Merger Control

The international regulation of mergers and joint ventures
in 74 jurisdictions worldwide

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CONTENTS

At the intersection of the global economy and national interests: foreign investment review and merger control meet 7
Robert Schlossberg and Christine Laciak
Freshfields Bruckhaus Deringer

Timelines 11
Michael Bo Jaspers and Joanna Goyder
Freshfields Bruckhaus Deringer

Acknowledgements for verifying contents 27

Albania 29
Günter Bauer, Denis Selimi and Paul Hesse
Wolf Theiss

Argentina 33
Alfredo M O'Farrell, Miguel del Pino and Santiago del Rio
Marval, O'Farrell & Mairal

Australia 39
Fiona Crosbie and Kon Stellios
Allens

Austria 47
Axel Reidlinger and Maria Dreher
Freshfields Bruckhaus Deringer

Belgium 54
Laurent Garzaniti, Thomas Janssens, Tone Oeyen and Amaryllis Müller
Freshfields Bruckhaus Deringer

Bolivia 59
Jorge Luis Inchauste Comboni
Guevara & Gutierrez SC – Servicios Legales

Bosnia and Herzegovina 63
Günter Bauer, Paul Hesse and Amela Selmanagić
Wolf Theiss

Brazil 68
Marcelo Calliari, Daniel Andreoli and Joana Cianfarani
TozziniFreire Advogados

Bulgaria 73
Peter Petrov
Boyanov & Co

Canada 78
Neil Campbell, James Musgrove, Mark Opashinov and Joshua Chad
McMillan LLP

Channel Islands 85
Rob van der Laan
OmniCLES

Chile 92
Claudio Lizana and María José Villalón
Carey

China 97
Nicholas French, Ninette Dodoo, Vivian Cao and Janet (Jingyuan) Wang
Freshfields Bruckhaus Deringer

Colombia 104
Carlos Esguerra
Posse Herrera Ruiz

COMESA 110
Janine Simpson and Nkonzo Hlatshwayo
Webber Wentzel

Croatia 113
Günter Bauer, Luka Čolić and Paul Hesse
Wolf Theiss

Cyprus 119
Anastasios A Antoniou and Aquilina Demetriadi
Anastasios Antoniou LLC

Czech Republic 124
Martin Nedelka and Radovan Kubáč
Nedelka Kubáč advokáti

Denmark 129
Morten Kofmann, Jens Munk Plum, Erik Bertelsen and Bart Creve
Kromann Reumert

Egypt 134
Firas El Samad
Zulficar & Partners

Estonia 138
Raino Paron and Martin Mäesalu
Ellex

European Union 143
John Davies, Rafique Bachour and Angeline Woods
Freshfields Bruckhaus Deringer

Faroe Islands 151
Morten Kofmann, Jens Munk Plum, Erik Bertelsen and Bart Creve
Kromann Reumert

Finland 154
Christian Wik, Niko Hukkinen and Sari Rasinkangas
Roschier, Attorneys Ltd

France 159
Jérôme Philippe and François Gordon
Freshfields Bruckhaus Deringer

Germany 166
Helmut Bergmann, Frank Röhling and Bertrand Guerin
Freshfields Bruckhaus Deringer

Greece 175
Aida Economou
Vainanidis Economou & Associates

Greenland 180
Morten Kofmann, Jens Munk Plum, Erik Bertelsen and Bart Creve
Kromann Reumert

Hong Kong 183
Nicholas French, Ninette Dodoo and Ruth Chen
Freshfields Bruckhaus Deringer

Hungary 192
Gábor Fejes and Zoltán Marosi
Oppenheim

Iceland 198
Hulda Árnadóttir and Heiðrún Lind Marteinsdóttir
LEX

India 203
Shweta Shroff Chopra, Harman Singh Sandhu and Rohan Arora
Shardul Amarchand Mangaldas & Co

Indonesia 209
HMBC Rikrik Rizkiyana, Anastasia PR Daniyati and Ingrid Gratsya Zega
Assegaf Hamzah & Partners

Ireland 215
Helen Kelly and Eoin Kealy
Matheson

Israel 221
Eytan Epstein, Tamar Dolev-Green and Eti Portook
Epstein, Knoller, Chomsky, Osnat, Gilat, Tenenboim & Co

