Merger Control
The Missing Link in Irish Competition Policy.

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Paper presented at Competition Press Conference 13 October 1998.

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Introduction.

I believe that today's conference on the *Proposals for Discussion in Relation to Merger* produced by the Competition and Mergers Review Group is particularly well timed coming as it does, less than two weeks after the deadline set for submissions on the proposals by the group which incidentally was also the date on which the Group celebrated its second anniversary. Hopefully today's discussions might have some influence on the Group's thinking. Certainly reading the proposals left me with somewhat mixed feelings. In quite a number of respects they largely reflect proposals made by the Authority in its submission to the Group back at the beginning of 1997. For that reason, the initial temptation is to broadly welcome the Review Group's proposals. However, on closer reading it is difficult to avoid being struck by the absence of any serious analysis of the issues. Allied to this is an apparent lack of any background research or investigation. This is surely not a good basis for policy formation. Before considering the actual proposals in some detail I propose to make a few general comments concerning the Report.

As I have just said the Report makes no serious attempt to undertake any detailed analysis of the issues. The question of why merger controls are needed and the rationale for such controls is simply not addressed. Instead we are treated to an outline of the existing legislation, a short factual summary of the position in other jurisdictions followed by a serious of issues and recommendations which, for the most part, are largely procedural rather than substantive. I note in passing that the Report contains a number of references to a book which I co-authored and, flattering as that may be, it does not indicate to my mind any exhaustive research. There has been a significant amount of economic research into mergers which I think would provide some useful insights for policy but the Group would not appear to have taken account of any of this material. Instead it seems to have relied almost entirely on submissions received and the views of its own members.

Such an approach seems unsatisfactory given that the Group appears to have received only nine submissions on the issue. These included one from the Authority and one from its former Chairman, a couple from academics and one from an individual working for the Commission in Brussels, which presumably was made in a personal capacity. Two of the larger law firms plus IBEC also made submissions. It seems a little odd that not a single company, large or small, made a submission. Nor is there any submission from ISME, although the fact that it is represented on the Group means that, presumably it made its views known, but in the absence of any submission

from that body, we do not know what its views are. Indeed we might not be a whole lot wiser if it had made a submission given the scanty information included in the report regarding the submissions which were received. The report simply summarises the views expressed in the submissions regarding the issues identified by the Group, i.e. it tells us that x favoured a particular approach without telling us why. It is interesting that the Group favours greater transparency in the merger control process, even if it does not adhere to such an approach itself. Nor is there any indication in the Report that the Group met any of the parties who made submissions or indeed consulted anyone else on the issue. Having eschewed the option of carrying out any detailed analysis itself, it seems that the Group has been content to rely on a handful of submissions and the views of its own members.

It is also fair to say that the Report includes a lot of material whose relevance is not immediately obvious. Take, for example, Chapter 3, which describes the position of mergers under the Competition Acts. It presents a relatively succinct summary of the criteria used by the Authority to decide whether or not mergers are anti-competitive, and cites a number of Authority decisions. The Report describes, for example, how the Authority employs the four firm concentration ratio and the Herfindahl-Hirschman Index (HHI) to measure market concentration. However, all of this seems largely irrelevant to the Group's conclusion that the legislation be amended so that Section 4 would no longer apply to mergers per se. One therefore wonders why it was considered necessary to engage in the exercise of going through the Authority's decisions when they really are not relevant to the proposals being made. Indeed perhaps the clearest illustration of the inclusion of irrelevant material can be found on page 17 which deals with the Authority's decision in *Barlo* and states:

> 'It is interesting to note that in this matter, the Minister for Enterprise, Trade and Employment made written submissions to the Authority indicating his concern about safeguarding the employment of those in the plant being acquired and his belief that the acquisition would enable the acquiring undertaking to compete effectively against larger European manufacturers. However, the Authority did not expressly refer to the submissions in coming to its decision.'

