



ESRI Research Bulletin

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Improving the Merger Control Process in Ireland

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INTRODUCTION

In a recent paper Patrick Massey raised serious concerns about the quality of analysis in the Irish Competition Authority's merger determinations.³ One of the five merger determinations reviewed could have been cleared, others perhaps prohibited. To improve the merger control process it was suggested that:

- third or non-merging parties should have the right to appeal a Competition Authority merger determination to the Courts. Such third parties might include unsuccessful bidders for the acquired firm as well as competitors, suppliers and customers of the merged entity; and,
- the Competition Authority should undertake a full scale *ex post* review of its merger determinations to identify possible errors and areas for improvement. A number of leading competition agencies have undertaken such reviews.

We consider the merits of these proposals and of the criticisms of Competition Authority merger determinations.¹

THIRD PARTY APPEALS

There are at least three reasons why third party appeals from Competition Authority merger determinations is not merited. We consider each in turn.

First, appeals from merger determinations in Ireland take a long time to resolve. The case of Kerry Groups acquisition of Breeo Foods and Brands is the only

¹ Paul K. Gorecki, (2014). "The Quality of Analysis of Irish Merger Decisions." *Journal of Competition Law and Economics*. Published online <http://dx.doi.org/10.1093/joclec/nhu003>.

² The author was a member of the Competition Authority, responsible for mergers between 2006 and 2008.

³ Patrick Massey, "Taking Politics Out of Mergers: A Review of the Irish Experience." *Journal of Competition Law and Economics*, Volume 6, 2010, pp. 853-878.

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determination to be appealed to date.⁴ The Competition Authority made its merger determination on August 28, 2008 prohibiting the merger. The High Court annulled that determination on appeal in a judgment dated March 19, 2009. The Competition Authority appealed that decision to the Supreme Court on April 7, 2009. As of May 2014 the case has yet to be heard by the Supreme Court.

Such Court-related delays create an incentive for third parties that are likely to be adversely affected by a merger to make a strategic decision to appeal the Competition Authority's merger determination with a view to delaying, if not preventing, the implementation of the merger. Furthermore, other knowledgeable third parties might decide to appeal a Competition Authority merger determination in the expectation of receiving a side payment (i.e. a monetary payment) in exchange to withdrawing from any Court proceedings. In both cases the market for corporate control is impaired, with no obvious benefit.

Second, it could be argued that the Courts are not the appropriate forum to deal with complex economic issues raised in merger analysis.⁵ Typically judges are not trained in competition economics, nor is it always clear that the High Court judge charged with responsibility for competition cases has a strong background in competition law.

Third, extensive and careful examination of the criticism, referred to above, made of the five important Competition Authority merger determinations found that these criticisms were either incorrect, misleading, confused, actually addressed in the Competition Authority's merger determination or invalid. In some instances the criticism reflected legitimate differences in the analysis of the merger. In the one case where the criticism was valid, this would not have materially changed the finding in the relevant case.

EX POST REVIEW

This does not mean that the Competition Authority's record of merger determinations should not be subject to review or is not capable of improvement. However, there are alternative less costly but as, if not more, effective approaches that could be used instead of third party appeals, one of which, ex post review, was suggested by Patrick Massey.⁶ *Ex post* review of the Competition

⁴ The appeal was taken by Kerry Group plc.

⁵ For an analysis of the High Court decision in the Kerry/Breeo appeal, see Paul K. Gorecki, "The Kerry/Breeo Merger: Two Views of Countervailing Power – the Competition Authority and the High Court," *European Competition Journal*, Vol. 5, 2009, pp. 585-612.

⁶ The review would, of course, be carried out by an independent third party, perhaps with a steering committee consisting of some legal and economic merger experts from outside the Competition Authority.

Authority's merger determinations can be used to address issues such as: the quality of the merger analysis; whether the Competition Authority's *Merger Guidelines* were applied appropriately; the degree to which the Competition Authority's *ex ante* analysis is consistent with subsequent market developments; and, based on this analysis, suggestions for improving merger control. The year 2014 would be an appropriate time to execute a full-scale merger review, notwithstanding budgetary pressures to which the Competition Authority is subject, given the current low volume of mergers being notified to the Competition Authority.⁷

⁷ In the period 1 January-30 May 2014, only 15 mergers were notified to the Competition Authority, with not a single Phase II merger, which are typically more complex and resource intensive. For details of current merger notifications see www.tca.ie.