Italy 227
Gian Luca Zampa
Freshfields Bruckhaus Deringer

Japan 236
Akinori Uesugi and Kaori Yamada
Freshfields Bruckhaus Deringer

Korea 242
Seong-Un Yun and Sanghoon Shin
Bae, Kim & Lee LLC

Latvia 247
Julija Jerneva and Janis Sarans
VILGERTS

Liechtenstein 252
Heinz Frommelt
Sele Frommelt & Partners Attorneys at Law Ltd

Luxembourg 257
Alexandrine Armstrong-Cerfontaine and Bertrand Geradin
King & Wood Mallesons

Macedonia 260
Vesna Gavriloska, Maja Jakimovska and Margareta Taseva
Čakmakova Advocates

Malta 266
Ian Gauci and Karl Sammut
GTG Advocates

Mexico 272
Gabriel Castañeda
Castañeda y Asociados

Morocco 277
Corinne Khayat and Maïja Brossard
UGGC Avocats

Namibia 282
Peter Frank Koep and Hugo Meyer van den Berg
Koep & Partners

Netherlands 286
Winfred Knibbeler and Paul van den Berg
Freshfields Bruckhaus Deringer

New Zealand 292
Sarah Keene and Troy Pilkington
Russell McVeagh

Nigeria 302
Babatunde Irukera and Ikem Isiekwena
SimmonsCooper Partners

Norway 307
Jonn Ola Sørensen, Simen Klevstrand and Øyvind Andersen
Wikborg Rein

Pakistan 312
Waqqas Mir
Mohsin Tayebaly & Co

Poland 317
Aleksander Stawicki and Bartosz Turno
WKB Wierciński Kwieciński Baehr

Portugal 322
Mário Marques Mendes and Pedro Vilarinho Pires
Gómez-Acebo & Pombo

Russia 329
Alexander Viktorov
Freshfields Bruckhaus Deringer

Saudi Arabia 334
Fares Al-Hejailan, Rafique Bachour, Anna Biganzoli and Hani Nassef
Freshfields Bruckhaus Deringer

Serbia 339
Günter Bauer and Maja Stanković
Wolf Theiss

Singapore 345
Lim Chong Kin and Corinne Chew
Drew & Napier LLC

CONTENTS

Slovakia 354
Günter Bauer, Ľuboš Frolkovič and Paul Hesse
Wolf Theiss

Slovenia 359
Günter Bauer, Klemen Radosavljević and Paul Hesse
Wolf Theiss

South Africa 364
Robert Legh and Tamara Dini
Bowman Gilfillan

Spain 374
Francisco Cantos, Álvaro Iza and Enrique Carrera
Freshfields Bruckhaus Deringer

Swaziland 380
Kenneth J Motsa and Gabsile A Maseko
Robinson Bertram

Sweden 383
Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg
Mannheimer Swartling

Switzerland 388
Marcel Meinhardt, Benoît Merkt and Astrid Waser
Lenz & Staehelin

Taiwan 393
Mark Ohlson, Charles Hwang and Fran Wang
YangMing Partners

Thailand 401
Pakdee Paknara and Pattraporn Poovasathien
Weerawong, Chinnavat & Peangpanor Ltd

Turkey 405
Gönenç Gürkaynak
ELIG, Attorneys-at-Law

Ukraine 411
Igor Svechkar and Alexey Pustovit
Asters

United Arab Emirates 416
Rafique Bachour and Anna Biganzoli
Freshfields Bruckhaus Deringer

United Kingdom 421
Martin McElwee, Alison Jones and Olivia Hagger
Freshfields Bruckhaus Deringer

United States 428
Ronan P Harty and Stephen M Pepper
Davis Polk & Wardwell LLP

Uruguay 437
Alberto Foderé
Foderé Abogados

Uzbekistan 441
Bakhodir Jabborov and Jamol Ryskiyev
GRATA Law Firm

Zambia 445
Sydney Chisenga
Corpus Legal Practitioners

The ICN in 2015 449
Andreas Mundt
Chair of the International Competition Network's Steering Group
President of the Bundeskartellamt (Germany)

Quick reference tables 450

Ireland

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Legislation and jurisdiction

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 2014 (the Act). The regime was recently significantly amended by the Competition and Consumer Protection Act 2014, which came into force on 31 October 2014 (the 2014 Act).