I must say I fail to see why this point is of interest. The Report itself draws no conclusion from this 'interesting' point and it is hard to see its relevance to a consideration of an appropriate merger control regime. I would have thought that if there was a significant issue raised in that particular decision it was the Authority's outline and adoption of the 'failing firm defence' and whether that represents an appropriate criteria which should be taken into account in the assessment of mergers.

Similarly I wonder why much of the material in Chapters 4 and 5 was included. The former outlines the main features of the EU Merger Regulation while the latter describes merger control regimes in other members states and in some major non-member States such as the US and Australia. At one level this is perhaps all very well and may be even mildly interesting but one is left wondering what the point of such an exercise is. I recognise that there may be lessons to be learned from other countries but simply describing regimes which operate in other jurisdictions without any analysis of their strengths and weaknesses does not really get us very far in this respect. I admit that Chapter 5 is only 2 pages but we also have six pages in appendix 2 setting out in tabular form the main features of merger control regimes in EEA countries followed by a seven page summary of overseas regimes in appendix 3. The only thing that struck me about all of this material was that most countries have merger control regimes and the criteria were generally a little different in all cases.

The Rationale for Merger Control.

I now want to turn to a consideration of Chapter 6 which is entitled 'Issues and Preliminary Recommendations'. The major problem with this Chapter of the Report is its almost total preoccupation with procedural issues to the exclusion of any formal policy analysis. Thus the chapter begins with the bald statement that '[T]he first issue that arises in relation to any proposed merger control system is whether or not notification to the relevant regulatory body should be voluntary or mandatory.' I would suggest that a better starting point would be to ask the questions (a) is there a need for a merger control regime and, if the answer to that question is yes, which I believe it is then (b) what is it supposed to do. Perhaps the group considered it to be self evidently obvious that a merger control regime was necessary and felt therefore, that there was no need to address the issue. In the final analysis, however, merger control, like any other policy tool, ought to be designed to achieve certain objectives. It is essential to the design of policy instruments that one first defines the objectives that they are intended to achieve. Such issues are simply not addressed at all in this Report.

Mergers and take-overs occur for a wide variety of reasons. Many occur for quite legitimate business reasons. Some mergers and acquisitions, however, are designed to reduce competition in the marketplace and some certainly have that effect, even if it is not the primary intention of the parties involved. Mergers which reduce competition may reduce overall welfare and thus may be not in society's interests. The case for a merger control regime rests on the need to prevent those mergers which are anti-

competitive and which therefore are likely to be welfare reducing. Experience shows that it can sometimes be difficult to prevent firms exercising market power once they have acquired it, with the result that it is widely recognised that, in certain circumstances, it is better to prevent firms gaining market power through acquisitions rather than simply to seek to regulate the exercise of such market power *ex post.* Consequently an effective merger control regime is an essential element of competition law and policy and that is why most developed economies have controls on mergers as well as competition legislation for regulating business behaviour.

Logically then I think it is reasonable to conclude that the objective of a merger control regime should be to identify and, where necessary, prevent those mergers which are likely to harm competition and thus reduce overall welfare, while minimising the impediments to all other mergers. Personally this does not strike me as a very controversial proposition and if one accepts this as a starting point it may provide a useful yardstick against which to assess the proposals contained in the Report.

It is fair to say that the existing merger control regime fails to achieve these objectives. Firstly under the existing regime a large number of the mergers notified to the Minister are found to be non notifiable. The fact that firms incur costs in unnecessary notifications suggests that some modification is required. Secondly the existing regime lacks transparency. In addition very few mergers are referred to the Competition Authority for detailed analysis and, given the limited resources employed in merger control within the Department of Enterprise, Trade and Employment, one cannot be completely confident that all mergers which are potentially welfare reducing, are subject to proper scrutiny. There is also a question of how the treatment of mergers under the Competition Acts satisfies the objectives identified above.

