Merger Control 2022

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the twenty-sixth edition of *Merger Control*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Peru, South Korea, Taiwan, Uzbekistan and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Thomas Janssens of Freshfields Bruckhaus Deringer, for his continued assistance with this volume.

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Getting The Deal Through

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Ireland's merger control regime has its legal basis in Part 3 of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017.

The Competition and Consumer Protection Commission (CCPC) is primarily responsible for the enforcement of the Irish merger control regime. The CCPC shares responsibility for the review of media mergers with the Minister for Communications, Climate Action and Environment. The Irish courts have jurisdiction to adjudicate on any allegation of breaches of the Act and on any appeal against a merger decision.

Scope of legislation

2 | What kinds of mergers are caught?

The Irish merger control regime applies to 'any merger or acquisition', which is defined by section 16(1) of the Act as including transactions where:

- two or more undertakings, previously independent of one another, merge;
- one or more individuals who already control one or more undertakings, or one or more undertakings, acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the acquisition of part of an undertaking, although not involving the acquisition of a corporate legal entity, involves the acquisition of assets that constitute a business to which a turnover can be attributed, and for the purposes of this paragraph, 'assets' includes goodwill.

The concept of 'undertakings involved in the merger or acquisition' is broadly equivalent to the concept of 'undertakings concerned' under Council Regulation (EC) No. 139/2004 (EUMR).

Mergers and acquisitions (mergers) that meet the turnover thresholds set out in section 18(1) of the Act are subject to mandatory notification to the CCPC. Where these requirements are not met, mergers may still be notified to the CCPC on a voluntary basis under section 18(3) of the Act.

There are different thresholds that apply to media mergers under the Act.

3 | What types of joint ventures are caught?

Only full-function joint ventures (ie, those that perform, on a lasting basis, all the functions of an autonomous economic entity) constitute a merger for the purposes of the Irish merger control regime. The relevant definition is included in section 16(4) of the Act.

The CCPC adopts an approach mostly consistent with the European Commission in identifying whether joint ventures are subject to Irish merger control law. Where a joint venture does not qualify as full-function, the CCPC may assess it under section 4 of the Act, which is based on article 101 of the Treaty on the Functioning of the European Union. Typically, the CCPC will have regard to the European Commission's Guidelines on Horizontal Cooperation Agreements and the Guidelines on Vertical Restraints when undertaking such an assessment.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The Irish merger control regime does not regulate the acquisition of interests other than those conferring 'control' over an undertaking or part of an undertaking.

The definition of control that applies under the Act is based on the concept of 'decisive influence', derived from the EUMR.

The following non-exhaustive list of the circumstances that can give rise to control is included in section 16(2) of the Act:

- ownership of, or the right to use all or part of, the assets of an undertaking; and
- rights or contracts that enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Irish merger control regime is mandatory where, for the most recent financial year:

- the aggregate turnover in the state of the undertakings involved is not less than €60 million; and
- the turnover in the state of each of two or more of the undertakings involved is not less than €10 million.

These revised thresholds came into effect on 1 January 2019. References to 'the state' are references to Ireland, excluding Northern Ireland.

There are different thresholds that apply to 'media mergers' under the Act.

The CCPC can also investigate mergers falling below the turnover thresholds under sections 4 and 5 of the Act (ie, where it believes, respectively, either that the merger could have as its object or effect the prevention, restriction or distortion of competition, or involves the creation or strengthening of a dominant position). In practice, the CCPC will contact parties to a merger falling below the turnover thresholds, where that merger raises potential competition concerns, and request that they notify the merger on a voluntary basis under section 18(3) of the Act. For example, through its market surveillance the CCPC became aware in February 2017 that Mediawatch Limited (trading as Kantar Media), a wholly owned subsidiary of WPP plc, was to acquire sole control of Newsaccess Limited. Notwithstanding the fact that the proposed merger fell below the turnover thresholds that trigger mandatory notification, the CCPC undertook a preliminary assessment, which found that the merger would result in Kantar Media removing its closest and most substantial competitor from the market. The CCPC therefore informed the parties that they should make a voluntary notification of the merger. The parties did so and the CCPC eventually cleared the merger with binding commitments.