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

2 What kinds of mergers are caught?

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

(a) two or more undertakings, previously independent of one another, merge; or

(b) 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

(c) 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.

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 (see question 5 for further details on turnover thresholds). Where these requirements are not met, mergers and acquisitions may be notified to the CCPC on a voluntary basis. The turnover thresholds are disapplied for media mergers under the Act.

3 What types of joint ventures are caught?

Only full-function joint ventures are caught by the Irish merger control regime. The relevant definition is included in section 16(4) of the Act: 'the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger'. The wording is closely based on the EUMR. The CCPC and the European Commission adopt similar approaches in identifying whether joint ventures are subject to merger control law.

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 'control'.

As under the EUMR, the definition of control that applies under the Act is based on the concept of 'decisive influence'. The following non-exhaustive list of the circumstances that can give rise to control is included in section 16(2) of the Act:

(a) ownership of, or the right to use all or part of, the assets of an undertaking, or

(b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

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 €50 million; and
- the turnover in the state of each of two or more of the undertakings involved is not less than €3 million.

The applicable jurisdictional turnover thresholds were amended under the 2014 Act with the intention of only capturing mergers that have a strong nexus to the state and eliminating the notification requirement for some foreign-to-foreign mergers. The previous applicable turnover thresholds were perceived to have resulted in a requirement to notify some mergers with limited effects in the state.

The turnover thresholds are disapplied for media mergers under the Act. The CCPC can also investigate mergers that fall below the turnover thresholds in Part 3 of the Act under sections 4 and 5 of the Act (ie, where it believes 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).

The concept of 'undertakings involved in the merger or acquisition' is broadly equivalent to the concept of 'undertakings concerned' under the EUMR.

The CCPC has not issued detailed guidance on its approach to the calculation of turnover. However, in practice, the CCPC tends to calculate turnover in a manner consistent with the principles of the European Commission's Jurisdictional Notice.

As for the 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. In practice, the CCPC tends to allocate all turnover by customer location, even in cases involving financial institutions where the European Commission's Jurisdictional Notice would suggest that turnover should be geographically allocated on a 'branch basis'.

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

Filing is mandatory for transactions that meet the jurisdictional 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 test?

The jurisdictional thresholds can cover mergers where the competitive effects are predominantly applicable outside the state, although the new jurisdictional thresholds set out in question 5 are intended to capture mergers with a closer nexus to Ireland. It is intended that many

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foreign-to-foreign mergers that previously would have required notification under the previous jurisdictional thresholds will now be excluded from a requirement to notify to the CCPC. There is no local effects test under the Act, in that mergers that will not materially affect competition in the state must nevertheless be notified to the CCPC if they meet the applicable jurisdictional thresholds.

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

Special rules apply to media mergers. Media mergers are defined as either mergers where two or more undertakings involved 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 term 'media business' is defined as:

- publication of newspapers or periodicals consisting substantially of news and comment on current affairs including the publication of such newspapers or periodicals on the internet,
- transmitting, re-transmitting or relaying a broadcasting service,
- providing any programme material consisting substantially of news and comment on current affairs to a broadcasting service, or
- making available on an electronic communications network any written, audiovisual or photographic material, consisting substantially of news and comment on current affairs, that is under the editorial control of the undertaking making available such material.

The 2014 Act has extended the definition of 'media business' to include online news sources and online broadcast of certain audiovisual material.

The 2014 Act introduced a new definition for 'carrying on a media business in the state', requiring undertakings involved to have either (i) a physical presence in the state and make sales to customers located in the state, or (ii) to have made sales in the state of at least €2 million in the most recent financial year.

The 2014 Act also sets out a new substantive test for identifying a 'plurality of the media' concern. The new 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'.

The 2014 Act introduced a new requirement for the undertakings involved to 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 to the Minister for Communications, each attracting a separate fee. The Minister for Communications now has responsibility for consideration of media mergers in place of the Minister for Jobs who retains responsibility for competition policy matters.