Analysis of the Group's Main Proposals.

The main proposals made by the Group are that mergers should be notified to the Competition Authority under the Mergers Act while Sections 4 and 5 of the Competition Acts would no longer apply to mergers. In addition certain modifications are proposed in respect of the thresholds above which notification is mandatory along with some changes in the mandatory notification process itself. It seems to me that the way to evaluate these proposals is to consider to what extent they achieve the objectives set out previously. For the purposes of today's discussion, the Group's proposals can, in my view be categorised under four broad headings:

- Notification requirements and procedures;
- Assessment of notifications;
- The application of the Competition Acts; and
- Miscellaneous issues.

(a) Notification requirements and procedures.

The Report favours compulsory notification of mergers above a certain turnover. In terms of identifying harmful mergers, a compulsory notification system has considerable benefits as it certainly makes it easier to identify potentially harmful mergers ex ante. At the same time the report recognised that, under the current regime, a large number of mergers which are notified are deemed to be non-notifiable, it concludes that this issue 'should be addressed by clarifying the scope of the legislation insofar as global mergers with an Irish element are concerned'.[1] According to the Report the principal reason for such mergers being notified in large numbers, appears to be the fact that the Act is silent as to whether, in a global merger between companies with one or more subsidiaries or branches in Ireland, the calculation of turnover and gross assets for the purposes of the thresholds should be based on global assets and turnover or only the assets and turnover of the Irish business. Unfortunately the report seems to get rather confused in this area. It ultimately comes down in favour of 'a turnover criterion which would combine national and world-wide turnover',[2] although elsewhere it states that a majority felt that the turnover criterion should apply only to turnover within the State.[3] At the end of the day there appears to be no easy solution. Arguably, for example, a world wide merger between Texaco and Shell is a global merger between companies with subsidiaries in Ireland. However, the merger of those Irish subsidiaries may have important competition consequences in Ireland. Similarly the acquisition by Tesco of Quinnsworth would not have been notifiable, if only turnover within the State was taken into account, yet arguably such a transaction could have had significant competition implications within the State. Similarly the recent proposed Coillte acquisition of Balcas, a firm located in Northern Ireland which was prohibited, following a Report by the Authority that it would have adverse effects on competition, would be likely to be outside the scope of any legislation with a turnover criteria confined to turnover within the State. Relying on turnover within the State only might allow mergers between an Irish firm and a firm outside the State,

[1] p.27.
[2] p.32.
[3] p.34.

which is nevertheless a significant competitor and, indeed possibly the only competitor to escape scrutiny which would appear undesirable.

At present those mergers which are between major international companies with Irish subsidiaries, which have no competition implications for the Irish market are considered to be non-notifiable and the Department requires only a 'technical' notification and does not apply the normal fee. This suggests that such notifications, although ultimately deemed unnecessary, do not involve major costs to the firms concerned. Adopting a threshold which applies only to turnover within the State, could allow mergers which have an anti-competitive effect within the State, to pass without scrutiny. In the circumstances it might be best to retain the current system where the notification threshold relates to turnover world-wide. At the same time, however, perhaps a formal mechanism could be introduced to deal with cases involving subsidiaries of multinationals where the transfer of ownership has no implications for competition within the State. It might be possible to have a short-form of notification for such cases which would include a statement giving reasons why the parties believed there were no competition implications for the Irish market. There would be no notification fee and unless an objection was raised within fourteen days, the notification would be deemed to be cleared.

The Group has also suggested that the turnover threshold should be raised from £20m to £30m in respect of both parties. No real argument is advanced for this beyond a passing reference to the fact that GDP has risen significantly since the last revision to the thresholds. However, the number of Irish companies with a turnover above £30m is relatively small. Moreover there are arguably many markets within the State where mergers between firms with turnovers below this threshold would have significant consequences for competition. It is somewhat unsatisfactory that the Report does not consider such issues but simply advocates a raising of the thresholds. At present if the non-notifiable cases are excluded there are some sixty to seventy mergers notified annually. If one is seeking to strike a balance between identifying and preventing potential harmful mergers and minimising the obstacles for others, it is not clear to me that there is a case for higher thresholds.

