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EU-China Trade Project II – 11th EU-China Competition Week

Procedural matters in merger investigations

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Session 2: Use of procedural regulations in merger review - Ireland

- **Merger Provisions of the Competition and Consumer Act 2014**
- **Notification Thresholds**
- **Timelines for Merger Review**
- **Drafting and implementing procedural regulations to clarify terms**
- **Procedures for the review of mergers and acquisitions**
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- **Measures on Procedures for Review of Concentration of Undertakings**
- **Measures on Notification of Concentration of between Undertaking**

Merger Provisions of the Competition and Consumer Act 2014

- The Competition and Consumer Protection Act 2014 (the 2014 Act) came into force on 31 October 2014 and replaces the Competition Act 2002 (the 2002 Act)
- The 2014 Act amalgamated the Competition Authority and the National Consumer Agency and introduced changes to the merger review regime in Ireland

Since 2003, the competition authority has reviewed and published approximately 700 merger decisions including 3 prohibitions

Notification Thresholds

The 2014 Act removes the worldwide turnover requirements in the 2002 Act. The new notification thresholds are:

- (a) the aggregate turnover in the State of the undertakings involved is not less than €50,000,000 and
- (b) the turnover in the State of each of two or more of the undertakings involved is not less than €3,000,000.

2014 Act ensures that the merger regime reviews only mergers with nexus to Ireland and thereby reduces the amount of 'foreign-to-foreign' notifications

Timelines for Merger Review

- The Phase 1 period of merger review = 30 working days (or 45 working days if any of the merger parties submit proposals to address competition concerns)
- The Phase 2 period for merger review = 90 working days
- The total period for Phase 1 and Phase 2 merger review period = 120 working days (or 135 working days where proposals have been made by the merger parties)

However, the competition authority has the power to ‘stop the clock’ within 30 working days from the date of notification

These deadlines are normally calculated from the date of notification but may change to a later date if the competition Authority issues a formal requirement for information within 30 working days from the date of notification

Drafting and implementing procedural regulations to clarify terms – Published guidance documents

Guidelines for Merger Analysis – This document explains in detail the competition authority's approach to assessing SLC test, substantive analytical tools and analysis, and evidence required

Procedures for the Review of Mergers and Acquisitions - Provides detail explanation of the processes and procedures for reviewing mergers notified to the competition authority

Merger Notification Form – Specifies required information for filing a merger notification

Mergers: Pre-Notification Discussions – Explains how the competition authority conducts pre-filing meetings and discussions

Procedures for Access to the File in Merger Cases - Sets out the competition authority's approach to granting notifying parties access to the file.

Notice in respect of the review of non-notifiable mergers and acquisitions – Explains how the competition authority will review mergers that do not meet the notification thresholds

Notice in respect of certain terms used in Part 3 of the Competition Act 2002, as amended – Explains the competition authority's understanding of “Undertakings” and “Turnover in the State”

Procedures for the review of mergers and acquisitions

This guidance document provides detail explanation of the procedures for dealing with mergers notified to the competition authority

This document outlines the various stages involved in each Phase of investigation up to the publication of the final decision

Phase 1 Review Stages

- Preliminary assessment
- Publication of Notice of Notification
- Submissions from third parties
- Requirement to provide further information
- Proposals to address competition concerns
- Determination that the merger or acquisition may **be put into effect** or **proceed to Phase 2**
- Special provision regarding media mergers

Phase 2 Review Stages

- Determination to carry out a full investigation
- Publication of the determination to carry out a full investigation
- Submissions from third parties
- Early determination of a full investigation (within 40 working days of decision to move to Phase 2 investigation)
- Assessment as to whether likely SLC or not (40 working days after decision to move to Phase 2 investigation)
- Access to file by notify parties
- Response to Assessment by notifying parties
- Consequence of failure to respond
- **Oral Submissions by notifying parties**
- Discussions and Proposals

Final Determination

- Publication of Phase 2 determination – Clear or Clear with Conditions or Prohibit merger
- Contents of the written determination
- Publication of the determination

Procedures for Access to the File in Merger Cases

This guidance document sets out the competition authority's approach to granting notifying parties access to the file:

- Who has access to the file?
- At what stage access takes place?
- What type of information is accessible?
- What type of information is not accessible?
- What is confidential information?
- What is non-confidential information?
- How access will be provided?

Access to the file is only provided to the notifying parties and at their request

Measures on Procedures for Review of Concentration of Undertakings

- **Article 3:** It would be helpful to clarify procedures to be followed to withdraw a notification including time period for agency's decision
- **Article 5:** Maybe, it would be better if this Article is moved to Chapter 6 of the Measures on Notification.
- **Article 8:** It would be helpful to clarify the role and legal standing of these relevant government authorities.
- **Article 9:** Who are the relevant parties? What are the roles and rights of relevant parties in convening hearings? What type of information about the concentration is provided to parties to trigger the convening of hearing? Are there published rules governing the conduct of hearing? At what stage of the investigation (Phase 1 or 2 or 3) does hearing take place? What is the aim of the hearing?

Measures on Procedures for Review of Concentration of Undertakings/2

- **Article 10:** It would be helpful to clarify whether concentrations can be cleared in Phase 1 – this will facilitate the simplified procedure.
- **Article 11:** Will Undertakings have a right to access information? What type of information will they access? Can Undertakings request hearing at this stage of the merger review process?
- **Articles 12-14:** Are restrictive conditions subject to market testing? What is the process used to seek views of third parties on restrictive conditions?
- **Article 15:** Can notifying parties reasonably calculate the deadline for decision making?

Measures on Notification of Concentration of between Undertakings

General observations:

- The changes introduced by the draft “Measures on Notification of Concentrations between Undertakings” further clarify terminologies, better explain notification requirements, set out some deadlines and explain the simplified procedures.
- These changes will improve on the understanding of China’s Merger Review Regime and ensure improved predictability and certainty of the merger notification system.
- The clarification on calculation of turnover will show that the Merger Review Regime seeks to control concentrations with nexus to China.
- Finally, these changes will go a long way to bring the merger notification system inline with international best practice.

Measures on Notification of Concentration of between Undertakings/2

Specific observations:

- **Article 4(2):** Does this cover minority control?
- **Articles 5-13:** Clarify the understanding of control, importantly, Articles 10-11 and 13: clarify when there is no change in control.
- **Article 12:** It would be helpful to clarify whether joint venture has to be on a permanent basis.
- **Article 16:** It would be helpful to include the territory (“Nationwide”) where turnover is obtained.
- **Article 17:** Need to check that factual control also applies to turnover calculation.
- **Article 20:** It would be helpful to clarify the legal status of before-filing discussions? How is before-filing information treated?

Measures on Notification of Concentration of between Undertakings/3

Specific observations:

- **Article 23:** It would be helpful to clarify the time period it will take for agency to complete before-filing assessment.
- **Article 26(2):** It would be helpful to issue detail guidelines on how these factors are assessed.
- **Article 36:** What happens if agency only discovers false information after case has been accepted and review has started?
- **Article 37(1):** Does use of market share tests make process simpler?
- **Article 38(6):** It would be helpful to be more specific or provide examples here.
- **Article 40:** Check whether provides certainty about information required.

THANK YOU