The CCPC has stated in its published guidance that if, having been contacted by the CCPC, parties to a non-notifiable merger that raises competition concerns inform the CCPC that they do not intend to notify, the CCPC will carry out a preliminary inquiry to determine whether to open an investigation under section 4 or 5 of the Act. The CCPC may then seek an undertaking from the parties not to implement the merger or, where necessary, may seek an injunction to restrain implementation of the merger. Where a non-notifiable merger raising competition concerns is implemented, the CCPC will conduct an investigation and in appropriate cases invoke the Irish Court's equitable jurisdiction to restore the status quo, which may result in the merger being reversed. Such an eventuality has not occurred to date.

The CCPC has not issued detailed guidance on its approach to the calculation of turnover but tends to follow the principles set out in the Commission Consolidated Jurisdictional Notice under the EUMR on the Control of Concentrations between Undertakings 2008 (the Commission Jurisdictional Notice).

One exception is the CCPC's approach to geographic allocation of turnover. A guidance note by the CCPC provides that 'turnover in the state' means sales made or services supplied to customers within the state. The CCPC follows this approach even in cases involving financial institutions where the Commission Jurisdictional Notice would suggest that turnover should instead be allocated on a 'branch basis'.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory for mergers that meet the turnover thresholds. No exceptions exist.

Section 18(3) of the Act provides for voluntary notification of a merger that does not meet the jurisdictional thresholds.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Any merger that involves undertakings meeting the turnover thresholds in the state as set out in the Act must be notified to the CCPC.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are currently no special rules that apply to foreign investment. Legislation establishing the new Irish regime, the Investment Screening Bill, was expected to be adopted as early as the end of the first half of 2021, after a heads of bill were approved by the government in July 2020. However, this has been delayed until the end of 2021 or beyond.

Special rules apply where two or more undertakings carry on a media business in the state or one or more of the undertakings involved carry on a media business in the state and one or more undertakings carry on a media business elsewhere.

The definition of 'carrying on a media business in the state' requires undertakings involved to have either a physical presence in the state and make sales to customers located in the state, or to have made sales in the state of at least €2 million in the most recent financial year.

The term 'media business' is broad and includes newspaper publishing, radio and TV broadcasting and production of news and current affairs programming, including online news sources and broadcasting.

Where a merger qualifies as a media merger, the substantive test is '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'.

Undertakings involved are required to make two notifications of a media merger. One notification is sent to the CCPC, which determines whether the merger is likely to give rise to a substantial lessening of competition (SLC). A separate notification is sent to the Minister for Communications, Climate Action and Environment. This is in a prescribed form, last updated in 2015. A fee is payable for each notification.

The Minister will commence a separate review of the media merger 10 days after the CCPC determination is made (ie, consecutively). If the media merger does not raise concerns, it will usually be cleared within 30 working days of the commencement of the Minister's review. However, if the Minister is concerned that the media merger may be contrary to the public interest in protecting plurality of the media, the Broadcasting Authority of Ireland (BAI) will carry out a 'Phase II' examination. The BAI has 80 working days to prepare a report to the Minister, which includes recommending whether the merger should be put into effect (with or without conditions). An advisory panel may be set up to assist the BAI in its review. The Minister will make the decision of whether to approve (with or without conditions) or prohibit the merger, taking into account the BAI report and, if applicable, the views of the advisory panel. The Minister must take this decision within 20 working days of receipt of the BAI report.

To date, there has been only one Phase II examination of a media merger, the acquisition of seven regional newspapers (part of Celtic Media Group) by Independent News & Media (INM). This examination was not completed, as the merger was terminated by mutual consent of the parties.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A filing must be submitted to the CCPC prior to the implementation of the merger, and may be made so long as the undertakings involved demonstrate a good faith intention to conclude an agreement. This approach is in line with the European Commission's practice under Council Regulation (EC) No. 139/2004.

Under sections 18(9) and 18(10) of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017, failure to notify a merger that meets the turnover thresholds is a criminal offence punishable by fines of up to €250,000, plus €25,000 per day for a continued breach. The CCPC cannot impose administrative fines but must refer the matter to the Director for Public Prosecutions to initiate either summary prosecution or prosecution on indictment.

Liability attaches to the undertaking required to make the notification, or the person in control of that undertaking. Section 18(11) of the Act provides that the 'person in control' of an undertaking is:

- in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention;

- in the case of a partnership, each partner who knowingly and wilfully authorises or permits the contravention; or
- in the case of any other form of undertaking, any individual in control of that undertaking who knowingly and wilfully authorises or permits the contravention.

