

market intelligence

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GETTING THE
DEAL THROUGH 

Merger Control

Pre-emptive remedies
support growth in
Phase I clearances

John Davies
leads the global
interview panel

Activity levels • Enforcement priorities • Keynote deals • 2017 outlook
Europe • North America • Asia-Pacific • Latin America

market intelligence

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A note from John Davies, Panel Leader

The past year has been one of the busiest for competition authorities around the world. The very active M&A market saw many large, cross-border transactions such as *AB Inbev/SABMiller*, *Halliburton/Baker Hughes*, *Staples/Office Depot*, *ChemChina/Syngenta*, *LSE/Deutsche Borse*, *Bayer/Monsanto* and *Dow/Dupont* reviewed by multiple agencies. In addition to managing a high merger control case load, competition authorities have also been active in protecting their mandates by investigating companies for gun-jumping and procedural failures within the merger control processes. For example, MOFCOM has shown an increased willingness to sanction companies for failure to file, as exemplified by its recent decision to fine Canon for failure to notify its acquisition of Toshiba Medical Systems Corporation. In another example, the European Commission sent Facebook a statement of objections in December 2016 alleging it provided misleading information in its acquisition of WhatsApp.

While recent political shifts have not yet seemed to chill global M&A, it is clear that merger control is sensitive to such developments. While changing economic dynamics may drive foreign investment, populist movements may bring about, for example, increased protectionism in the form of foreign investment controls and increased intervention in strategically important areas. In the US, a number of recent foreign investment transactions, in particular involving Chinese investors, were blocked on national security grounds or faced extensive reviews. Chinese investments in German technology companies have similarly led to calls for tighter foreign investment controls in key sectors. The French government changed its foreign investment regime following the *GE/Alstom* transaction and the UK government is expected to amend its regime in the near future.

This changing landscape will require stakeholders to keep a close eye on both competition and foreign investment developments. The contributions in this issue of *GTDT: Market Intelligence - Merger Control* provide a good introduction to these developments locally. We hope that this will be helpful for readers operating in this active and dynamic environment.

We are grateful to the interview panel for assisting with this project and providing their insights into major market, regulatory and enforcement trends, and the impact these are having on this complex field of practice.

Freshfields Bruckhaus Deringer LLP

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In this issue

Australia	2	Korea.....	79
Austria	9	Mexico.....	85
Belgium	13	Netherlands	90
Brazil	20	Nigeria	96
China	26	Norway	99
Denmark	32	Russia	104
European Union.....	37	Spain	110
Finland.....	41	Sweden.....	114
France.....	46	Switzerland	121
Germany.....	53	Turkey	125
Indonesia	60	Ukraine	131
Ireland	64	United Kingdom.....	137
Italy	70	United States	142
Japan.....	74		



MERGER CONTROL IN IRELAND

Helen Kelly is a partner and head of the EU, competition and regulatory law group at Matheson. Helen has particular expertise in EU and Irish merger control work and has experience in dealing with Phase I and Phase II cases under the EU Merger Regulation, including advising on the merger of two Irish health insurers, Aviva Health and GloHealth and advising on Three Ireland (Hutchison) Limited's acquisition of Telefónica Ireland, as well as advising on Irish merger control cases including the ongoing Phase II investigation of INM/CMNL and the 2014 Phase II investigation of Glanbia/Wexford Creamery. Helen also advises on

behavioural competition issues including cartels and abuses of a dominant position. Helen has experience in dealing with complex investigations including dawn raids by the European Commission, the CCPC (formerly the Competition Authority) and other sectoral regulators, and witness summons procedures by the CCPC.

Helen has written and spoken extensively on competition, state aid and regulatory issues. She is consistently recognised as one of the top Irish competition lawyers by directories including Chambers Global, the European Legal 500, Global Competition Review and Who's Who Legal.



Helen Kelly

GTDT: *What have been the key developments in the past year or so in merger control in your jurisdiction?*

Helen Kelly: It has now been over two years since the advent of a new merger regime in Ireland. The Competition and Consumer Protection Act 2014 (the Act) entered into force on 31 October 2014, and significantly amended the merger regime contained in the Competition Act 2002 (the 2002 Act), with new jurisdictional thresholds and applicable timelines, as well as a new ‘media merger’ regime.

Non-media mergers or acquisitions now require prior notification where the aggregate turnover in the Irish state of the undertakings involved is not less than €50 million, and the turnover in the state of each of at least two of the undertakings involved is not less than €3 million.