Finally the Group proposes that there should be scope for retrospective notification of mergers. As with many other proposals no convincing argument is advanced for such a proposal. The Report states that the permanent shadow on title makes it desirable that some mechanism to remedy the failure to notify should be made available. Of itself this is a rather weak argument. After all one must ask if there is any evidence

that firms unwittingly forget to notify. It is of course an offence not to notify a merger. Nevertheless the Group's proposal appears somewhat inconsistent with arguments made elsewhere in the Report. 'It was felt that, in a country such as Ireland, where legislation introducing the principles of competition policy is relatively recent and which has been perceived as under-rating the value of effective competition in the market, a system of mandatory notification would be more appropriate.'[4] The Group also noted that the mandatory nature of the current system had not given rise to any significant criticism in the submissions received, although given the relative paucity of such submissions this is hardly surprising. The Group recommends, however, that the Authority should be able to impose a fine on parties in respect of the failure to notify and be able to impose conditions in respect of such retrospective approval, which would require endorsement from the Minister. As pointed out no convincing argument is put forward to justify removing. what is regarded as an effective mechanism for ensuring compliance. The proposals for fines and conditions for 'retrospective approval' smack largely of window dressing and indeed the phrase 'retrospective approval' is illustrative in itself and by implication suggests that the merger notification process is a 'rubber stamping' sort of exercise. It appears that no thought has been given to the difficulties that would arise in trying to unscramble a merger notified under such a provision, if it was subsequently felt that it ought not to be approved. Such a proposal provides a clear incentive to delay notification where firms correctly anticipated that approval was unlikely to be forthcoming. The report is vague as to what would happen if a harmful merger remained unnotified. Such a regime would mean that Authority resources could end up being devoted to pursuing parties for a technical matter, i.e. failing to notify, rather than focusing on the implications for competition. Mandatory notification ought to mean mandatory notification and it seems to me that this proposal has not been properly thought through.

(b) Assessment of notifications.

Perhaps the most significant proposal advanced by the Group is that mergers should be notified to the Competition Authority and not the Minister as under the Mergers Act at present. Perhaps it will come as no surprise if I state that this seems to be a very sensible proposal. The Authority included such a proposal in its own submission. As the Group points out this would allow the Authority's expertise in the area of competition to be brought to bear in all mergers. However, the Report's proposals are somewhat vague with excessive attention on certain minor detail to the neglect of

[4] p.27.

more significant issues. For example, it recommends that the Authority 'should apply pure competition criteria, such as those heretofore applied.'[5] With respect I would suggest that such a phrase is rather meaningless.

A consideration of overseas practice shows that most regimes apply one of two broad tests in assessing mergers: the dominance test or the significant lessening of competition test. In my view, if the Authority is to have a responsibility for considering merger notifications, then the criteria to be applied must be clarified. In particular there should be a clear signal of the circumstances in which a merger might be deemed problematic. Personally I have no difficulty in the notion that the Authority only analyse competition aspects of a proposed merger and would suggest that the appropriate test is 'the significant lessening of competition test'. Thus the legislation could be amended to provide that the Authority would only recommend that the Minister make an Order prohibiting a merger, where the Authority has concluded that it would be likely to result in a significant lessening of competition. I think formalising the grounds to be applied for recommending prohibition of a merger would provide greater clarity for business regarding the basic ground rules to be applied. It would also make it clear that the purpose of the merger control regime was to identify and, when necessary, prohibit mergers which would be harmful to welfare.

