

LAW SOCIETY SUBMISSION



A SIMPLIFIED MERGER PROCEDURE FOR THE REVIEW OF CERTAIN MERGERS & ACQUISITIONS

COMPETITION & CONSUMER PROTECTION COMMISSION

DECEMBER 2018

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction and Summary of Proposals

- 1.1 The Public Consultation by the CCPC on “a Simplified Merger Procedure for the Review of Certain Mergers & Acquisitions” (the “Consultation”) is welcome.
- 1.2 In the Consultation, the CCPC proposes to put in place a simplified merger notification and review procedure for notifiable transactions that meet the following three criteria/scenarios:
- (i) Where none of the parties to the merger (termed “undertakings involved” in the transaction) are active in the same product or geographic markets, or in any upstream or downstream product markets from one-another;
 - (ii) Where two or more of the parties involved in the merger or acquisition are active in the same product or geographic market, but their combined market share is less than 15%. Or, where one or more parties involved in the merger or acquisition are active in a market which is upstream or downstream to a market in which another party is active, but the market share of each of the parties involved in each market is less than 25%;¹
 - (iii) Where a party, which already has joint control over a company, is to acquire sole control over that company.
- 1.3 For transactions that meet these three criteria, the Consultation proposes that a shorter notification form could be used by the notifying parties and shortened determination for mergers or acquisitions under the simplified procedure. No indication is given, however, that transactions notified under the simplified procedure may receive more rapid clearance.

¹ This is subject to a request for more detailed information from the notifying parties (e.g., by issuing a request for information under section 20(2) of Act at any time), in the event that factors come to light which require further investigation.

2. General Observations of the Law Society

- 2.1 The Law Society of Ireland (the "Law Society") agrees that a simplified procedure for notification and review of mergers that clearly do not raise competition concerns should be introduced in the State. This would bring benefits to Irish business, in the form of lower compliance costs, and to the CCPC, by freeing up much needed resources.
- 2.2 The Law Society considers that introduction of an effective and transparent simplified procedure is in line with best international practice, including that of the European Commission,² other Member States,³ and applicable recommendations of the International Competition Network (ICN), of which the CCPC is a member.⁴
- 2.3 At the same time, the Law Society considers that important aspects of current CCPC merger control procedures work well and should, in all cases, be retained. In particular, the established CCPC practice of openness to merger filings without extensive pre-notification interaction and delay promotes predictability and certainty for business. The Law Society considers that adoption of a Simplified Treatment procedure should not result in pre-filing discussions or interaction with the CCPC becoming mandatory.
- 2.4 In this regard, the Law Society considers existing CCPC procedures to be highly effective and, indeed, compare favourably with the practice of other merger control agencies such as the European Commission and the UK CMA. The CCPC's practice of accepting filings with limited pre-notification interaction allows certainty for notifying parties and thereby allows them to plan better for merger control approvals during closing. It is also in line with U.S. practice, which the Law Society considers to be the benchmark for top class merger control enforcement.
- 2.5 The Law Society considers that the CCPC should continue and retain these aspects of its practice and any move to adopt a simplified procedure should not detract from or otherwise undermine this approach.

² Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

³ Consultation, para. 1.10.

⁴ International Competition Network, 'Recommended Practices for Merger Notification & Review Procedures' (2002-2018) section V.B; International Competition Network, 'Information Requirements for Merger Notification' (Report to the ICN Annual Conference Zurich, Switzerland; June 2009) section II.

3. Specific Consultation Questions

3.1 On the basis of your experience of the Irish merger control regime, and considering the analysis presented in the [consultation document], do you consider that there is currently scope for simplification of the Irish merger control procedure without impairing the merger regime's objective of preventing harmful effects on competition?

3.1.1 The Law Society agrees that a simplified procedure for notification and review of mergers that clearly do not raise competition concerns should be introduced in the State. This would bring benefits to Irish business, in the form of lower compliance costs, and to the CCPC, by freeing up much needed resources.

