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**EU-China Trade Project II – 12th EU-China Competition
Week**

**Roundtable on determining appropriate merger
remedies and mergers in high-tech industries**

Beijing 14 -18 March 2016

Session 1: Determining appropriate remedies and monitoring trustees - Ireland

- **Legal context – Competition Act 2002 (Amended) and Competition and Consumer Act 2014**
- **Timelines for Merger Review and Assessment of Remedies**
- **Types and nature of Remedies with examples**
- **Market Testing – better understand competitive structures and assess effectiveness of Remedies**
- **Monitoring implementation of Remedies**
 - **Monitoring trustee**
 - **Arbitration clauses**
 - **Cooperation in cross-border mergers**

Legal Context of Merger Remedies in Ireland

- The law allows the Authority to **engage in discussions of remedies with any undertaking** (Section 20(1)(b) of the Competition Act 2002 (Amended))
- The law allows undertakings involved in a merger **to submit proposals to the Authority and for the Authority to take such proposals into account in its determination** in either **Phase 1 or Phase 2** (Section 20(3))
- **In Phase 1**, the Authority **can only take into account proposals**, it **cannot impose conditions**
- **In Phase 2**, the Authority **can take into account proposals** or **impose conditions**
- The law provides for **enforcement** of **commitments, determinations** and orders (Section 26)
 - **it is an offence to contravene a provision of a commitment or a determination which is punishable by fine or imprisonment or both**

Timelines for Merger Review and Assessment of Remedies in Ireland

- **Phase 1:**

30 working days – without proposal

Replace with **45 Working days** – when proposal is submitted (to allow for assessment of remedy)

- **Phase 2:**

120 working days – without proposal

Replace with **135 Working days** – when proposal is submitted (to allow for assessment of remedy)

- Structural remedies are usually required to be completed **between 3 to 6 months**
- Behavioural remedies will usually include a sunset clause
- Conditional determination **should require** that the merger or acquisition be implemented **within 12 months** after the making of the determination

Types and Nature of Remedies

The Authority has consistently expressed a preference for Structural Remedies

- **Structural Remedies involve sale of, for example:**
 - a viable stand-alone business:– M/07/040 – Communicorp/SRH
 - businesses and share holding interest in another business:- M/15/020 – Topaz/Esso Ireland
 - Intellectual Property right and business:- M/15/026 – Valeo/Wardell/Roberts/Roberts
- **Behavioural Remedies are measures mainly aimed at changing or modifying the future:**
 - behaviour of the merged undertaking towards its competitors or third parties:- address access by competitors and reporting to sector regulator :- M/05/50- eircom/Meteor
 - commercial relationship between the merged undertakings and its parent companies:-address flow of information between parents of merged undertaking:- M/09/013- Metro/Herald AM
- A mix of both Structural and Behavioural remedies

Achieving effective Remedies: Guiding Principles

The Authority accepts that the process of achieving effective remedies is not a one shot game....

Key relevant questions the Authority keeps in mind....

- Does the remedy modify the notified merger to remove anticompetitive elements and retained pro-competitive elements?
- Is the remedy package capable of being applied *ex ante* to prevent harm to competition within the relevant market rather than *ex post* as a corrective measure?
- Who are the beneficiaries of the remedy?
 - **Consumers**? Or Competitors? Or others?

Characteristics of an effective Remedy Package

The Authority will determine through its investigation and market testing if a remedy package is ..

- Appropriate – structural or behavioural or a mix
- Proportionate – sufficient in nature and type to remove competition harm
- Capable of being implemented
- Time bound
- Capable of being monitored
- Capable of being enforced
- Void of any unintended anticompetitive outcomes

Market Testing of Remedies

The Authority usually market tests remedies, in particular, structural remedies....

- Market testing helps the Authority to enhance its understanding of the competition issues and how the proposed remedy package will resolve the identified competition concerns
- M/15/020 - Topaz/Esso Ireland - both merger undertakings were active in distribution and retail sale of motor fuels in Ireland
 - **Divested businesses:- Motor Fuels Retail stations**
 - **Divested shareholding interest:- Joint Fuels Terminal owned by Esso and another company**
- M/07/40 – Communicorp/SRH – both merger undertakings were active in radio broadcasting and advertising in Ireland
 - **Divestment of standalone business - divestment of a Dublin radio station**
- Market testing helps the Authority gauge whether the proposed remedy package has characteristics of an effective remedy package (i.e., appropriate, proportionate, etc.)

Monitoring implementation of Remedies

The law allows the Authority to monitor and review commitments or conditions contained in a merger determination..

