relied on Competition Authority merger determinations, nor used in combination with the displacement ratio.

In view of the constant references in the Consultation Paper to international best practice and reference in the accompanying news release to "advances in the economic analysis underlying merger review,"[42] it would have been useful had the Consultation Paper raised two issues: first, the implications of the move towards unilateral effects as the relevant theory of harm in merger analysis and thus how the reliance on structural measures such as HHI indexes may be less than reliable indicators of where competition concerns are located; and the suggestion that in unilateral effects cases an alternative approach might be the deployment of UPP measures. These have been developed and applied in the UK in cases and the concept is referred to in the recently revised UK Guidelines (CC&OFT, 2010, paras 5.4.9-5.4.10). The same applies to the US Guidelines (USDoJ&FTC, 2010, p. 21).

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[41] For further discussion see, for example, Farrell & Shapiro (2010), Shapiro (2010, pp. 97-101) and Simons & Coate (2010).

[42] Competition Authority (2010h). The advances in economic analysis is given as one of the reasons for the review of the 2002 Guidelines, but it is not clear how that is reflected in the Consultation Paper.

7. Lessons

A number of lessons can be drawn from the Competition Authority's experience revising the 2002 Guidelines that are likely to have wider applicability to other competition authorities considering revising their Guidelines.

- One of, if not the, purposes of the Guidelines, irrespective of the jurisdiction, is provide practical advice to merging parties and their advisors in considering whether or not a proposed merger is likely to be cleared.[43] This is achieved by setting out in the Guidelines the competition authority's custom and practice in merger assessment. To be sure there are likely to be some differences between competition authorities. For example, in some jurisdictions the remit for merger control may be confined largely or solely to the competition authority, while in others there may be a much richer set of legal precedents on which to draw. Nevertheless, this does not detract from the viewpoint that the Guidelines set out the competition authority's merger evaluation methodology so that the merging parties can establish whether or not a potential merger meets the relevant merger test and what evidence is needed to satisfy that test. The Guidelines thus need to be clear, concise and readily understood, containing the minimum of legal and economic jargon.
- Proposals for revising the Guidelines should carefully distinguish between those that incorporate existing merger assessment custom and practice and proposals that mark a departure from current Guidelines as well as existing custom and practice. The former set can be illustrated drawing on merger determinations, while the latter might draw on developments in merger theory and/or the practice elsewhere.
- Proposals for revising the Guidelines, particularly when setting out and explaining existing custom and practice, should be specific rather than general. If the proposals consist of clarification, nuancing, providing greater detail, and/or furnishing a more complete discussion, then the suggested wording should be provided for comment. Absent this it is difficult to comment helpfully on the proposed changes.

[43] For example, the US Assistant Attorney General, Antitrust Division, stated in 2010 that, "[O]ur Guidelines are meant to inform practioners and the business community of the Agencies' standards for evaluating mergers."Cited in Shapiro (2010, p. 58).

- Proposals for revising the Guidelines that rely on international best practice still need to carefully explain its relevance and rationale. International best practice is not a one size fits all, so that attention needs to be paid to local economic and legal circumstances.
- In revising the Guidelines proposals should consider the importance of multijurisdictional mergers. Mergers are sometimes notified in more than one jurisdiction so it makes sense to be cognisance of developments in these jurisdictions in revising Guidelines. This is likely to be especially relevant for smaller economies.
- In revising the Guidelines the competition authority should carefully set out the steps involved in the process of revising and issuing new Guidelines at the beginning of the process. Time should be permitted not only for submissions on the initial proposals, but also draft revised Guidelines. The more extensive and complex the proposed changes in the Guidelines, the more elaborate will be the review process.[44]

[44] In the case of the 2002 Guidelines the proposals are by and large elaboration of existing practices and as such not a major departure. Hence the limited number of steps as set out in Section III above. In contrast, the US revision of its Guidelines was a much more involved process with many more steps (Shapiro, 2010, p. 701), reflecting the fact that the 2010 *Horizontal Merger Guidelines* replaced those that were issued in 1992, amended in 1997. Equally the issuing of joint rather than separate Guidelines by the Competition Commission and the Office of Fair Trading also resulted in an extensive consultation process prior to completion. For full details see Competition Commission website. This can be accessed at: http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/cc2_review.htm. Accessed 7 February 2011.

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