



LAW SOCIETY
OF IRELAND

Submission on the Revised CCPC Guidelines for Merger Analysis

Competition and Consumer Protection Commission

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About the Law Society

The Law Society of Ireland (the **Law Society**) is the educational, representative and professional body of the solicitors' profession in Ireland. The Law Society's main statutory functions in relation to the education, admission, enrolment, and discipline of the solicitors' profession are provided by the *Solicitors Acts 1954 to 2015*. These statutory functions are exercised by the Council of the Law Society or by the various committees, task forces and working groups to which the Council delegates those statutory functions.

The Law Society delivers high-quality legal education and training and also places significant emphasis on civic engagement, supporting local community initiatives and driving diversity and inclusion.

Introduction

The Law Society appreciates the opportunity to provide a submission to the Competition and Consumer Protection Commission (the **CCPC**) in response to its [Consultation on Merger Guidelines](#) (the **Consultation**).

We note there have been significant social and market changes since the introduction of the previous iteration of the CCPC's [Merger Guidelines](#) (the **Merger Guidelines**) in 2014, particularly with regard to digitalisation, and also with regard to relevant EU case law. We also acknowledge that the CCPC has actively developed its protocols and practices through its numerous experiences in merger analysis over the years, but that the guidelines had been adopted, without change, from the CCPC's predecessor (the Competition Authority) upon its formation in 2014.

We also note that, as acknowledged by the CCPC itself, ten years have passed since the publication of the CCPC's Merger Guidelines and we welcome the fact that (a) the CCPC has taken the opportunity and initiative to revise its guidelines, and (b) that the CCPC, displaying a strong commitment to transparency, has consulted widely with stakeholders on this revision.

As noted in the consultation, the 2014 Merger Guidelines:

"... set out and elaborate on key elements of the CCPC's merger review function, covering each of the areas of analysis the CCPC may undertake in order to establish whether or not a merger will lead to a substantial lessening of competition in any market for goods and services in the State ("SLC")" (at page 1).

While the 2014 Merger Guidelines are not binding, they are relied upon by Irish practitioners, the business community and the courts to understand the CCPC's approach to merger review. In *Rye Investments Ltd v Competition Authority* [2009] IEHC 140, an earlier version of the 2014 Merger Guidelines was cited extensively by the Commercial Court.

We provide below our high-level views on where the Guidelines could be improved. The Law Society will first provide some general comments on the consultation before addressing the 8 main questions provided by the CCPC in their Call to Input document.

General Comments

The Law Society of Ireland understands that following this consultation the CCPC will publish draft revised guidelines for further comment from stakeholders and we look forward to further engagement and collaboration with the CCPC at that stage.

The Law Society notes that the Merger Guidelines are helpful in explaining the CCPC's approach on key analytical issues. In revising the Merger Guidelines, we ask that the CCPC consider including greater explanation of the analytical tools, and the sources of evidence the CCPC uses when reviewing mergers, and the probative value the CCPC places on evidence would be welcome.

The speed of advancement of the digital economy in the last decade means that practitioners really need clarity on the standards that the CCPC use in establishing a SLC in this sector.

In addition, the CCPC could greatly improve the Merger Guidelines by including citation to CCPC decision-making practice. For example, in the section on the counterfactual, the revised Guidelines could cite the CCPC's three major recent decisions in which the counterfactual is discussed at length¹.

Finally, illustration of the practical application of Merger Guideline concepts by reference to concrete examples would assist in making the guidelines more accessible.

Responses to Specific CCPC Questions

Question 1: Do you agree with the proposed scope set out in [the scoping document]? If not, please provide details?

We agree with the scope of this project, as described in the Call for Input. The proposed scope of this project is to focus on the substantive elements of merger review. We note in this regard that the project will focus on “*all areas of substantive review*,” including approaches to (i) the SLC test; (ii) market definition; (iii) the counterfactual (including e.g., failing firms and/or exiting assets); and (iv) assessment of competitive effects of a merger, including (but not necessarily limited to): (a) horizontal unilateral effects; (b) coordinated effects; (c) vertical mergers; (d) entry and expansion; (e) countervailing buyer power; and (f) efficiencies.

Question 2: What, in your view, are the areas of merger review/analysis where new/updated guidance is urgently required? What changes would you propose?