Following a Competition and Consumer Protection Commission (CCPC) investigation, on 8 April 2019, Armalou Holdings Limited (Armalou) pleaded guilty in the Dublin Metropolitan District Court to a breach of section 18. Armalou pleaded guilty to six charges arising from its failure to notify the CCPC of its acquisition of Lillis-O'Donnell Motor Company Limited in December 2015. Subsequently, on 10 May 2019, Airfield Villas Limited (formerly known as Lillis-O'Donnell Holdings Limited), also pleaded guilty to six charges arising out of its failure to notify the CCPC of the same transaction. This was Ireland's first criminal prosecution involving 'gun-jumping'. In both cases, the District Court decided to apply the Probation Act 1907 on condition that each company made a charitable donation of €2,000 and pay a contribution of €2,070 towards the Director of Public Prosecutions legal costs and the CCPC's witness expenses.

10 Which parties are responsible for filing and are filing fees required?

Each 'undertaking involved' in the merger must submit a merger filing. In practice, joint filings are submitted and the purchaser tends to lead on drafting the filing. A filing fee of €8,000 (for each filing) currently applies.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A Phase I clearance determination must be issued by the CCPC within 30 working days of the 'appropriate date', which means the date on which a full and complete filing by the merging parties is made, unless either the CCPC has used its power to 'stop and restart the clock' by issuing a formal requirement for information (RFI), which has the effect of resetting the clock and it only restarts when the RFI is complied with, or where the parties and the CCPC are negotiating remedies, in which case the Phase I period is extended to 45 working days. The CCPC also issues 'informal' requests for information that do not stop and restart the clock.

A Phase II clearance determination must be issued by the CCPC within 120 working days of the appropriate date. If the CCPC issues a formal RFI in the first 30 working days of the Phase II period, this has the effect of stopping and restarting the clock in the same way as at Phase I. If the parties and the CCPC are negotiating remedies, the Phase II period is extended to 135 working days.

Media mergers are subject to the waiting periods for notification.

A suspensory obligation is included in the Act. Section 19(1) of the Act imposes a prohibition on the merging parties putting a merger that has been notified (both mandatory and voluntary) into effect prior to the issue of a clearance determination.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Section 19(1) of the Act prohibits the putting into effect of a notifiable merger until the CCPC has reached a determination that it may be put into effect.

In M/16/013 *INM/Greer*, INM completed the acquisition of assets of Greer Publications prior to notification in breach of section 19(1) of the Act. The CCPC accepted the notification on the basis that INM would not, prior to receiving CCPC clearance, combine or change the structure of the target assets, integrate any retailing or advertising functions of the target assets into INM, cross-sell advertising space between INM and the target assets or share commercially sensitive information between INM and the target assets. The CCPC subsequently cleared the merger.

Section 19(2) of the Act provides that a notifiable merger that is notified to the CCPC, but put into effect prior to a clearance determination, is void. The Act does not state whether a merger that is completed prior to clearance is rendered void for all time, or merely until such time as the CCPC issues a clearance determination. The CCPC has previously expressed the view that a notifiable merger completed without notification remains void until the date of a clearance determination (M/04/003 *Radio 2000/Newstalk* 106).

Completing after notification but prior to clearance (ie, where clearance is ultimately given) is not a criminal offence.

While the CCPC has permitted the parties to submit a late notification of a completed merger, it has released statements that parties have breached the Act by closing before clearance. For example, in M/10/043 *Stena/DFDS*, the merging parties completed the merger prior to notification and the CCPC issued a press release stating that the parties had infringed section 19(1) of the Act, and therefore that the implementation of the acquisition was void under section 19(2).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same legal rules apply to all cases involving closing before clearance, regardless of whether or not the transaction is a foreign-to-foreign merger.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

No formal guidance has been published by the CCPC on whether structures such as 'hold-separate' undertakings might enable parties to avoid a legal breach of the suspensory obligation under section 19(1) of the Act. In general, we would expect the CCPC to follow the same approach as the Commission with regard to its approach to carve-outs or close-arounds.

