

Review of CCPC's Guidelines for Merger Analysis – Call for Input

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Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

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1. INTRODUCTION

The Competition and Consumer Protection Commission (“CCPC”) is the statutory body responsible for enforcing and promoting compliance with competition, consumer protection and product safety law in Ireland.

Our vision is for open and competitive markets where consumers are protected and businesses actively compete. Under Part 3 of the Competition Act 2002, as amended (the “Act”), the CCPC is responsible for reviewing proposed mergers and acquisitions which are notified to us. Mergers and acquisitions which meet certain financial thresholds and other conditions must be notified to the CCPC. Parties involved in a merger or acquisition which does not meet the financial thresholds can make a voluntary notification or, under Section 18A of the Act, the CCPC may require such a merger or acquisition to be notified within a set timeframe where it is of the opinion that there may be an effect on competition in any market for goods or services in the State. Following best international practice, the CCPC has established procedures for and published guidance on its statutory merger review function.

The CCPC has started a project to review and update the [CCPC’s Guidelines for Merger Analysis](#) (the “Merger Guidelines”) which were adopted by the CCPC in October 2014, the year of the CCPC’s establishment. The Merger Guidelines, which were adopted as a notice pursuant to section 10(1)(e) of the Competition and Consumer Protection Act 2014, 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 or services in the State (“SLC”).

The CCPC considers this project to be timely because:

1. ten years have passed since the publication of the existing guidelines;
2. the CCPC has developed its practice and learned lessons in reviewing mergers during this time period;
3. a number of competition authorities in other jurisdictions have updated their guidelines over this time period; and
4. there have been significant developments and changes in markets and merger review practice, both in Ireland and internationally over this time period.

The output of this project will be new published guidelines for merger analysis.

Purpose of the Invitation for Input

This document sets out the purpose and proposed scope of the CCPC's review of the Merger Guidelines. It provides an overview of the CCPC's proposed approach and the themes to be explored, setting out questions for stakeholders to provide their views and inputs on.

2. BACKGROUND

The CCPC's Guidelines for Merger Analysis were published by the CCPC's predecessor, the Competition Authority, on 20 December 2013, and adopted by the CCPC, without change, on 31 October 2014. The Merger Guidelines set out the CCPC's analytical framework and approach to conducting merger analysis. Businesses and their advisors use these guidelines as the basis for analysing mergers notified to the CCPC.

Since 20 December 2013, international practice for merger analysis has changed to take into account new markets and economic developments and advancements in analytical tools. Internationally, digital markets and ecosystems, vertical and conglomerate mergers, increasing concentration, and so-called 'killer acquisitions', to name but a few, have become increasingly prominent issues in recent years. One of the main reasons for the UK Competition and Markets Authority's ("CMA") update of its Merger Assessment Guidelines in 2021 was to improve that authority's ability to address dynamic issues that arise in digital markets. The UK's Merger Assessment Guidelines note in their introduction the *"risk of under-enforcement, particularly in relation to digital markets"* and that *"competition authorities need to recalibrate how they assess some mergers because underenforcement can be very costly"*.¹ The European Commission, in implementing its 2024 update of its Market Definition Notice, stated that *"Since [the adoption of the original Market Definition Notice in 1997], there have been significant societal and technological changes, especially digitalisation, as well as important developments in the Commission's competition law enforcement practice and in the Union courts' case law."*²

The following is a non-exhaustive list of merger guidelines which have been updated and adopted by competition authorities in other jurisdictions since the Competition Authority/CCPC adopted its Merger Guidelines in December 2013:

- 1) [France Autorité de la Concurrence](#), adopted 2020.
- 2) [CMA](#), adopted March 2021.
- 3) [New Zealand Commerce Commission](#), adopted May 2022.
- 4) [US horizontal merger guidelines](#), adopted 2023.
- 5) [EC market definition notice](#), adopted February 2024.

¹ https://assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs_for_publication_2021_-_pdf, paragraphs 1.7 and 1.8.

² https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_6002

As approaches to merger review and guidelines develop internationally, it is important that the CCPC's substantive approach to the analysis of notified mergers remains up-to-date and in line with international best practice.

Furthermore, the CCPC's approach to analysing mergers has evolved since 2014, particularly since the beginning of 2021, as the CCPC has seen a significant uptick in the number of mergers notified which have required a Phase 2 merger review. In that time, sixteen notified mergers proceeded to Phase 2. An increased number of Phase 2 mergers led to more instances in which the CCPC considered the application various aspects of the Merger Guidelines and assisted in identifying the importance of ensuring that they are up to date and fit for purpose. A review of the Merger Guidelines also provides an opportunity to ensure that recent lessons learnt and new approaches to merger review are taken into account which will enhance the transparency and certainty of the CCPC merger review regime.

The CCPC does not propose, as part of this project, to focus on other important elements such as the CCPC's [Mergers and Acquisitions Procedures](#), which were updated in 2023 in advance of the Competition (Amendment) Act 2022 coming into force.

3. INVITATION FOR INPUT

The CCPC has done a preliminary review of the Merger Guidelines and welcomes views and inputs from interested parties on the following:

Proposed Scope

The proposed scope of this project is to focus on the substantive elements of merger review. Specifically, the project will focus on all areas of substantive review, including approaches to the following:

- The SLC test;
- Market definition;
- The counterfactual (including e.g., failing firms and/or exiting assets); and
- Assessment of competitive effects of a merger, including (but not necessarily limited to):
 - Horizontal unilateral effects;
 - Coordinated effects;
 - Vertical mergers;
 - Entry and expansion;
 - Countervailing buyer power; and
 - Efficiencies.

Consultation Questions

1. Do you agree with the proposed scope set out in this document? If not, please provide details?
2. What, in your view, are the areas of merger review/analysis where new/updated guidance is urgently required? What changes would you propose?

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

Additional Comments

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

Submission Deadline

The closing date for submissions is 17:00 12 November 2024.