The number of merger filings to the Competition and Consumer Protection Commission (CCPC) was down by 14 per cent in 2016 (from 78 in 2015 to 67 in 2016), despite the expectation that the end of the 2008 recession would provide the conditions for more mergers activity. This decrease may be partly attributable to increased market caution following the UK’s Brexit vote in June 2016. Notwithstanding this slight decrease, the past 24 months suggest that the new financial thresholds have significantly

increased the number of mergers being notified to the CCPC, with 145 mergers or acquisitions being notified to the CCPC over 2015-2016, compared to 78 in 2013-2014.

Interestingly, 75 per cent of 2016 deals notified to the CCPC involved an Irish target, confirming that the new thresholds primarily capture mergers with a strong nexus to the state, and have eliminated the notification requirement for some ‘foreign-to-foreign’ mergers (pre-2014, only 35 per cent of all deals notified to the Irish Competition Authority involved an Irish target). The number of Phase II investigations opened in 2016 continued on a downward trend from three in 2015 (*Valeo/Wardell/Robert Roberts, Topaz/Esso and Baxter Healthcare/Fannin*) to one in 2016 (*PandaGreen/Greenstar*).

There were two extended Phase I investigations in 2016: *Bon Secours Health System/Barringtons Hospital* and *INM/CMNL*. The *Bon Secours Health System/Barringtons Hospital* was cleared by the CCPC subject to binding commitments whereby Bon Secours committed:

- not to amend the reimbursement rates agreed between Barringtons Hospital and any health insurance provider who at the date of the determination had entered into a binding contract with Barringtons Hospital; and
- on expiry of any agreement between Barringtons Hospital and a health insurance



“The unprecedented INM/CMNL media merger review could extend the investigation by up to 100 days.”

provider and for a relevant period (redacted in the commitments published by the CCPC), to negotiate the reimbursement rates separately from the rates to be applied by the health insurance provider to any other hospital owned or operated by Bon Secours.

The *Bon Secours* case is notable in that the CCPC accepted behavioural commitments (in Phase I) for the first time under the new regime introduced by the Act.

At the time of writing, the full rationale for the determination of the CCPC had not yet been published.

The only Phase II investigation opened in 2016, *PandaGreen/Greenstar* was notable as the merger clearance was conditional on the acceptance of binding divestment commitments. After a number of years where no merger clearances were subject to divestment commitments, there have been three such cases in the past two years (*Valeo/Wardell/Robert Roberts*, *Topaz/Esso*, and *PandaGreen/Greenstar*). It is possible that this trend is partly driven by the CCPC's ability to focus resources on a lesser number of more Irish-focused mergers since the advent of the Act. The

PandaGreen/Greenstar investigation related to an acquisition in the domestic waste collection business. To prevent a substantial lessening of competition following the implementation of the proposed merger, the legally binding commitments required PandaGreen to sell Greenstar's domestic waste collection business in two Dublin locations to a purchaser to be approved by the CCPC. The total time frame of the Phase II investigation was 189 days.

The year 2016 saw the bedding-in of the new 'media merger' regime introduced by the Act. All media mergers must be notified to the CCPC, regardless of whether the financial thresholds set out above are met. The undertakings involved must make two notifications of a media merger. One notification is sent to the CCPC, which is responsible for carrying out the substantive competition review to determine whether the merger is likely to give rise to a substantial lessening of competition (SLC); and a separate notification goes to the Minister for Communications following a CCPC determination. The Minister for Communications applies a media plurality test in assessing whether to clear the media merger. The Act sets out the test

for identifying a ‘plurality of the media’ concern: ‘whether the result of the media merger will not be contrary to the public interest in protecting the plurality of the media in the State’, and this includes a review of ‘diversity of ownership and diversity of content’.

Five media mergers were notified to the CCPC in 2016: *INM/Greer Publications, News Corp UK & Ireland/Wireless Group, Liberty Global/UTV Ireland, INM/CMNL* and *BBC & ITV – Britbox Joint Venture*. Of particular interest is *INM/CML*, on which Matheson is advising, which involves the acquisition of Celtic Media’s seven regional newspapers. The merger was cleared by the CCPC following an extended Phase I investigation and subsequently has been referred to a Phase II media merger review by the Minister for Communications, Denis Naughton, in January 2017. The Broadcasting Authority of Ireland (BAI) must now prepare a report for the Minister outlining its view on the media plurality test. An advisory panel may be set up to assist the BAI in its review. The Minister will make the ultimate decision, taking into account the BAI report and, if applicable, the views of the advisory panel. This unprecedented, first Phase II media merger review has the potential to extend the investigation by up to 100 days.