Where such mechanisms have been used in Ireland, the CCPC has publicly criticised the merging parties for doing so. In M/12/031 *Top Snacks/KP Snacks*, the CCPC stated in its determination that the Act does not permit partial implementation of a merger or acquisition even where a 'framework agreement' or other kind of hold-separate arrangement is put in place with regard to certain parts of the business within the state. The CCPC might be less likely to initiate court proceedings for breach of section 19(1) or section 19(2) in cases where the Irish businesses of the merging parties were being held separate pending the grant of clearance by the CCPC. In M/16/013 *INM/Greer*, the CCPC accepted the notification of the merger after completion on assurances from INM that it would not, prior to receiving the CCPC's determination, integrate the relevant target assets into its business. Parties should seek legal advice on a case-by-case basis and consider engaging with the CCPC in pre-notification discussions.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Section 18(1A) of the Act provides that, where the turnover thresholds are met, the making of a public bid may be notified by any of the undertakings involved to the CCPC once one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

There is a standard form for notifying the CCPC. All parts of the notification form must be completed, unless a conditional approval has been granted by the CCPC in pre-notification discussions. For example, where there is no overlap between the parties' activities, it is usual practice to request an exemption from completing some or all of section 4 of the form, which requires a description of the conditions of competition in relation to all markets where there is a horizontal or a vertical overlap.

No market share threshold applies for the identification of overlaps.

The form requests details of the proposed merger, the parties involved, the overlapping products or services, any ancillary restraints and copies of any non-privileged competition assessments of the merger. The Act requires 'full details' of the proposed merger to be notified to the CCPC.

In terms of media mergers, a notification form and guidelines have been issued by the Department of Communications, Climate Action and Environment. The content required in the merger notification form includes a description of the proposed merger, and significant details on the undertakings involved. Market share details (both pre and post-merger) are required for each media business of the undertakings involved, in terms of readership, listenership, viewership and page impression hits. The undertakings involved must submit detail on compliance with industry codes of practice, relevant regulatory bodies and applicable legislation. Detail is also required on grievance procedures for employees, and employment tribunal proceedings involving employees. The notification form states that an undertaking's record in respect of industrial relations and Labour Court rulings may be examined as part of the assessment.

The undertakings involved must provide information on the 'editorial ethos' of each media business, including data on editorial control, editorial structure and positions taken regarding political endorsements and issues of debate or controversy. A breakdown of content for each media business is also required as well as details of any future plans of the undertakings; for example, whether the undertakings to be acquired will continue as separate enterprises (eg, a newspaper and a radio station) and whether there will be changes to editorial and key content-producing staff.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

Pre-notification

- Request conditional approval not to complete the entire notification form (where no overlaps); and
- meeting or conference call to discuss the proposed merger (for difficult cases, expedited cases or requests only).

Phase I

- Submit filing to the CCPC (one hard copy only is required plus an electronic copy of the merger notification form in Word format);
- publication of notice on the CCPC's website within seven days recording fact of filing and parties' names with a call for submissions or comments from third parties (generally a 10-day period);
- possibility of a formal requirement for information that stops and, when complied with to CCPC's satisfaction, restarts the Phase I timetable;
- possibility of an informal request for information that does not impact on the Phase I timetable;
- discussion of remedy proposals from the parties (if applicable), which extends the Phase I period to 45 working days;
- notice to parties of determination (clearance, conditional clearance or Phase II; with press release for noteworthy mergers);
- merging parties may request redactions from the public version of the determination; and
- publication of Phase I determination within 60 working days of date of adoption.

Phase II (if applicable)

- Communication from the CCPC setting out its decision to move to Phase II giving limited details;
- call for submissions or comments from third parties;
- possibility of a formal requirement or informal request for information;
- the CCPC may commission a market survey or economic analysis from consultants;
- meeting between the parties and the CCPC (optional);
- early determination approving the merger can be issued within 40 working days of the beginning of Phase II (rather than 120 working days from notification; this is the usual Phase II outcome) or if the investigation is to progress, the CCPC sends the parties an assessment setting out its concerns about the merger;
- oral hearing (if requested within five working days of receipt of the CCPC's assessment);
- access to the CCPC's file;
- discussion of remedy proposals from the parties (no later than 15 working days after receipt of the CCPC's assessment);
- market testing of remedy proposals of parties (depending on circumstances and at the discretion of the CCPC);
- notice to parties of determination (clearance, conditional clearance or blocking) and press release;
- merging parties may request redactions from the public version of the determination; and
- publication of Phase II determination within 60 working days of date of adoption.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The CCPC has a period of 30 working days in which to decide whether to grant a Phase I clearance, and a period of 120 working days in which to decide whether to grant a Phase II clearance.