The Minister for Communications has 30 working days, commencing 10 days after a CCPC determination clearing the merger, to consider the media merger. If the Minister for Communications is concerned that the media merger may be contrary to the public interest in protecting plurality of the media, the Minister for Communications will request the Broadcasting Authority of Ireland (BAI) to carry out a 'Phase II' examination. Within 80 working days of receipt of the request, the BAI must prepare a report for the Minister for Communications outlining its view on the merger with regard to the new plurality of the media test (above), and 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 for Communications will make the ultimate decision, taking into account the BAI report and, if applicable, the views of the advisory panel. The Minister for Communication's final determination must be made within 20 working days of receipt of the BAI report.

Notification and clearance timetable

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 or acquisition, and may be made if the undertakings involved demonstrate a good faith intention to conclude an agreement. This approach is in line with practice under the EUMR.

Under section 18(9) of the Act, wilful and knowing failure to notify a merger 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 has legal powers to initiate a summary prosecution in the Irish courts or to refer the matter to the Director for Public Prosecutions to initiate prosecution on indictment.

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

> a) *in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention,*
> b) *in the case of a partnership, each partner who knowingly and wilfully authorises or permits the contravention,*
> c) *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.*

In practice, we are not aware of any penalty having being imposed by the Irish courts on account of a failure to notify a merger that was caught by the jurisdictional thresholds.

10 Who is responsible for filing and are filing fees required?

Each 'undertaking involved' in the transaction 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?

In respect of a non-media merger, 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 ('effective date'), unless either the CCPC has used its power to 'stop and re-start the clock' by issuing a formal request for information (RFI), 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 effective date unless the CCPC uses its new power (introduced in the 2014 Act) to 'stop and restart the clock' by issuing a formal RFI. The 120 working day time limit is suspended by the issuance of a formal RFI in Phase II, and restarts when the RFI is complied with. If the undertakings involved negotiate remedies with the CCPC, the Phase II period is extended to 135 working days.

Media mergers are subject to the waiting periods outlined above in question 8.

A suspensory obligation is included in the Act. Specifically, section 19(1) of the Act imposes a prohibition on the merging parties putting a notifiable merger into effect prior to the issue of a clearance determination.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

Section 19(2) of the Act provides that a notifiable merger that is put into effect prior to a clearance determination is void. The Act does not state whether a transaction that is completed prior to clearance is rendered void for all time, or merely until such time as the CCPC issues a clearance determination. However, the CCPC has previously expressed the view that any such transaction remains void until the date of a clearance determination (decision in M/04/003 *Radio 2000/Newstalk 106*).

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

To date, the CCPC has not taken court action against any party for closing before clearance. The CCPC has, however, released statements that parties have breached the Act by closing before clearance. For example, in M/10/043 *Stena/DFDS*, the merging parties closed the transaction prior to notification and the CCPC issued a press release stating that the parties had infringed section 19(1) of the Act, therefore the implementation of the acquisition was void. It is expected that the changes to the trigger date for making a notification (see question 9) should reduce instances of 'gun jumping'.

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 the transaction is a foreign-to-foreign merger.

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However, as stated in question 12, to date no party has been sanctioned by the Irish courts for closing a notifiable transaction prior to clearance.

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

No guidance has been provided by the CCPC or by the Irish courts 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.

While such mechanisms have been used in Ireland, the CCPC has publicly criticised the merging parties (in a press release or decision). As recently as 2013, 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. It might be less likely to initiate court proceedings for breach of section 19(1) in cases where the Irish businesses of the merging parties were being held separate pending the grant of clearance by the CCPC.

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

Section 18(1A) of the Act provides that, where the jurisdictional 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.

16 What is the level of detail required in the preparation of a filing?

There is a standard form for a filing to 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.

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

In terms of media mergers, a merger notification form and guidelines have recently been issued by the Department of Communications, Energy and Natural Resources. The content required in the merger notification form includes a description of the proposed transaction, 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 (eg, advertising; regional, local, national or international stories; sport; entertainment; audience participation; and cross-media content). Undertakings involved can also point to alternative content provided by other media undertakings that may protect against any adverse impact the proposed merger could have on media plurality in the state. The future plans of the undertakings must also be submitted, 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.