The Call for Input includes a non-exhaustive list of merger guidelines that have been updated and adopted by competition authorities in other jurisdictions since the Competition Authority/CCPC adopted its Merger Guidelines in 2014.²

We note that the CCPC intend to share a draft of the revised Merger Guidelines following this consultation. It would be helpful in this regard if the CCPC could provide explanation of those proposed changes and whether similar changes have been made in equivalent guidelines in other jurisdictions that have also recently adopted comparable revised rules.

¹ DAA/Gannon M/23/011, Bank of Ireland/KBC, and AIB/Ulster Bank

² These include the French Autorité de la Concurrence (adopted 2020), the UK CMA (adopted March 2021), the New Zealand Commerce Commission (adopted May 2022), the U.S. horizontal merger guidelines (adopted 2023), and the EC market definition notice (adopted February 2024).

It is submitted that because of the pace of change and advancement of the digital economy, this area needs new focus in the revised Merger Guidelines.

We recommend that the revised Merger Guidelines should, consistent with the EU's new approach in its market definition notice, include recognition of the importance of non-price parameters for market definition, including innovation, quality, reliable supply and sustainability.

Specific guidance on the application of market definition concepts in specific circumstances would also be important, including: digital markets, for instance with respect to multi-sided markets and digital "ecosystems" (e.g., products built around a mobile operating system), innovation-intensive industries, where companies compete on innovation, including through the development of new products.

In addition, consistent with practice at EU level, we recommend that the revised Merger Guidelines include extensive overview of the various sources of evidence and their probative value for purposes of the CCPC's analyses.

Clarity in the revised Merger Guidelines around the substantive test used for the CCPC "calling in" power would be very helpful and more guidance on how the CCPC analyses vertical mergers.

Question 3: Do you have views on the current Merger Guidelines' approach to establishing an SLC? Should elements such as the strengthening of dominant position be taken into account in establishing SLC in the revised merger guidelines?

The standard of proof in determining that an SLC "will" or "would" occur, as stipulated in the Competition Act 2002 section 22(3) and section 20(1)(c) respectively, should be more clearly elaborated on in the Merger Guidelines. In the published version of the CCPC's determination in DAA/Gannon³, the CCPC discusses this issue⁴ ("The Commission's approach to the SLC Test"). Regarding the test whether the merger "will or will not" result in an SLC under section 22(3), the CCPC says it considers that "...*the relevant standard of proof is the ordinary civil standard, i.e., the balance of probabilities. In other words, in order to decide whether the result of the merger or acquisition will (or will not) be an SLC, the Commission must decide that it is more likely than not that an SLC will occur*"⁵. Further, the CCPC says the "... *application of the balance of probabilities test is also recognised in the Commission's Merger Guidelines*"⁶. The CCPC also states that "... *an unduly technical or rigid approach to the application of the standard of proof is not helpful or appropriate*"⁷.

Explanation in the Merger Guidelines how the CCPC's standard is consistent with the legislative stipulation that a transaction "will" or "would" give rise to a substantial lessening of competition would be helpful for practitioners, deal-makers and the courts. It is submitted that the word "likely" should not be used in the guidelines.

A merger may harm competition by strengthening a dominant position of the acquiring entity and/or the merging party(ies). However, we recommend that the Merger Guidelines clarify that this will be the case only where there is actual evidence that the transaction is likely to lead to harm. As in equivalent U.S. guidelines, the Merger Guidelines could stipulate that this

³ M/23/011

⁴ At para.'s 155 – 165

⁵ at para. 158

⁶ at para. 159

⁷ at para. 160

may be via raising barriers to entry, eliminating nascent competition, or extending a dominant position from one market to another.

We would emphasise that dominance by the acquiring firm alone should not, without more, be enough to establish that a merger may result in a substantial lessening of competition or otherwise tend to lead to a monopoly and clarity around this in the guidelines would be helpful.

As with the analysis of all mergers that come before the CCPC, the CCPC must engage in the full merger analysis contemplated by the Merger Guidelines, including assessing whether the transaction could create the ability and economic incentive for harm to competition through increased prices, reduced quality, or lower innovation.

We also acknowledge that the strengthening of a dominant position held premerger by the party to be acquired may also harm competition. It would be helpful if the Merger Guidelines included additional explanation or illustration of contexts where such a situation is likely to create competitive concern as this may help public understanding.