The Act does not provide for an accelerated investigation and there is no guidance issued by the CCPC on this point. However, in practice, merging parties can request an accelerated investigation and the CCPC has issued expedited clearance decisions in cases not raising competition concerns. For example, M/12/029 *Endless/VION* was cleared in 11 days, and in cases that involved strict insolvency procedure timetables, such as M/09/002 *HMV Ireland/Zavvi*, the clearance determination was issued in nine days. More recently, in M/16/053 *Anchorage Capital/Eircom*, the CCPC cleared that 'no issues' merger in 11 days.

The CCPC can reduce the normal period of 10 days allowed for public comment after publication of notice of a merger notification on its website in individual cases, if circumstances so require. For example, in M/12/048 *Endless/Imtech Suir*, the notification period was reduced from 10 days to five days where Imtech Suir's parent company had been declared insolvent and consequently Imtech Suir was in financial jeopardy and unlikely to operate as a going concern. In that case, the CCPC issued a clearance determination in six days.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

Section 20(1)(c) of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017 provides that the substantive test for assessment of competition issues is 'whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the state' (the SLC test). The Competition and Consumer Protection Commission (CCPC) interprets the SLC test in terms of consumer welfare, which depends on a range of variables. In particular the CCPC will assess whether a merger would be likely to result in a reduction in choice or a price rise for consumers. This is a similar test to that applied by other jurisdictions, such as the UK's Competition and Markets Authority (CMA).

A merger that would otherwise give rise to an SLC may nonetheless be cleared by the CCPC where the failing firm or failing division test is met (as set out in Chapter 9 of the CCPC's Guidelines for Merger Analysis) and therefore the relevant counterfactual is not the prevailing conditions of competition. For example, in M/15/026 *Baxter Healthcare/Fannin Compounding*, the CCPC identified competition concerns related to the reduction in competition for the commercial supply of compounded chemotherapy medicines to hospitals in the state. However, the parties submitted that Fannin Compounding was a 'failing division' of Fannin Limited and that the assets involved would exit the market if the merger was prohibited. The CCPC investigated this argument and engaged Grant Thornton to independently examine financial information pertaining to Fannin Compounding. The CCPC ultimately cleared the merger. It found that the most likely outcome absent the merger would be that Fannin Compounding would close and its assets would exit the market. Thus, the competitive structure of the relevant market would deteriorate to at least the same extent in the absence of the proposed acquisition.

20 Is there a special substantive test for joint ventures?

No. Joint ventures that are notifiable under section 16(4) of the Act must satisfy the same SLC test.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

The CCPC's October 2014 Guidelines on Merger Analysis states that the CCPC will examine unilateral, coordinated, conglomerate and vertical effects (including the loss of actual 'or potential' competition). Like the European Commission, the CCPC in practice tends to focus on the risk of horizontal unilateral effects, although coordinated effects and vertical mergers are occasionally examined.

For example, in M/17/005 *Vhi Investments/Vhi Swiftcare Clinics*, the CCPC investigated potential vertical concerns arising from the acquisition by VHI Healthcare (the state's largest health insurer) of the remaining 50 per cent interest in each of two 'Swiftcare' clinics offering primary care services in Dublin and one clinic in Cork. Specifically, the CCPC investigated an input foreclosure theory of harm whereby VHI could potentially exclude other competing insurers from offering their policyholders access to these clinics. However, the CCPC determined that the clinics formed a small part of the overall primary care market (which included GP clinics and hospitals in those areas) and therefore the merger would not lead to input foreclosure.

Separately, in M/17/035 *Dawn Meats/Dunbia* the CCPC investigated whether the merger could give rise to an increased risk of coordinated effects and undertook econometric analysis to test this point, though it ultimately did not identify any concerns.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

Aside from media mergers, non-competition issues are not relevant under the Act. However, the CCPC does sometimes consider wider welfare factors. For example, in M/17/035 *Dawn Meats/Dunbia*, the CCPC investigated whether the merger would give Dawn Meats the ability and incentive to lower the prices it pays to farmers for live cattle for slaughter in the state. The CCPC did not find evidence to support this potential concern.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

The CCPC's October 2014 Guidelines on Merger Analysis state that it will consider efficiency arguments, but the burden of proof is on the parties to demonstrate that the claimed efficiency gains are as a direct result of the merger.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Upon the completion of a Phase II investigation, the Competition and Consumer Protection Commission (CCPC) may clear a merger subject to conditions or block a merger outright if the CCPC forms the opinion that the merger would lead to a substantial lessening of competition in markets for goods or services in the state.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Section 20(1)(b) of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017 provides that the CCPC may enter into discussions with the merging parties with a view to identifying measures that would ameliorate any negative competitive effects of the merger. These discussions can have as their outcome divestment undertakings or behavioural remedies. Section 20(3) of the Act provides that the negotiation of remedies or commitments may be commenced at any stage of a Phase I or Phase II investigation.