The guidelines state that information provided in the merger notification form will be assessed by the Minister for Communications under a series of 'relevant criteria' defined in the Act (eg, the effect of the merger on media plurality, the desirability of allowing one undertaking to hold significant interests in a media sector or across a number of media sectors, whether the scale and reach of the state-owned broadcasters RTÉ and TG4 are adequate to protect the public interest in media plurality, commitments offered by the undertakings). In assessing the 'relevant criteria, the guidelines provide that the information supplied in the merger notification form will be evaluated by the Minister for Communications under a number of headings: ownership and control, market share, governance, editorial ethos, content, sources, and finance. The first media mergers under the Act have been notified and cleared by the CCPC in Phase I on 12 March 2015 (M/15/008 *Discovery/Setanta Sports Asia*) and on 15 May 2015 (M/15/018 *Southbank/N-Vision*). At the time of writing, it is not clear whether the Minister for Communications has made determinations on either merger.

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

A full description of the applicable waiting periods is included in response to question 11.

The CCPC generally 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 waiting period to apply in any circumstances. However, in practice, merging parties frequently request an accelerated investigation and the CCPC has issued expedited clearance decisions in cases such as M/12/029 *Endless/VION*, which was cleared in 11 days, and in cases that involved strict insolvency procedure timetables, such as M/09/002 *HMV Ireland/Zavvi*, which was cleared in nine days. The CCPC's Mergers and Acquisition Procedures allows for the CCPC to reduce the normal period of 10 days allowed for comment after publication of notice of a merger notification on its website in individual cases, if circumstances so require.

18 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 transaction (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 request for information that stops and restarts the Phase I timetable;
- possibility of an informal request for information that does not impact on the Phase I timetable but must be dealt with promptly;
- discussion of remedy proposals from the parties (if applicable, extension to 45 working days);
- notice to parties of determination (clearance, conditional clearance or Phase II; with press release for more 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 or informal request for information (note the 2014 Act has introduced a new 'stop the clock' RFI power for the CCPC in Phase II);
- the CCPC may commission a market survey or economic analysis from consultants;
- meeting between the parties and the CCPC (optional);
- early determination approving the transaction can be issued within 40 working days (rather than 120 working days; 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;

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- 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 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.

The typical steps in a media merger worked in a similar manner during the previous regime, which involved interaction with the Minister for Jobs in parallel, normally involving submissions only. Under the new regime for clearance of media mergers, the Minister for Communications has 30 working days, commencing 10 days after a CCPC determination clearing the merger, to consider the media merger in Phase I, and effectively an additional 100 working days under a full Phase II investigation.

Substantive assessment

19 What is the 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). The 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.

20 Is there a special substantive test for joint ventures?

Joint ventures that are notifiable under section 16(4) of the Act must satisfy the same SLC test.

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

Unilateral, coordinated, conglomerate and vertical effects are examined. Like the European Commission, the CCPC in practice tends to focus on unilateral effects 'theories of harm'. In terms of the specific matters that will be considered, the CCPC's October 2014 Guidelines on Merger Analysis states that the CCPC will consider, inter alia, the market structure – degree of concentration, market shares, unilateral and coordinated effects and vertical foreclosure; the likely reaction of competitors and customers; and countervailing buyer power.

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

Aside from media mergers, where the media plurality test set out in question 8 must be applied by the Minister for Communications, as well as the SLC test applied by the CCPC, non-competition issues are not otherwise relevant under the provisions of the Act.

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 there is a high burden of proof on the parties to demonstrate that the claimed efficiency gains are as a direct result of the merger.

Remedies and ancillary restraints

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

Upon the completion of a Phase II investigation, the 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.

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

Section 20(1)(b) of the Act 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. Behavioural remedies were accepted in M/09/13 *Metro/Herald AM* where ring-fencing and reporting obligations were put in place so as to ensure that the *Metro Herald* free newspaper would compete effectively with its shareholders' broadsheet newspaper; and M/10/026 *ESB/NIE* so as to prevent the exchange of commercially sensitive information regarding the electricity transmission and distribution systems in Northern Ireland between the target and the acquirer. Most recently, divestment undertakings were accepted by the CCPC in M/14/026 *Valeo/Wardell/Robert Roberts*, where the acquirer undertook to divest the YR brand of brown sauce in order to address the negative competitive effects of the merger. The CCPC was concerned 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.

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

As stated above, there is a 45 working day statutory period for the issue of a conditional clearance at Phase I.

In practice, the CCPC tends not to allow merging parties sufficient time to design and obtain approval for any complex remedies proposal during the Phase I timetable, in particular because the CCPC often does not articulate clearly its competition assessment or 'theories of harm' during Phase I discussions.