The Group has recommended what it describes as a 'two-tier' system with a fast-track procedure for mergers, which give rise to no great competition concerns, and a second in-depth phase for those which do. Arguably such a system already exists, albeit one where responsibility for the two stages is split between the Minster and the Authority. Again the Report is somewhat vague. I presume, however, we are talking about an arrangement where the Authority would have thirty days from the receipt of a completed notification to decide whether a second stage inquiry was due and where such a review was considered necessary, there would be a second thirty days allotted to that exercise, in other words the existing time limits would apply. That seems quite in order with the proviso that where additional information is requested within the first thirty days the thirty day period would re-commence from the date of receipt of such information. One anomaly that appears, however, is the proposal allowing the Minister to request a more detailed review by the Authority if it decided that there was no need for a second stage inquiry. It would seem that if the Authority is to be regarded as the body with expertise in the competition area and if it is to concern itself solely with assessing the competition implications, the suggestion that the Minister be allowed to ask it, effectively to think again, seems somewhat anomalous, particularly

[5] Page 58.

given that the Authority would have produced a report setting out the reasons for its view. Indeed one wonders if such a request might not almost be considered as a hint that the Authority ought to come up with a different answer.

The Group also proposes that as part of the second stage process the Authority and the parties might be able to look at ways of modifying the proposed merger to overcome any difficulties. There is a lot of merit in such a proposal. However, I think one might ask why stop there, why not allow this to take place at the first stage as well, if it appears that there are problems which can be identified at that stage. The parties might well prefer a quick favourable decision and if particular problems are evident early on , presumably it would be helpful if the parties and the Authority could address them at that stage. However, an issue that the Report fails to address is the status of any such undertakings. It seems to me that any undertakings given in return for obtaining Authority approval have to be legally binding. In particular it should not be open to the parties to seek to have the Minister modify such commitments. Otherwise it would appear to undermine the incentives for the parties to negotiate seriously with the Authority. It would also mean that having negotiated with the parties the Authority would have to present a case as to why it thought such conditions were essential for the deal to be approved. Thus I would argue that it would be useful to allow parties to modify their proposal at either stage during discussions with the Authority, but that any undertakings given by the parties must be legally binding. The parties could choose not to modify their proposals in the face of objections by the Authority and seek to persuade the Minister to reject any recommendation that the merger be prohibited. Obviously circumstances may change and their be legitimate reasons for modifying undertakings if they can be shown to be unnecessary. Thus it should be open to the parties to make a case for doing so to the Authority. Admittedly this is only likely to arise in the case of behavioural undertakings.

The Group also proposes a pre-notification guidance system. It is, however, rather vague on the details. I do not personally have any problem with a system of pre-notification discussions but I think one has to be realistic also. The level of actual merger notifications averages out at more than two per week and even if one considers only those deemed notifiable (excluding for a moment that some consideration is needed even for non-notifiable cases) one is still dealing with more than one case per week. It makes no sense at all to make proposals without any consideration of the associated resource implications. While one might argue that such a scheme would be desirable in an ideal world where resource constraints were not an issue, the failure to

consider such issues means that the Report to some degree reads like a sort of 'wish list.'

The Report advocates the creation of sturdy 'Chinese walls' within the Authority because of a perceived reluctance by firms to engage in pre-notification discussions because of the Authority's enforcement powers. It is tossed in in the context of a proposal about pre-notification but it is not clear whether it would apply only to such matters or not. Again little justification is advanced beyond this rather vague reference to firms being reluctant to discuss matters with the Authority because of its enforcement powers. That simply is not good enough in my view. At the very least one is entitled to expect that the Group set out a proper case for such a proposal.