- The Authority partly uses monitoring trustees to perform its function of monitoring commitments or conditions
- Monitoring trustees are given significant monitoring, supervising, reporting and disposing of assets responsibilities
- Monitoring trustees are allowed to appoint their own advisers (legal or financial assessors) at the cost of the merged undertaking
- For behavioural remedies, Monitoring trustees monitor and report on conduct of the merged undertaking before and after the implementation of the merger
- Any dispute between the monitoring trustees and the merged undertaking is arbitrated by the Authority
- Monitoring trustees are appointed in all mergers involving structural remedies which ensures that remedies are implemented without placing unnecessary burden on the Authority's limited resources

Use of Arbitration clauses in Remedies

Some agencies use arbitration clauses to alleviate the cost of monitoring the implementation of remedies...

- Arbitration clauses are mainly used to design remedies aimed to give rights to third parties to access facilities or infrastructure controlled by the merged undertaking
- Arbitration clauses allow the merged undertaking and third parties to resolve disputes over commitments without using the scarce resources of the agency
- Ireland does not currently use arbitration clauses in merger remedies, the Authority co-ordinates with sector regulators to monitor behavioural remedies involving mergers in that sector

Remedies in Cross Border mergers

- Ireland cooperates mainly with the EU Commission and the Competition and Market Authority, UK
- A key challenge to coordination and cooperation is the ability of agencies to share and discuss information
- Early, open and frank cooperation and coordination can remove doubts as to the applicability of remedies negotiated in one jurisdiction in another

M/10/043/Stena/DFDS:- the transaction was notified in UK and Ireland. Office of Fair Trading UK negotiated a pre-clearance remedy with the undertakings which was implemented before the merger was cleared in Ireland. The transaction became void because it was found to have breached notification requirement in Ireland

- Waivers have ensured that the Authority is able to share and discuss with other agencies information on possible theories of harm, sources of information, deadlines, applicable analytical tools and possible remedies

M/03/035/Stena/P&O:- the merger was notified in UK and Ireland. Merger was withdrawn and binding commitment on future acquisition to be notified was obtained. A good outcome of cooperation and coordination between the Authority and Competition Commission UK.

Session 2: Merger Review in High Tech Industries and Challenges for Existing Analytical Framework

- Rapid change in technological innovation in the hands of new undertakings
- Rapid change in technological innovation in the hands of an incumbent dominant undertaking or monopolist
- Big data issues
- Market definition issues in High tech industries

Rapid changing technologies in hands of new undertakings

Existing market share may not be a correct indicator of current or near future competitive situation in a market

- One or more undertakings may dominate the market at any point in time without necessarily having the ability to exercise market power over a long period of time
- Rapid technological changes through innovation by new undertakings may displace exiting dominant undertakings or a monopolist
- The market may be characterised by low barriers to entry
- Dominance and exercise of market power cannot be sustained

New technologies in the hands of a dominant incumbent

Alternatively, in some markets existing market share may be a correct indicator of current or near future competitive situation in a market

- A dominant or monopoly undertaking with “first mover” advantage may entrench its position and exercise market power over a long period of time
- Such markets may be characterised by high barriers to entry due to, for example, network effects, long lasting patent rights and lock-in arrangements
- Under this market scenario, it is feasible to readily use existing tools and analytical framework to review mergers

Big data issues

Key challenge is to access and analyse data that are protected by data protection laws within and outside a jurisdiction....

- Data protection regulators can investigate and prosecute undertakings that contravene data protection laws
- Potential of significantly affecting the ability of an agency to properly define markets and assess the likely competitive effects of a merger
- There is debate as to whether mergers involving big data undertakings can result in adverse effects on competition
- Potential of affecting the design of certain types of behavioural remedies

Market definition issues in High tech industries

There are serious challenges to identifying the relevant market..

- **Relying on use of SSNIP test:** Price competition may not be the most important competitive instrument in the market
- **Accessing and analysing data:** Econometric analysis of data may not be feasible due to big data issues or lack of data
- **Rapidly changing technologies:** Is supply-side substitution a market definition or competitive effects consideration?

Reviewing documents of merging undertakings, competitors and customers becomes an equally very important aspect of merger review

Concluding Remarks: Merger Review in High Tech Industries

- It is feasible to use existing tools and analytical framework in reviewing mergers in high tech industries
- Market share may not be a good indicator of the competitive situation of the market
- It is essential to understand the competitive market dynamics of technological changes in the affected markets
- Properly assessing supply-side substitutability is crucial in determining whether future-generation products can effectively compete with existing products
- Assessment of barriers to entry is essential in the analytical framework

Thank you