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. As noted above, the CCPC may 'market test' a remedies proposal during Phase II.

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

Thus far, the CCPC has not subjected any foreign-to-foreign mergers conditional to clearance.

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

A merger clearance decision by the CCPC covers not only the notified transaction but any arrangements constituting restrictions which are directly related and necessary to the implementation of the merger, and which 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 its assessment of ancillary restraints.

Involvement of other parties or authorities

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

Section 20(1)(a) of the Act provides that, within seven days following receipt of a merger notification, the 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.

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

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.

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Update and trends

Key merger investigations of the CCPC

In 2014, the CCPC initiated two Phase II investigations pursuant to section 21(2)(b) of the Act. The cases subject to Phase II were M/13/036 *Glanbia/Wexford Creamery* (decision to move into Phase II made on 5 March 2014, and clearance issued by the CCPC (without conditions) on 30 April 2014), and M/14/026 *Valeo/Wardell/Robert Roberts* (decision to move into Phase II on 18 December 2014, and clearance issued by the CCPC (subject to the condition that the acquiring party would divest the YR brand of brown sauce) on 17 February 2015).

The *Glanbia/Wexford Creamery* case involved the acquisition by Glanbia of Wexford Creamery, an entity supplying liquid milk, cream and cheese under the 'Wexford' brand to various Irish retailers and selling cheese by-product, whey, to Glanbia. The CCPC's Phase II review appears to have been prompted by concerns about consolidation occurring in Ireland's agribusinesses, in particular, the purchase of milk from dairy farmers and greater strength in procurement by Glanbia and possible knock-on effects on milk and cheese making. Consolidation in Irish agribusiness, and milk and cheese processing in particular, is likely to be subject to strict CCPC scrutiny in future.

The *Valeo/Wardell/Robert Roberts* transaction involved horizontal overlaps between the merging parties' activities in 20 product categories. The CCPC's investigation predominantly focused on the competitive effects of the transaction on the market for 'the supply of brown sauce to the retail sector', and the acquisition was cleared in Phase II subject to the divestment of the YR brand of brown sauce.

The CCPC also cleared a merger in Phase I subject to behavioural conditions in 2014 (M/13/033 *Sappho/TCH*), which involved the acquisition by Sappho of the regional radio stations Beat FM and WLR FM, as well as joint control of Red FM. The merging parties submitted proposals in Phase I of the investigation in order to address concerns arising from the horizontal overlap between Beat FM and WLR FM in the targeting of local advertising in Waterford city and county. The proposals essentially set out that the sales and advertising teams of each of Beat FM and WLR FM would be operated entirely separately, with a commitment that information on the sale of advertising and pricing policies of each radio station would not be shared with the other. The merging parties also proposed that (with one exception), no member of the management team of WLR FM would sit on the board of directors of Beat FM, and no member of the management team of Beat FM would sit on the board of directors of WLR FM. An 'independent observer' was proposed by the merging parties to monitor and report to the CCPC regarding compliance with the proposals. The CCPC accepted the proposals and adopted them as conditions of the merger.

During 2014, the CCPC accepted a reference from the European Commission of a proposed acquisition that met the thresholds for European Commission review under article 4(4) of the EUMR (M/14/008 *Fitzwilliam/Wittington Canada/Arnotts*). The reference was made on the request of one of the undertakings involved, following discussions between the undertakings, the European Commission and the CCPC, on the basis that the acquisition would significantly affect competition in a distinct market in Ireland (multi-category non-food retailing in the Dublin area).

Key legislative developments

The 2014 Act significantly amended the merger control regime in Ireland, introducing revised turnover thresholds, extending time frames for investigations by the CCPC, and making substantial changes to the media merger regime. While it is still too early to draw definite conclusions on the impact of the changes, a number of developments can be noted.