(c) The application of the Competition Acts

As far as the application of the Competition Acts is concerned the Group recommends that Sections 4 and 5 would no longer apply in respect of mergers. The rationale for such a proposal, at least in the case of Section 4, is that the present system creates an unnecessary burden for business in the form of dual notifications under both the Mergers and Competition Acts. Personally I have no problem with the proposal to remove the application of Section 4 and indeed the Authority advocated this in its own submission to the Group.[6] However, in passing it is worth noting that there is little evidence that the supposed burden of dual notification is a real issue. It is patently obvious that only a tiny minority of mergers notified under the Mergers Acts are notified under the Competition Acts. 'The Group feels that the arguments made in favour of streamlining the system so as to avoid the double jeopardy which currently exists are persuasive.'[7] That may well be, but one could not, I would suggest, come to such a conclusion on the basis of what is contained in the Report itself. If anything the evidence is overwhelming that business does not appear to see that there is any dual burden given that for some years now, only a handful of mergers have been notified under the Competition Acts. It might have been useful for the Group to try and analyse why this is so. However, it is probably fair to state that little harm can be done by removing mergers from the scope of Section 4 only. In those circumstances mergers above the thresholds would be dealt with under the Mergers Act. Potential threats to competition from mergers involving firms below the current Merger Act thresholds could in my view be dealt with under Section 5.

[6] Massey and O'Hare came to a similar conclusion.
[7] p.44.

The question of the application of Section 5 is a different matter. Here again the Group fails to advance any serious justification for its proposals. It recognises that the acquisition by a dominant firm of a smaller competitor is capable of constituting an abuse of a dominant position and that by rendering Section 5 as well as Section 4 inapplicable, there is a risk that such acquisitions 'which may constitute abuses of Section 5 of the Competition Act but which, for one reason or another fall below the thresholds of the 1978 Act, would avoid any regulatory scrutiny.' However it argues rather lamely that this situation will not arise very often. No evidence is advanced in support of this assertion. It is true that since the Authority's decision in Cooley no dominant firm notified the acquisition of a smaller competitor to the Authority, which is hardly surprising. One must ask what evidence the Group has to support its assertion that this situation will not arise very often. Moreover the expected frequency with which abuses are expected to occur is hardly a justification for totally excluding them from the scope of the Acts. International experience shows that successful cases of predatory pricing are quite rare but does that mean that we should exclude such behaviour from the scope of the Act. If behaviour is anti-competitive then it should be capable of being prevented by legislation. Unfounded beliefs as to how often such behaviour might arise cannot justify putting it outside the scope of the Act. The Authority is aware of apparent instances of such behaviour and is currently considering instituting proceedings against them.

The Group then advances a second weak argument to support the proposal, namely that 'the actions of the merged entity will always be the subject of the potential application of Section 5 by the Competition Authority...'.[8] At the very least this indicates rather sloppy thinking. It has already been pointed out that the rational for merger controls rests on the fact that it is preferable on occasion to prevent the establishment of a dominant position rather than try and police it by behavioural measures subsequently. Arguing that it is alright to allow an anti-competitive merger to go ahead because we will somehow prevent the dominant position thus established being abused just does not make sense. Take a situation where a dominant firm establishes an effective monopoly by acquiring smaller rivals, as would have happened in the Cooley case. The most likely outcome is that having established such a monopoly, the firm would set prices at the monopoly level with a consequent loss in welfare. Now arguably monopoly pricing would be considered an abuse of a dominant position if EU precedents were applied but it would appear to be notoriously difficult to prove. It also seems to be a rather curious approach, in effect to try and compel the firm to set its prices at the level which would prevail if there were competition in the

[8] p.44.

market, having allowed the firm to eliminate such competition. Indeed it would require that resources be devoted to constantly ensuring that the monopolist was in this instance charging a 'competitive' price an exercise which would be totally unnecessary if the monopolist had simply been prevented from eliminating such competition. Take an alternative situation where a dominant firm engaged in predatory pricing to soften up a smaller rival as a prelude to its acquisition. The Authority would be able to take proceedings against the predatory behaviour but one must ask what would be the point if the acquisition by the dominant firm could not be challenged. The firm would have achieved its objective.