3.1.2 As the ICN has noted, “[g]iven that the vast majority of notified transactions do not raise material competitive concerns, merger review systems should be designed to permit such transactions to proceed expeditiously.”⁵

3.1.3 From Table 1.0 Merger Notifications 2014 – 2018, it is clear that there has been a significant increase in the number of merger filings to the CCPC in recent years. New jurisdictional thresholds, to come into effect on 1 January 2019, may reduce the number of filings somewhat. But many so-called “no issues” mergers will doubtless continue to be caught by the thresholds.

3.1.4 The Law Society notes the CCPC's finding that 55% of merger filings to the CCPC from 2016 to 2018 merited simplified procedure treatment, consistent with standards the European Commission currently applies. In all likelihood, even with new thresholds coming into force on 1 January, a high percentage of merger filings will continue to be candidates for simplified treatment. Accordingly, the Law Society considers that a new procedure is necessary to separate transactions that are likely to raise competition concerns from those that are unlikely to do so.

3.2 In your view, what are the potential benefits and risks associated with the introduction of a simplified procedure?

3.2.1 As regards the regulatory burden and compliance costs, the European Commission has previously noted that its simplified procedures decreased merger control costs for business, thereby reducing compliance costs. Given that the simplified procedures would apply only to transactions that clearly do not raise competition concerns, the Law Society considers that the introduction of such procedures would be a proportionate and appropriate way for the CCPC to proceed.

3.2.2 Assuming a transparent, clear and reliable definition of what types of transactions qualify for simplified treatment, the Law Society considers that potential enforcement risks identified by the CCPC (e.g., at para. 2.5 of the Consultation) can be addressed.

⁵ International Competition Network, ‘Recommended Practices for Merger Notification & Review Procedures’ (2002-2018) section V.B.

The Law Society notes that the CCPC proposes to reserve to itself the right to declare filings notified under the simplified procedure incomplete in certain cases. A number of benefits will arise for both the CCPC and Irish businesses from a more focused merger review framework.⁶ These include less burdensome filing requirements, more rapid clearance timeframes, and better use of CCPC resources.⁷

3.2.3 A simplified procedure has been described by the ICN as one of the “various ways to provide flexibility in the initial review,”⁸ and is useful because it allows alternative notification formats in line with varying levels of complexity of the competitive analysis of the transaction.⁹ Moreover, a simplified procedure provides the discretion to focus on certain responses to information specifications rather than others that are not sufficiently relevant to the transaction.¹⁰

3.2.4 While the CCPC’s concern about potentially harmful mergers escaping review has been identified by other competition authorities in a survey by the ICN,¹¹ it has also been noted that the effectiveness of a merger control framework relies on the interplay between its various mechanisms for dealing with different transactions.¹²

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

3.3.1 The Law Society considers that the criteria chosen by the CCPC for the selection of a transaction under the simplified procedure should be identical to the criteria followed by the European Commission for its simplified procedure. This would harmonise the CCPC’s simplified procedure along the lines of international best practice and offer the parties predictability.

3.4 What type of screening tools/procedures do you think the CCPC should consider to ensure that the correct transactions are selected for review under a simplified procedure?

3.4.1 The Law Society considers that established CCPC practice on waiving the requirement to provide certain information for no-issue transactions reflects a pragmatic and effective approach. The Law Society is not aware of any transaction that has

⁶ International Competition Network, ‘Setting Notification Thresholds For Merger Review’ (Report to the ICN Annual Conference Kyoto, Japan; April 2008) section III.

⁷ International Competition Network, ‘Information Requirements for Merger Notification’ (Report to the ICN Annual Conference Zurich, Switzerland; June 2009) section II.

⁸ International Competition Network, ‘Setting Notification Thresholds For Merger Review’ (Report to the ICN Annual Conference Kyoto, Japan; April 2008)

⁹ International Competition Network, ‘Setting Notification Thresholds For Merger Review’ (Report to the ICN Annual Conference Kyoto, Japan; April 2008)

¹⁰ International Competition Network. See International Competition Network, ‘Recommended Practices for Merger Notification & Review Procedures’ (2002-2018) section V.B

¹¹ International Competition Network, ‘Information Requirements for Merger Notification’ (Report to the ICN Annual Conference Zurich, Switzerland; June 2009)

¹² International Competition Network, ‘Setting Notification Thresholds For Merger Review’ (Report to the ICN Annual Conference Kyoto, Japan; April 2008)

benefitted from such a pragmatic approach that was subsequently considered to give rise to substantive competition law concerns. Nor is any example of such an outcome provided in the Consultation.