Buildings as a target 'asset'

The precise features of an 'asset acquisition' were considered in M15/004 *Blackstone/The Atrium Buildings* where the CCPC cleared a transaction in the market for 'rentable commercial property': two Grade A commercial buildings located in the Sandyford Industrial Estate in Dublin. Implicit in the view taken by the CCPC, for the first time, is that the buildings constituted an 'undertaking' for the purposes of Part 3 of the Act. The basis for this view was (i) the assets transferred with existing leases over office space, licences and a roof mast, and (ii) generated a rental income of greater than €3 million in its most recent financial year. While the determination does not refer to any employees transferring in the transaction, it does refer to the Building Owners and Managers Association (BOMA) definition of Grade A, which provides such buildings or offices are 'most prestigious buildings competing for premier office users with rents above average for the area. Buildings have high quality standard finishes, state of the art systems, exceptional accessibility and a definite market presence.' It is likely that this latter feature provided a basis for the CCPC view – nonetheless, a degree of uncertainty exists as to whether an asset acquisition in Ireland is identical to that under the EUMR. We understand that the CCPC may produce further guidance on this point later in 2015. In any event, from a merger control policy perspective, there is ample evidence to support 'rentable commercial property' as forming a distinct product market capable of review by the CCPC.

Advance notification

Helpfully, the Irish rules now mirror the position at EU level such that parties may now notify a proposed transaction to the CCPC, where they can demonstrate that there is a 'good faith intention' to enter into a binding agreement. In M/14/041 *JDM/Common Cars*, the parties notified on this basis and later followed up with a draft share purchase agreement which the CCPC accepted as evidence of the parties' bona fides. It is not clear if initial payment of the filing fee alone was enough to demonstrate to the CCPC the parties' 'good faith intention to conclude an agreement'. While early notification involves public notice of the impending deal which may influence the parties' decision to notify in advance, we expect that this mechanism will be a useful tool for parties to use in future from a deal scheduling perspective.

Delay in clearance

The lower financial turnover thresholds have resulted in a definite increase in notifiable transactions. For example, there were 31 notified transactions in 2015 at 1 July, while in previous years there were far fewer notified transactions by 1 July: 18 in 2014, 19 in 2013, 10 in 2012, and 18 in 2011. In addition, we identify that transactions involving small local businesses such as petrol stations and local car dealerships, are now being notified on the basis of the lower turnover thresholds triggering notification. Additionally, 28 per cent of transactions notified since October 2014 involved the hotel sector. This may, in part, arise from parties seeking to restructure debt associated with the development of hotels during the Celtic Tiger years. All hotel sector transactions were cleared at Phase I. Nonetheless, we identify an overall rise in the time taken by the CCPC to review transactions; based on the 36 notifications cleared under the new thresholds since October 2014, we identify an average review period for a Phase I decision of 33.6 calendar days (22.8 working days). Previously, the CCPC had a single calendar month to reach a Phase I decision; the average time for clearance was 26.5 calendar days in 2013. This trend is likely influenced by the increased caseload of the CCPC.

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

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

As stated above, 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.

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

Section 46 of the 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.

We understand that the CCPC maintains regular contact with competition authorities in other jurisdictions, including in particular the UK Competition and Markets Authority and the European Commission regarding cases that are subject to parallel reviews in the UK and Ireland and EU cases that may impact on Ireland.

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

Judicial review

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 Act provides no right of appeal in respect of a determination to clear a merger and third parties are not given a right of appeal.

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 after the CCPC's published determination, or, in the case of a media merger, within 40 working days after the Minister for Communications informs 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 has lodged an appeal to the Supreme Court and the case remains pending at the time of writing due to long waiting periods before the Supreme Court.

Enforcement practice and future developments

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

The CCPC initiated two Phase II investigations in 2014, one of which was cleared subject to a divestment condition (M/14/026 *Valeo/Wardell/Robert Roberts*) (see 'Update and trends' for more detail).

We have not identified any particular divergence in the CCPC's approach to foreign-to-foreign mergers, as opposed to local effects mergers. As noted in question 5, new jurisdictional thresholds for compulsory notification of mergers have been introduced by the 2014 Act with the intention of eliminating the need to notify some foreign-to-foreign transactions and only capture mergers with a strong nexus to the state.

The CCPC has not identified any priority industry sectors or competition issues that will inform its approach to merger control investigations. However, merging parties can expect the CCPC to closely scrutinise transactions involving material overlaps in consumer-facing markets and key infrastructure assets (eg, telecoms, electricity and gas, transport networks).

35 Are there current proposals to change the legislation?

The 2014 Act came into force on 31 October 2014, and introduced significant changes to the merger control regime (as outlined above). There are no further plans to change applicable merger control legislation at this time.

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