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Economics at the Core of New Merger Control Regime.[1]

Introduction.
Radical changes in the law controlling mergers and takeovers in Ireland took effect on 1st January when Part III of the Competition Act, 2002 replaced the old 1978 Mergers Act. The Authority's Guidelines indicate that sophisticated economic analysis will play a key role in its assessment of mergers. They also demonstrate that the 'substantial lessening of competition' test provided in the Act is somewhat wider than the 'dominance' test contained in the EU Merger Regulation.

Main Features of the New Legislation.
Section 18 of the Competition Act, 2002 provides that all mergers must be notified to the Competition Authority if:

1. Each of two or more of the undertakings involved has a world-wide turnover of not less than €40m;
2. Each of two or more of the undertakings involved carries on business in any part of the island of Ireland; and
3. The turnover within the State of any one of the undertakings involved is not less than €40m.

The legislation provides for a two stage investigation of mergers by the Authority. At stage one the Authority has one month to either approve the merger or to decide to carry out a more detailed stage two investigation. The Authority has a further three months to complete a second stage investigation at the end of which it must take a decision to permit the merger, to permit it subject to certain conditions or to prohibit it.

Where the Authority blocks a merger the parties may appeal to the High Court within one month of the decision. The Court may consider points of fact as well as law where it considers that the Authority's findings on a matter of fact were unreasonable. There is no appeal in the event that the Authority fails to block a merger that would reduce competition.

The Authority Guidelines.
The Authority may prohibit a merger which would 'substantially lessen competition'. In contrast the EU Merger Regulation prohibits a merger that would create or strengthen a dominant position. In its Guidelines the Authority has indicated that it would interpret a 'substantial lessening of competition' as occurring where a merger would result in higher prices.

The Guidelines contain no 'safe harbour' levels of post-merger market concentration, i.e. a merger could be held to substantially lessen competition even where post merger market concentration is low. In the past such mergers were considered unlikely to pose competition problems. The Guidelines concede that a merger is 'less likely' to substantially lessen

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competition where post merger concentration levels are low.

Horizontal mergers, i.e. mergers between firms that are competing in the same market, give rise to two types of potential problems.

(i) Co-ordinated Effects.
Co-ordinated effects arise in one of two ways. Reducing the number of competitors may facilitate overt collusion. Alternatively a merger may facilitate tacit collusion by reducing the number of firms to the stage where each of those remaining is far more likely to recognise that they can gain by not competing with one another. The EU has sought to address the latter problem using the concept of 'joint dominance' with mixed results. The Guidelines indicate that co-ordinated effects may arise where the number of firms remaining in the market post-merger is greater than that normally associated with joint dominance.

(ii) Unilateral Effects.
Unilateral effects arise where a merger enables the merged firm to raise prices unilaterally. The Guidelines outline three scenarios in which this might arise:

1. Where the merger creates or strengthens a dominant position.
2. In the case of differentiated products, where the merging parties products' are the closest substitutes for one another in the market, a merger may enable the merged firm to raise price unilaterally, although its market share might be lower than normally considered necessary to constitute dominance.
3. Where a merger changes the non-cooperative market equilibrium. 'Game theory', which is widely used in the economic analysis of competition, has shown that, in an oligopoly, a non-competitive market outcome can emerge without cooperative behaviour. The Guidelines do not clearly distinguish between such a situation and tacit collusion.

While the first situation corresponds with the EU 'dominance' approach, the second and third types of situation go beyond it and identifying such cases will require complex economic analysis. As with co-ordinated effects the Guidelines suggest that concerns may arise in a wider number of cases than under the EU Merger Regulation.

Efficiencies.
The Guidelines state that efficiency gains arising directly from the merger may offset any anti-competitive effects. They state that claimed efficiency gains must be clearly verifiable, quantifiable and timely.

Non-Horizontal Mergers.
The Guidelines note that vertical mergers, i.e. mergers between firms at different levels of the production/distribution process, may substantially lessen competition by foreclosing the market.

The EU Commission has invoked the concept of 'portfolio effects' in prohibiting a number of conglomerate mergers. 'Portfolio effects' arise where a merger does not increase concentration in individual markets but gives the merged firm a strong position in several different markets. The Guidelines, however, state that 'anticompetitive harm from portfolio effects is extremely unlikely'.