The CCPC has previously accepted both divestment undertakings and behavioural remedies as conditions to clearance determinations.

For example, in M/16/008 *PandaGreen/GreenStar*, CCPC clearance was obtained where PandaGreen made divestment undertakings in relation to Greenstar's domestic waste collection businesses in Fingal and Dun Laoghaire-Rathdown. In M/14/026 *Valeo/Wardell/Robert Roberts*, the acquirer undertook to divest the YR brand of brown sauce to address the CCPC's concern that the acquirer's large post-merger market share in the market for the supply of brown sauce to the retail sector would incentivise it to increase prices to retailers, with insufficient competitive constraint from competitors or countervailing buyer power. Divestment undertakings were also accepted in M/15/020 *Topaz/Esso*, where Phase II clearance was subject to divestment commitments relating to Esso's interest in a fuel terminal at Dublin Port and certain fuel retail sites. This interest was subsequently divested to

Applegreen during the course of 2017, with a binding commitment that Applegreen would import and supply refined fuel products, including aviation fuel (Jet A1), through the JFT.

In M/17/012 *Kantar Media/Newsaccess*, Kantar agreed to divest fixed assets and release a number of contracted customers from their fixed-term contracts. Finally, in M/17/027 *Dalata/Clarion Liffey Valley/Clayton Cardiff Lane*, the CCPC took the somewhat unusual step of requiring Dalata to commit to voluntarily notify the CCPC any time it begins operating a hotel in the state on behalf of a third party, where this would not otherwise be notifiable to the CCPC or EU Commission or give rise to potential competition concerns.

In M/18/36 *Enva/Rilta*, Enva agreed to divest property and fixed assets to ameliorate concerns identified by the CCPC in the waste-processing market as a result of its Phase II investigation. Enva also agreed to certain access proposals relating to the processing of waste lubricant oil and hazardous contaminated soil.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There is a 45-working-day statutory period for the issue of a conditional clearance at Phase I.

In practice, the Phase I deadlines tend not to allow merging parties sufficient time to design and obtain approval for any 'complex' remedies.

The Phase II timetable allows the merging parties more time to satisfy the CCPC that their remedies proposal effectively resolves any identified 'theories of harm' or competition law concern. The CCPC may 'market test' a remedies proposal during both Phase I and Phase II investigations.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The CCPC has not required remedies or commitments in foreign-to-foreign mergers, to date.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A merger clearance determination by the CCPC covers not only the notified merger but any arrangements constituting restrictions that are directly related and necessary to the implementation of the merger, and that have been described by the merging parties to the CCPC in the notification form.

In practice, the CCPC tends to follow the principles included in the European Commission's Notice on Ancillary Restraints in this regard.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

Section 20(1)(a) of the Competition Acts 2002 to 2017 (the Act) as amended by the Competition (Amendment) Act 2017 provides that, within seven days of receipt of a merger notification, the Competition and Consumer Protection Commission (CCPC) must publish a request for comments from third parties (including customers and competitors). Generally, a 10-working-day period is allowed for the submission of third-party comments during Phase I, and a 15-working-day period is allowed for the submission of third-party comments during Phase II (this 10-working-day period may be reduced depending on the facts of the merger).

In practice, the CCPC will often proactively seek submissions from competitors and customers during both Phase I and Phase II investigations.

Section 20(1)(b) of the Act provides that the CCPC may enter into discussions with third parties (including customers and competitors), with a view to identifying remedies.

The CCPC will consider all third-party submissions and, at its discretion, may meet with interested competitors and customers during the review process.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The CCPC publishes on its website notices of all mergers notified to it, written determinations and any press releases by the CCPC on particular cases.

Notifying parties can identify commercially sensitive information that they believe should remain confidential when submitting a notification. Notifying parties are also afforded the opportunity to submit comments on the deletion of confidential information from the public version of the CCPC's determination.

In the event that the CCPC seeks to include information provided by a third party in its determination, that third party will also be offered the opportunity to protect confidential information. Similar provisions apply in access to the file in Phase II.