Taken together with the proposal to raise the thresholds for notifying mergers under the Mergers Acts to £30m this recommendation is likely to exclude mergers with potentially serious anti-competitive consequences from any scrutiny or indeed from any effective action. Yet as pointed out little if any justification whatsoever has been advanced for such course of action. Indeed the relatively weak arguments that have been trotted out lead one to suspect that the Group decided upon its conclusions on this issue and then tried to come up with some reasons for them. On this issue the submissions received by the Group were quite divided. At best only three of the nine submissions can be said to favour the approach recommended, and, as stated previously, we do not know what reasons were advanced in these submissions. What can be said is that the arguments which apply in the case of Section 4 are invalid in this instance. There is no provision for notifying arrangements which are in breach of Section 5, while cases which involve dominant firms buying up smaller competitors are almost certainly outside the scope of the Mergers Acts. The double jeopardy and the burden of double notification simply does not arise. Rather the only 'danger' is that an acquisition which could be proven in court to be anti-competitive because it would create or strengthen a dominant position could be prevented. One cannot but wonder what would be so bad about that. To quote the famous neo-classical economist and philosopher John Stuart Mill:

> 'They forget that whatever competition is not, monopoly is; and that monopoly in all its forms, is the taxation of the industrious for the support of indolence, if not of plunder.'[9]

In my view this proposal is totally inconsistent with the fundamental objective of an effective merger control regime, i.e. to identify and, where appropriate, prevent those mergers which have serious anti-competitive effects. Thus, while I agree with the

[9] J.S. Mill, (1848); *Principles of Political Economy: Books IV and V*, London, Penguin 1985 paperback edition, p. 141.

proposal to put mergers outside the scope of Section 4 of the Act, the Group's proposals with regard to Section 5 are totally misconceived in my view. If, after two years the Group is unable to recognise that there is something wrong in proposing that dominant firms be allowed to eliminate competition by buying out smaller rivals, serious questions need to be asked.

(d) Miscellaneous issues.

It is difficult to say much about most of the other proposals. For example, the Group recommends that procedures be laid down for the Authority's consideration of mergers. That's hard to argue with but one would really need to look at what procedures are being proposed. Beyond parties having a right to make submissions on a second stage and being able to request an oral hearing (presumably we are talking about the parties to the merger, although again it is not stated), the Report says very little. Should such hearings also involve parties opposed to a merger and should such objectors have an opportunity to question the parties involved? The Report does not appear to have considered this. Its proposals on publication and allowing third parties an opportunity to make submissions are welcome. It is a pity, as I already noted however, that the Group did not feel a greater need to be more transparent itself.

One difficulty I see is in the Group's proposals with regard to appeals and judicial review. Specifically the proposal that the Minister's decision would be reviewable in judicial review proceedings on the grounds that the recommendation from the Authority was irrational. Of course, there are those who believe that any decision by the Authority that a merger is anti-competitive is per se irrational. It seems to me that if one wishes to introduce such a criteria for judicial review, then principles of fairness and natural justice would require that the Authority have the opportunity to defend itself. After all a finding that it had behaved irrationally would reflect on the integrity of the Authority members. I believe that this would require that the Authority would have to be a fully fledged defendant to any such review. It would be totally inappropriate for the Minister to be the sole defendant in such circumstances. Provided that principle is accepted then I do not have any difficulty with the proposal. However, I would suggest that such a mechanism is not very conducive to dealing with mergers. It seems to me that adopting instead a requirement that the Authority may only recommend that a merger be prohibited where it concludes that it would be likely to result in a significant lessening of competition would go a long way to addressing any potential concern in this regard, by establishing better defined criteria

for the Authority's decision. The parties would have an opportunity to argue to the Minster that the Authority's conclusions were wrong.