GTDT: What lessons can be learned from recent cases to help merger parties manage the review process and allay authority concerns at an early stage?

HK: As mentioned above, the number of mergers or acquisitions notified to the CCPC has significantly increased following the entry into force of the Act (albeit with a slight decline in 2016 compared with 2015).

The vast majority of merger notifications to the CCPC are cleared in Phase I. The predictability of a Phase I clearance depends on the individual merger; however, it is relatively rare that a merger investigation will proceed to Phase II (in 2016, one merger out of 67 notified went to Phase II; in 2015, two out of 78 went to Phase II).

The Mergers Division of the CCPC is available for pre-notification discussions with parties that have expressed a good faith intention to notify a merger or acquisition. Such discussions can be helpful in potentially complex cases or where there is little market definition precedent. CCPC staff are generally accessible during investigations in order to provide general updates on their progress. The CCPC can also be asked to waive completion of parts of the notification form pre-merger, thus reducing the notification burden in cases of minimal overlap.

The CCPC has powers to ‘stop the clock’ on the time limits for the investigation during Phase I and Phase II by making an information request. Accordingly, it is extremely important that a comprehensive and well-argued notification form

is submitted so as to mitigate the risk of a formal information request. ‘Stop the clock’ is a risk that has increased where the CCPC is receiving more notifications and resources are stretched. The CCPC used these powers in two Phase I investigations during 2016 (*Bon Secours Health System/Barringtons Hospital* and *INM/CMNL*). In addition, there may be informal contact between the undertakings and the CCPC throughout the review, with informal information requests during the investigation that do not stop the clock.

Acquisition documents should be drafted with the CCPC process in mind where a notification is required. The acquisition documents should permit flexibility between signature and completion to allow for a CCPC investigation that may vary in length. Media mergers will require clearance from the Minister for Communications, with an even longer time frame for CCPC and ministerial investigation. Deal timing considerations are therefore important in the case of media mergers.

The Act does not provide for an accelerated waiting period to apply in any circumstances. However, in practice, merging parties frequently request clearance by specific dates to enable completion. The CCPC and its predecessor, the Competition Authority, has previously issued expedited clearance decisions in cases that involved strict insolvency procedure timetables, such as the *HMV Ireland/Zavvi* merger (which was cleared in nine days).

GTDT: What do recent cases tell us about the enforcement priorities of the authorities in your jurisdiction?

HK: The vast majority of merger notifications to the CCPC are cleared in Phase I. As noted above, the CCPC made one Phase II determination and two extended Phase I determinations in 2016. The CCPC has not expressed an intention to focus merger control resources on any particular market or industry sector (it cannot pick and choose the mergers that are notified due to mandatory statutory thresholds).

Generally, the Phase II investigations carried out by the CCPC (and its predecessor) in recent years have concerned consumer goods where the effects of the mergers would be felt at a retail/consumer level.

The CCPC has not expressed particular concerns about consolidation in specific industries, nor do political considerations or the ‘public interest’ influence merger enforcement policy or the outcome of CCPC investigations. The CCPC has indicated a renewed focus on the banking sector following the enforced consolidation brought about by the financial crisis, and it remains to be seen whether banking or financial institution mergers will attract particular scrutiny.



“Changes to the turnover thresholds have increased the number of reviews.”

GTDT: *Have there been any developments in the kinds of evidence that the authorities in your jurisdiction review in assessing mergers?*

HK: It is common for the notifying undertakings to adduce expert economic evidence in cases where there are potential competition concerns arising from the merger, and where the CCPC is likely to scrutinise the effects closely, in particular where an investigation is likely to proceed to Phase II. The CCPC also tends to engage external economists or conduct some market surveys where it identifies potential competition concerns and wishes to obtain the views of competitors, customers or suppliers.

The CCPC tends to be very interested in reviewing parties' internal documents in Phase II investigations, including when arguments are adduced on issues of size of investments and costs and where efficiency arguments are adduced.

It is mandatory for the CCPC to publish a notice of the notification of a merger or acquisition within seven days of receipt (under section 20(1) (a) (i) of the Act), and the practice of the CCPC is to give third parties 10 days to make submissions. The CCPC will consider all submissions made to it, whether from the undertakings involved or any third party.