The CCPC tends to accept all reasonable requests to maintain confidentiality in its written determinations.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Section 23 of the 2014 Act permits the CCPC to enter into arrangements with other competition authorities in other countries for the exchange of information and the mutual provision of assistance.

The CCPC maintains regular contact with competition authorities in other jurisdictions, including in particular the UK CMA and the European Commission regarding, respectively, cases that are subject to parallel reviews in the United Kingdom and Ireland and EU cases that may impact on Ireland. For example, in 2018, the CCPC closely followed the European Commission's investigations into a number of proposed mergers that it considered to be of significant interest to Ireland, including the following:

- M.8306 *Qualcomm/NXP Semiconductors*;
- M.8677 *Siemens/Alstom*;
- M.8736 *Toohil Telecom/Eircom*;
- M.8792 *T-Mobile NL/Tele2 NL*;
- M.8084 *Bayer/Monsanto*;
- M.8882 *Kennedy Wilson/AXA JV*; and
- M.8900 *Wieland Werke/Aurubis & Schwermetall*.

Finally, the CCPC is an active member of the European Competition Network, the International Competition Network and the OECD Competition Committee.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Merging parties may appeal a determination of the CCPC prohibiting a merger or imposing conditions on a point of fact or law to the Irish High Court. There is a possibility for merging parties or the CCPC to make a subsequent appeal of a High Court decision, but only on a point of law. The Competition Acts 2002 to 2017 as amended by the Competition (Amendment) Act 2017 provides no right of appeal in respect of a determination to clear a merger and third parties are not given a right of appeal.

Time frame

33 | What is the usual time frame for appeal or judicial review?

An appeal to the High Court must be lodged within 40 working days of the CCPC's published determination, or, in the case of a media merger, within 40 working days of the Minister for Communications informing the relevant party of his or her determination. The High Court will issue a decision within two months, if this is practicable.

To date, the only successful appeal to the High Court from a determination of the CCPC blocking a merger was in September 2008, when Kerry Group successfully appealed the determination of the CCPC blocking its proposed acquisition of Breeo. The CCPC lodged an appeal to the Supreme Court in respect of the High Court judgment but decided in April 2016 not to proceed with the appeal.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2020, the Competition and Consumer Protection Commission (CCPC) received a total of 41 merger notifications, representing just a 13 per cent decrease of notified mergers from 2019, despite the significant economic turmoil. The most prominent sectors for 2020 were information and communications and healthcare, both of which saw an increase in merger notifications from the previous year, while there was a sharp drop in notifications in the real estate, manufacturing and auto sectors.

The CCPC issued 43 determinations (or clearance decisions) during the year, 32 of which related to notifications made in 2020, with the remaining 11 relating to notifications carried over from 2019. Fifteen investigations involved an extended Phase 1 review, of which 13 were cleared unconditionally and two were subject to a Phase 2 investigation *(Link/Pepper*, *ESB/Coillte* (joint venture). Formal commitments to secure clearance were obtained in just one case in 202: *CVC Funds/Celtic Rugby DAC* (involving a behavioural commitment by the acquirer to voluntarily notify the CCPC if it acquires control over the commercial activities of the Six Nations competition without meeting the CCPC's mandatory notification thresholds). The parties to the latter merger met this commitment by notifying *CVC/Six Nations Rugby* to the CCPC on 17 May 2021. Separately, the CCPC also oversaw the implementation of divestment remedies in two other cases, namely *Berendsen/Kings Laundry* and *Enva/Rilta*.

The average time frame for Phase 1 clearance (excluding extended reviews) in 2020 was 23 working days (as compared with the statutory 30 working day period). The timelines varied from 10 to 29 working days (noting the introduction of the CCPC's simplified procedure). Notably, the 2020 average also marked a reduction of around two business days from the 2019 average.

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The CCPC reviewed four media mergers, clearing three of these (*Reach/ISL*, *Greencastle/Maximum Media*, *Rocketsports/BenchWarmers*) within the initial Phase 1 review period and subjecting one (*DMG/JPIMedia*) to an extended Phase 1 review, which it ultimately cleared unconditionally.

Reform proposals

35 | Are there current proposals to change the legislation?

