Comments of the American Bar Association's Sections of Antitrust Law and International Law on the Irish Competition Authority's December 2007 Submission in Response to the Irish Department of Enterprise, Trade and Employment's November 2007 Public Consultation on the Operation and Implementation of the Competition Act of 2002 and the Department of Enterprise, Trade and Employment's April 2008 Consultation on in Relation to Media Mergers

The Section of Antitrust Law and the Section of International Law (the Sections) of the American Bar Association (the ABA) submit these comments regarding the Irish Competition Authority's (the Authority) December 2007 Submission,[1] S/07/008 (the Submission), in response to the Public Consultation on the Operation and Implementation of the Competition Act of 2002 announced by the Minister for Enterprise, Trade and Employment on November 13, 2007, and in response to the Public Consultation in Relation to Media Mergers announced by the Minister for Enterprise, Trade and Employment on April 11, 2008[2] (together with the November 13, 2007 consultation, the Consultations). The views expressed herein are presented on behalf of the Sections. They have not been approved by the ABA House of Delegates or the Board of Governors of the ABA and, accordingly, should not be considered as representing the policy of the ABA.

The Sections have substantial experience in the antitrust and merger control laws of the United States and other jurisdictions, and in the practical implications of those laws. The comments draw upon that experience, and the Sections hope and intend that they will

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[1] The Competition Authority, Submission to the Department of Enterprise, Trade and Employment, December 10, 2007, S/07/008, *available at* http://www.tca.ie/PromotingCompetition/Submissions.aspx?selected_item=57

[2] Department of Enterprise, Trade and Employment, Public Consultation in Relation to Media Mergers, April 11, 2008, *available at* http://www.entemp.ie//commerce/competition/whatsnew.htm

assist the Department and the Authority in their development of the operation and implementation of the Competition Act of 2002 (the Act).

The Sections applaud the Authority and the Department of Enterprise, Trade and Employment (the Department) for their efforts to clarify ambiguities in the Act, to codify current interpretations of the Act, and to harmonize procedures with the European Commission. The Authority and the Department are to be especially commended for engaging in a comprehensive and critical review of the Act following on their experience in enforcing the Act. These efforts will enhance the efficiency, consistency, and transparency of the enforcement program and merger review process and provide clarity and legal certainty. The Sections strongly support the Authority's and the Department's efforts to conform its merger control regime to the Recommended Practices for Merger Notification Procedures adopted by the International Competition Network (the ICN).[3]

As to specific proposed amendments to the Act, the Sections submit brief comments regarding penalties and deterrents for civil enforcement. With respect to the merger review regime, the Sections provide comments on the following topics: (1) harmonization with the EC Merger Regulation; (2) the definition of "carries on business" and the related definition of "carries on a media business"); (3) media mergers; (4) the power to review partial investments; and (5) the substitution of civil fines for criminal penalties for failure to notify a merger.

Enforcement: Penalties and Deterrents

In its Submission, the Authority propose to amend the Act to provide the same power to bring a civil action in court for fines for infringements of the Act that it believes

[3]International Competition Network Recommended Practices for Merger Procedures, *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf.

is available for infringements of Article 81 and 82 in actions brought pursuant to Regulation 1/2003. The Sections fully agree that there is no reason for such a dichotomy in enforcement powers, and that the power to impose civil fines, to be exercised by the courts, will tend to strengthen deterrence. The Sections further support the proposal to outline the factors to be considered by the court in assessing civil fines. Aligning the factors with those utilized in the 2006 *European Commission Guidelines*[4] will provide consistency in approach and guidance at the national level.

Merger Process: Harmonization with the EC Merger Regulation

The Authority proposes to bring its merger notification into closer alignment with the administrative procedures of the 2004 EC Merger Regulation (ECMR). Changes involve allowing notification prior to a completed agreement, suspension of time periods for compliance with information requests and for consideration of remedy proposals, and rendering a notification invalid if full details are not submitted. The Sections fully support aligning the process in Ireland with the ECMR in order to provide guidance, efficiency, and consistency in merger filings in Europe.

Merger Process: Definition of "carries on business"

Sections 18(1) of the Act establishes the requirement for merging parties to notify the Authority and sets forth the thresholds that trigger this requirement: (1) the worldwide turnover of each of two or more of the merging parties is €40,000,000; (2) each of two or more of the merging parties carries on business in any part of the island of Ireland; and (3) the turnover in Ireland of any one of the merging parties is €40,000,000. The Act does not define "carry on business in any part of the island of Ireland," and this

[4] European Commission, *2006 Guidelilnes on the Method of Imposing Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003*.Official Journal C 210, 1.09.2006, 2-5, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT

could result in the mandatory notification of certain mergers that have no meaningful nexus to Ireland.

In its Submission, the Authority proposes to amend the Act consistent with a 2006 notice describing its understanding of the term "carries on business" so that it would mean (1) having a physical presence on the island of Ireland and making sales and/or supplying services to customers on the island of Ireland; or (2) making sales into the island of Ireland of at least €2,000,000 in the most recent financial year. The Authority proposes to define "carries on a media business" using the same criteria.