Question 4: Do you have views on the Merger Guidelines' approach to market definition? Are there elements of other guidance, such as the European Commission Notice on the definition of the relevant market for the purposes of Union competition law, which should be incorporated into the revised merger guidelines?

The revised Merger Guidelines should reflect the evolution of market definition at EU level. We note that enforcement agencies in other jurisdictions have updated equivalent national guidelines on market definition to reflect increased importance of non-price factors, particularly at EU level. In addition, the Merger Guidelines could benefit from revision to considering such non-price factors in applying the SSNIP test. The Merger Guidelines could also better reflect Cooke J's ruling in *Rye Investments Ltd v The Competition Authority*⁸, that "...the definition of the product market is crucial to the reliability of the assessment of any change in competition resulting from the proposed merger"⁹.

Greater clarity on local and regional market effects in Ireland would help practitioners.

Our observations in response to question 2 above with regard to the digital economy are also relevant in the context of question 4.

Question 5: Do you have views on the Merger Guidelines' 'ex-ante' approach to the counterfactual? The CCPC's approach to counterfactual analysis has evolved as set out in cases including M/23/011 – DAA plc / Certain Assets of Mr Gerard Gannon, M/21/040 AIB/Certain Assets of Ulster Bank, and M/21/021–Bank of Ireland/Certain Assets of KBC. Do you have views on how these developments can be incorporated in revised merger guidelines?

In DAA plc/Certain Assets of Mr Gerard Gannon¹⁰, the CCPC appeared to adopt for the first time an *ex-post* approach to assessing the relevant counterfactual. This seems to run contrary to the CCPC's approach in prior cases. For instance, in Bank of Ireland/KBC¹¹, the Commission states that "... actions taken by a merging party post-notification should not have the effect of altering the counterfactual." Given the importance of this issue, we recommend that the CCPC clarify its position on this point in the Merger Guidelines. In all events, we

⁸ [2009] IEHC 140

⁹ at para 7.21

¹⁰ M/23/011

¹¹ M/21/21

recommend that a flexible approach be adopted to allow consideration in appropriate circumstances of post-notification actions taken by the parties.

It is submitted that the CCPC should take into account the benefits of the merger notwithstanding the counterfactual with a focus on evidence-based effects.

Question 6: Do you think that the HHI test, as currently set out in paragraph 3.10 of the Merger Guidelines, is an appropriate ‘screening device’ for the CCPC’s merger review? Are there types of mergers where it may not be an appropriate test? Or are there types of mergers where the HHI threshold should be higher/lower?

We believe the current HHI test is an appropriate “screening device” and should be retained. In the event of any change to the HHI test, we suggest that the CCPC provides robust and comprehensive explanation of the empirical, qualitative, and/or legal basis for changing the concentration thresholds. Practitioners have become accustomed to the thresholds in the 2014 Merger Guidelines. We do not believe that there are types of mergers where the HHI threshold should be higher or lower.

Question 7: Do you have views on how any of the elements of competitive assessment set out above should be updated in revised merger guidelines?

We look forward to further engagement on any new elements of competitive assessment in the draft revised Merger Guidelines following this consultation.

In general, it is recommended that the revised Merger Guidelines are clear and concise on the analysis the CCPC intend to use when assessing “efficiencies” including the positive effects on the economy and “potential competition” and when this is relevant in merger analyses.

Question 8: Please include any further comments that have not been captured by the questions above.

We urge the CCPC to consider inclusion in the revised Merger Guidelines extensive overviews of the various sources of evidence and their probative value for purposes of the CCPC’s analyses.

Given enforcement trends in other jurisdictions, we recommend that the CCPC include in revised Merger Guidelines discussion of the CCPC’s position on the impact of mergers on buyer markets and labour markets.

Conclusion

The Law Society appreciates the opportunity to provide this submission to the Competition and Consumer Protection Commission.

The Law Society, in particular through its members on the Business Law Committee and EU Law Committee, is available to answer any queries on the content of this submission, and looks forward to further collaboration when the revised Merger Guidelines are shared with stakeholders.

For further information on any aspect of this submission, please contact the Policy Department of the Law Society of Ireland at: PolicyTeam@LawSociety.ie



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