GTDT: *Talk us through any notable deals that have been prohibited, cleared subject to conditions or referred for in-depth review in the past year.*

HK: No transactions were prohibited by the CCPC in 2016 although one joint venture, *Marino Point Port Company, Port of Cork et al*, was withdrawn at the request of the parties prior to a determination issuing. As noted above, the CCPC made one Phase II determination in 2016: *PandaGreen/Greenstar*. The CCPC imposed remedies as a condition of clearance in that merger, which included divestment of domestic waste collection customer contracts. It is notable that the CCPC (and its predecessor body, the Competition Authority) had not imposed divestment remedies since 2007 (*Communicorp/SRH*) prior to divestments being required in each of *Valeo/Wardell/Robert Roberts* and *Topaz/Esso* in 2015. As noted above, the trend towards greater use of divestment conditions may be partly due to the CCPC being able to focus its resources on a lesser number of investigations that are more relevant to the state, under the new regime brought in by the Act.

Bon Secours Health System/Barringtons Hospital was the only other 2016 case cleared subject to behavioural commitments. However, unlike

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

An effective adviser pre-empts the issues most likely to be of concern to the CCPC taking into account the market context, prior merger treatment of similar issues and current concerns of the CCPC, including in areas where similar issues are being or have been explored including in the context of non-public investigations in the areas of cartels, dominance and advocacy. It is important to design a strategy to ensure that all issues are fully considered by the notifying parties pre-notification and effectively dealt with in the notification process to give the CCPC a clear picture of the issues during the process and limit the possibility of detailed requests for information.

What are the key things for the parties and their advisers to get right for the review process to go smoothly?

The onus is on the adviser to provide a comprehensive and well-drafted notification form dealing with all key areas of concern without imposing an unnecessary burden on the parties so that irrelevant information is not sought. Dealing with the authorities' concerns and information requests quickly and comprehensively is important for an expedient clearance.

What were the most interesting or challenging cases you have dealt with in the past year?

We advised on getting EU clearance for the merger of two Irish health insurers, Aviva Health and GloHealth, which involved

a rare notification of an Irish-only transaction to the European Commission under the EU Merger Regulation. This was a highly complex matter, as it was the first-ever merger of Irish health insurers in a market where half the Irish population relies on private health insurance. The clearance process was simplified by successfully convincing the European Commission to accept the acquisitions of Aviva Health and GloHealth as a single notification.

We have also been at the forefront of advising on the first significant mergers in the media merger regime introduced in October 2014. In 2016 we advised News Corporation in its acquisition of Wireless Group, ITV in its acquisition of UTV Ireland, and Independent News & Media in its proposed acquisition of Celtic Media's seven regional newspapers (*INM/CMNL*). Each transaction has involved a CCPC and a Minister for Communications notification, with difficult assessments around the relatively new 'media plurality' test being applied by the Minister. The Independent News & Media acquisition of Celtic Media has proceeded to a Phase II media merger investigation, with the Broadcasting Authority of Ireland now required to examine the merger and report to the Minister.

We also advised on the merger of Hailo with mytaxi, a first-of-its-kind merger involving taxi-hailing apps. A notification to the CCPC examining this novel and dynamic market was required, and Phase I clearance was granted.

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PandaGreen/Greenstar, this was conditionally cleared after an extended Phase I investigation and did not proceed to Phase II.

Another notable transaction was the media merger *INM/CMNL*, the first ever Phase II media merger case under the new Irish regime on which Matheson is advising. The CCPC cleared the merger stating there were no concerns that the proposed merger would lead to a substantial lessening of competition but subsequently, the Minister for Communications determined that the proposed merger may be contrary to the public interest in protecting the plurality of the media in the state, as provided for in Part 3A, section 28D(1)(c) of the 2002 Act. This means the merger will now be subject to a full Phase II review. This Phase II review is the first of its kind in Ireland.

GTDT: Do you expect enforcement policy or the merger control rules to change in the near future? If so, what do you predict will be the impact on business?

HK: As predicted, the changes to the merger control turnover thresholds introduced by the Act have resulted in a large increase in the number

of transactions being reviewed by the CCPC. Many of these transactions are not large and have no discernible impact on competition in any markets in Ireland. Increased regulatory burdens and delays are being imposed on undertakings involved in relatively minor transactions.

The CCPC has recognised the effects of the revised turnover thresholds, and we understand that it may advocate changes to the thresholds (the CCPC itself does not have the statutory power to change them). Legislation will likely be needed to amend the turnover thresholds set out in the Act, therefore it remains to be seen whether such changes will take place in 2017.

Another point of note for 2017 will be the outcome of the *INM/CMNL* merger, the first ever Phase II merger case under the new Irish regime on which Matheson is advising. This will hopefully shed some light on the new merger regime under the Act and more specifically expand on the concept of media plurality in Ireland. The published determinations of the Minister for Communications have provided minimal detail on the rationale behind them, which is unsatisfactory in terms of transparency and predictability of the Minister's review.

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