Although the Sections commend the Authority for its efforts to ensure that its notification requirements establish a nexus to Ireland, because the proposed definition is disjunctive, a filing still could be required where the target has no meaningful nexus to Ireland. Accordingly, the Sections recommend that the same jurisdictional amount be applied to both (1) and (2); there does not appear to be any reason to distinguish between the two. It further supports applying the same test to media mergers. With regard to the materiality of the nexus to Ireland, in the Sections' view the €2,000,000 figure likely does not contain the requisite level of materiality to conform to the ICN's *Recommended Practices for Merger Notification Procedures*. Recommended Practice I.B. states that merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification, and Comment 1 notes that should encompass standards such as material sales or asset levels within the jurisdiction concerned. As explained in Comment 1, the purpose of establishing a level of materiality in merger notification thresholds is to screen out transactions that are unlikely to result in appreciable competitive effects within a jurisdiction. Recommended Practice I.C. further

states that the determination of the nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.

In the Sections' view, the Authority's proposed definition satisfies the standards of the Recommended Practices, with the exception of the materiality requirement. The Sections note that comparably sized jurisdictions that conform to the ICN Recommended Practices have higher local nexus levels for each of two parties.[5] Accordingly, the Sections respectfully submit that the Authority may wish to reconsider the €2,000,000 threshold, perhaps with reference to the thresholds established by jurisdictions of a similar size, measured by gross domestic product, and to increase the threshold to a level more commensurate with Ireland's own GDP.[6]

Merger Process: Media Mergers

The Sections agree with the Authority's view that competition agencies ought not to be called upon to include in their merger review process criteria[7] other than those that affect an assessment of competition within the relevant industry. That view is fully supported by the ICN's Recommended Practices for Merger Analysis recently approved by its Annual Meeting in Kyoto.

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[5] The Sections note that Ireland's 2006 gross domestic product (GDP) was €177,000,000,000, and the Authority's proposed turnover threshold for purposes of defining "carries on business" is only €2 million. By comparison, Finland, with a GDP of €167,000,000,000 has a turnover level of €20 million, and Denmark, with a GDP of €219,000,000,000 billion, has a turnover level of €40,000,000.

[6] For a recent discussion of the numerous factors that might be considered when establishing notification thresholds, *see* International Competition Network, Setting Notification Thresholds for Merger Review (April 2008) (report to the ICN Annual Conference, Kyoto, Japan).

[7] "A merger review law should not be used to pursue other goals." RP IA. Comment 1,

Merger Process: Review of Partial Investments

The Authority proposes to amend the Act so as to give it the power to review partial investments that result in a substantial lessening of competition. The Authority raises two issues for discussion in connection with the issue of minority investments that fall short of decisive control. First, should the control of such investments be ex post or, as with current merger control, ex ante? And, second, what definition of partial or minority investment should be used? As one option to address these issues, the Authority suggests that it review minority investments ex ante if they meet a level of partial investment in the target of around 30%. The Authority further suggests a review of the efficacy of such an approach after four years.

The Sections commend the Authority for raising this issue for discussion and for its effort to bring clarity for the business community as to when and whether minority investments might substantially lessen competition and, therefore, should be notified to competition authorities. As the Authority notes in the Consultations, in some cases, although the investment is passive in that the investor exerts no influence over the firm's activities, the acquiring firm's economic incentives nevertheless may change as a result of the investment if it creates the possibility that the acquiring firm might profit from the firm's actions. Further, a partial investment may result in the acquiring firm exerting influence over the target, even though that influence stops short of decisive control.

The Sections believe that the purpose of ex ante review is to ensure the prevention of competitive harm that may not be possible to remedy if reviewed ex post. In addition, the costs of ex ante review, both for the parties and the reviewing authority, must be compared with the benefits. When an investment fails to provide the acquiring firm with

control over the acquired entity, the possibility of a competitive harm that cannot be remedied ex post is extremely unlikely, as a divestiture of the acquired minority interest should fully address any such harm. Furthermore, acquisitions of control relatively rarely raise competitive harm concerns, as reflected by the fact that generally far less than 4% of notified transactions in the U.S. received requests for additional information,[8] and enforcement in instances of minority acquisitions are even rarer. As a result, the implementation of an ex ante review system for minority acquisitions imposes significant burdens on parties that are unlikely to be warranted by the level of protection of competition that will result. The Sections therefore recommend that the Authority review partial investments ex post and that no ex ante filing be required (or that it be made voluntary).

If the Authority decides to proceed with an ex ante review, requiring a notification, the Authority's proposed plan to review the workings of this approach after four years is reasonable. With regard to the level of investment that would trigger such review, the Sections encourage the Authority to specify a bright-line percentage figure for minority investments below which such partial acquisitions would not be reportable. In this regard, the Sections note that Canada uses a 20% threshold for public companies and a 35% threshold for private companies. Competition Act (Canada), R.S.C. 1985, c. C-34, s.110. As this filing requirement has the potential to capture many acquisitions involving companies located primarily outside Ireland, choosing a high threshold of 30-35% is particularly important if the threshold for carrying on business in Ireland is not raised significantly, as the Sections recommend above.

[8] *See*, Federal Trade Commission and Department of Justice, *Hart-Scott-Rodino Annual Report Fiscal Year 2006*, at pp. 5-6, fig. 2. http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf

Merger Process: Adoption of Civil Fines

The Authority proposes to amend the Act so as to eliminate criminal penalties, and instead substitute civil fines, for failure to notify a merger or provide further information. Currently, failure by an undertaking to notify or to respond to a requirement for further information is a criminal offense for the person in control of that undertaking. The Sections agree that civil fines, rather than criminal penalties, are far more appropriate to remedy and deter such failures.

Conclusion

The Sections commend the Department's and the Authority's exemplary initiative to undertake their comprehensive review of the Act to improve the Irish competition enforcement regime in manners informed by their experience. We are grateful for the opportunity to submit these comments, and hope that they are helpful to the Department and the Authority as the proceed with this important undertaking.