3.4.2 The Law Society notes from the Consultation (para. 2.6) that the CCPC would “reserve the right to revert to the standard procedure at any point – specifically, by invoking the provisions of section 18(12) of the Act (*i.e.*, by declaring the notification submitted under the simplified procedure to be not valid in accordance with section 18(12) of Act and thereby requiring the parties to submit a fresh notification using the standard procedure) or by issuing a request for information under section 20(2) of the Act requiring the notifying parties to submit more detailed information in relation to the transaction.”

3.4.3 Currently, the CCPC rarely (if ever) declares filings invalid or otherwise requires the parties to submit a fresh notification (even where significant waivers are given in advance to the parties in respect of more burdensome aspects of the CCPC’s standard notification form). The Law Society would be concerned if the proposed Simplified Treatment procedure might introduce greater uncertainty and/or delay in the merger review process for no issue mergers. The Law Society sees no reason why introduction of a Simplified Treatment procedure should increase uncertainty or prospect for delay. Nor, for the same reason, should introduction of a Simplified Treatment procedure increase the number or frequency of formal section 20(2) requests for information.

3.5 **Under a simplified procedure, what current CCPC merger procedures do you believe should be simplified/eliminated?**

3.5.1 While the Consultation’s proposals on the shorter notification form and the CCPC’s discretion to seek additional information are welcome, more can be done to give the CCPC the flexibility to waive responses to information that is not sufficiently relevant to justify the burden that the responses would impose.¹³

3.5.2 This is based on the International Competition Network’s idea that while it is “legitimate for competition agencies to require the merging parties to provide information sufficient to demonstrate that the transaction does not present such concerns [...], competition agencies should [also] be flexible as to formal requirements where the merging parties are able to demonstrate the absence of material competitive concerns by reference to objectively quantifiable information maintained in the ordinary course of business, as opposed to the detailed market information sometimes required upon notification.”¹⁴

3.5.3 The Law Society respectfully submits that section 4.4 to 4.11 of the CCPC’s standard notification form could be effectively eliminated in filings of transactions that qualify for simplified treatment. Section 4.4 in particular seems overly burdensome and excessive for simplified treatment transactions. The Law Society notes in this regard that Section

¹³ As recommended by the International Competition Network. See International Competition Network, ‘Recommended Practices for Merger Notification & Review Procedures’ (2002-2018) section V.B.

¹⁴ International Competition Network, ‘Recommended Practices for Merger Notification & Review Procedures’ (2002-2018) section V.B.

4.4 requires details of “vertical integration” of the parties, the characteristics of the industry, nature of the products, extent of switching, importance of customer preferences and the manner of pricing and sale of goods.

3.5.4 The Law Society also notes that, in practice, the CCPC does not typically require parties to no issue transactions to provide details responding to section 4.4. Given this pragmatic established practice of the CCPC, the Law Society submits that the CCPC should not now increase burdens on parties to no-issue transactions at pre-notification stage, for instance by requiring increased justification for simplified treatment.

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

3.6.1 The Law Society agrees that a short notification form for transactions that qualify for simplified procedure has merit.

3.6.2 In practice, however, the Law Society understands that the CCPC has generally, albeit on an ad hoc basis, allowed parties to non-controversial deals to notify with less information. Thus, it has been the practice of the CCPC to waive some of the requirements of the CCPC’s standard notification form (particularly by waiving relevant parts of section 4).

3.6.3 Those parts of section 4 of the notification form that require the parties to provide top customer, supplier and competitor information can be time consuming for notifying parties and costly. The Law Society questions how useful this information is to the CCPC in the context of a no-issues merger filing. In addition, however, section 4.4 of the CCPC’s standard notification form, requiring a detailed and lengthy description of relevant markets, can be demanding and, for review of uncontroversial deals, unnecessary.

4. Conclusion

4.1 The Law Society hopes that the CCPC will find the above comments constructive and helpful and is available to engage further with the CCPC if required.

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