The Department for Enterprise, Trade and Employment is currently finalising draft legislation for the possible introduction of a new foreign investment or FDI screening regime, as mandated by the EU Investment Screening Regulation (Regulation (EU) 2019/452) that became operational in October 2020 and established an information sharing and cooperation framework across EU member state authorities. The legislation establishing the new Irish regime, the Investment Screening Bill, was expected to be adopted as early as the end of the first half of 2021, after a heads of bill were approved by the government in July 2020. However, this has been delayed until the end of 2021 or beyond. Although the exact scope of the new FDI regime and whether it will give rise to additional mandatory notification requirements in certain instances remains as yet unclear until the draft legislation is published, the CCPC is likely to have a role in administering the initial review under the new FDI regime, alongside the general merger control and media merger regimes.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

On 18 March 2020, in light of the ongoing covid-19 pandemic, the Competition and Consumer Protection Commission (CCPC) announced temporary measures to assist it in complying with binding statutory deadlines and to ensure business continuity in the review of notified mergers and notifications. These temporary measures included allowing for notifying parties to file all notification forms and supporting documents (including material contained in annexes and appendices to the notification form) in electronic format by email to the CCPC. The

CCPC is also accepting request-for-information responses (involving large internal document disclosures) electronically for the first time. The electronic filing of notifications does not appear to have impacted negatively on the CCPC's merger review function, given that there was just a 13 per cent decrease of notified mergers from 2019 in 2020 despite the economic turmoil caused by the covid-19 pandemic. As a result, these temporary measures could be continued as standard practice even after covid-19 restrictions are eventually lifted.

Following its introduction in July 2020, the CCPC's new simplified procedure for transactions presenting no substantive issues was fully embraced by parties and the CCPC alike, which is set to continue into 2021. The new simplified procedure has proved particularly attractive for non-strategic or pre-'bolt on' M&A and private equity deals in the Irish market and the CCPC's latest statistics based on the six clearances from July to December 2020 demonstrate that parties can secure clearance for such 'no issues' deals in less than three weeks.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Ireland	
Voluntary or mandatory system	The Irish merger control regime is a mandatory system and no exceptions exist. The mandatory obligation to notify arises where, for the most recent financial year: • the aggregate turnover in the state of the undertakings involved is not less than €60 million; and • the turnover in the state of each of two or more of the undertakings involved is not less than €10 million. Section 18(3) of the Act provides for voluntary notification of a merger that does not meet the jurisdictional thresholds. The CCPC can request parties to potentially problematic mergers that fall below the relevant financial thresholds to voluntarily notify mergers under section 18(3).
Notification trigger/ filing deadline	The notification must be made prior to the merger or acquisition being put into effect. The notification may be made in the following circumstances: • one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted; • the undertakings involved demonstrate to the CCPC a good faith intention to conclude an agreement or a merger or acquisition is agreed; or • in relation to a scheme of arrangement, a scheme document is posted to shareholders.
Clearance deadlines (Stage 1/Stage 2)	A Phase I clearance determination must be issued by the CCPC within 30 working days of the submission of a full and complete filing by the merging parties (the 'appropriate date'), unless either the CCPC has used its power to 'stop and restart the clock' by issuing a formal request for information, or where the parties and the CCPC negotiate remedies to 'ameliorate the effects of the merger', which extends the Phase I period to 45 working days. A Phase II clearance determination must be issued by the CCPC within 120 working days of the appropriate date, unless the CCPC has used its power to 'stop the clock' by sending a formal request for information, or where the parties and the CCPC negotiate remedies to 'ameliorate the effects of the merger', which extends the Phase II period to 135 working days.
Substantive test for clearance	Section 20(1)(c) of the Act provides that the substantive test for assessment of competition issues is 'whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the State' (the SLC test).
Penalties	Under section 18(9) of the Act, wilful and knowing failure to notify a merger or acquisition that is caught by the jurisdictional thresholds is a criminal offence punishable by fines of up to €250,000, plus €25,000 per day for a continued breach. The CCPC does not have legal powers to impose a fine itself; instead the CCPC can recommend that the Director of Public Prosecution initiate a prosecution in the Irish Courts. Liability attaches to the undertaking itself and/or the 'person in control' of an undertaking. Section 18(11) of the Act provides that the 'person in control' of an undertaking is: • in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention; • in the case of a partnership, each partner who knowingly and wilfully authorises or permits the contravention; or • in the case of any other form of undertaking, any individual in control of that undertaking who knowingly and wilfully authorises or permits the contravention.
Remarks	The revised thresholds have resulted in a significant reduction in merger notifications in 2019. As of 20 June 2019, 16 mergers had been notified to the CCPC, a 68 per cent reduction as compared to the same time period in 2018.

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