It is inevitable that when a merger is blocked the parties involved will complain that the decision is wrong. As Conservative MP John Redwood observed of his exerience as a Minister with responsibility for deciding on mergers:

> 'Sometimes businesses would want to push through a "sweetheart" deal, which just happened to give them a dominant position. We had to say "No",with both sides complaining.'[10]

While on the subject of the Authority's ability to defend itself I would like to make a few remarks regarding comments made by a member of the Review Group in a recent issue of *Competition Press* because I believe they give rise to some serious concerns. It is alleged, for example, that Coillte were treated unfairly by the Authority by not being afforded an opportunity to respond to the Authority's Report. This is simply not true. Coillte were given a copy of the Authority's report by the Tanaiste and afforded an opportunity to respond to its contents before she took a decision on the matter. Such an apparent lack of understanding of current merger control procedures by a member of the Group after two years of analysing the issue ought, at the very least, be a cause for concern.

The article contained a number of other strange remarks. For example, it suggested that the Authority should have included recommendations regarding a number of issues which are outside those on which it is required to comment under the Act. Such a proposal would seem to be at odds with the proposal in the Report of the Review Group that the Authority would be confined to considering 'pure competition' issues. The article also suggests that State companies should receive some form of favourable treatment by being presumed to act in the public interest. One wonders what those firms attempting to enter newly liberalised or about to be liberalised utility industries would make of this? Given that State companies in areas as air transport and telecommunications have been forced to reduce their prices with the advent of competition, one wonders whether they could be said to have been operating in the public interest when they were charging excessively high prices to their customers. One would have hoped that this sort of special pleading had been left behind. The author also claims that it is extraordinary that the Authority concluded that the proposed acquisition 'would be likely to increase the ability of Coillte to abuse its dominant position'. Note we are talking about its ability to do so, not the likelihood of

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[10] John Redwood, Moving goalposts, *Financial Times,* 7 October 1998.

it doing so. I would suggest that one of the primary purposes for a merger control regime is to prevent the establishment or the strengthening of a dominant position. The author concludes that the Coillte decision raises some serious concerns about future merger policy. I would argue that the Authority's decision is entirely consistent with the objectives of merger control policy.

> 'But equally managers cannot complain when their natural thrust towards oligopoly is halted by competition authorities. This is often rough justice: some deals get stopped while others sneak through. But rough justice is better than no justice at all.'[11]

Conclusions.

Overall it is hard to avoid the conclusion that the Report is somewhat lacking in depth. There is a total lack of any rigorous analysis. Instead the Group has relied on a handful of submissions, which cannot be evaluated, given the paucity of detail included in the Report, and the views of its own members. Even though I think there is merit in a lot of the proposals, overall I think a much more rigorous assessment is required and indeed might have been expected given the length of time which has elapsed since the Group was established.

Finally I would like to just make some wider comments on the work of the Group. The Group's remit includes not just the issue of mergers but the wider issue of the effectiveness of competition legislation and associated regulations. There have been a number of fairly dramatic developments in this area over the past two years. Within the past year alone the Authority has issued formal proceedings in five cases and several more are pending. Such cases will obviously go some way towards clarifying many issues which are thus far unresolved. In a number of other cases the threat of proceedings by the Authority has sufficed to cause parties to alter their behaviour. While the Group has been thinking about the effectiveness of competition legislation the Authority has been getting on with the job of making it effective. There has also been a major rethink in Government policy in respect of competition in public utilities in a relatively short period of time and key decisions will have to be made about competition in these areas in the very near future, decisions which will have major implications for the future prosperity of this county. The situation today and the issues which need to be addressed are very different from those which prevailed when the Group commenced its work. The world has moved on. Given the time that has elapsed

[11] The Merger Police, *Financial Times,* 12 March 1998.

since it was established one cannot help wondering if the Group has allowed itself to become bogged down in the consideration of minor details and has lost sight of the bigger picture. I would suggest, for example, that the Authority's recent intervention in the electricity industry is far more important and, one might suggest interesting, than the fact the then Minister made a submission about the Barlo notification back in 1994.