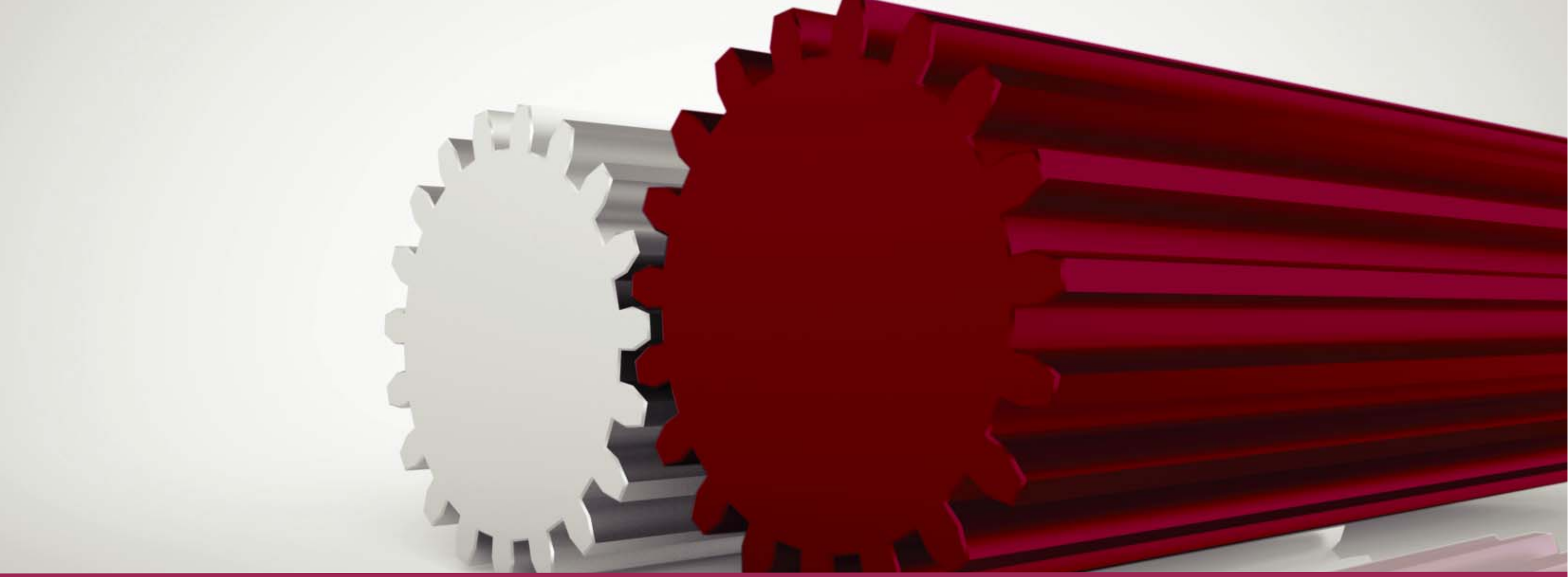

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The International Comparative Legal Guide to:

Merger Control 2014

10th Edition

A practical cross-border insight into merger control

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The International Comparative Legal Guide to: Merger Control 2014

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Contributing Editors
Nigel Parr and Catherine Hammon, Ashurst LLP

Account Managers
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Senior Editor
Suzie Kidd

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 52 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Ireland

Matheson

Helen Kelly

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Irish Competition Authority (the "Competition Authority") is an independent body responsible for the promotion and enforcement of competition law in Ireland. The workings of the Competition Authority are governed by the Competition Acts, 2002 – 2012, (the "Competition Act"). Part 3 of the Competition Act, which came into force on 1 January 2003, governs Ireland's merger control regime. Currently, the Competition Authority has sole responsibility for non-media mergers and mergers not involving "credit institutions" necessary to maintain the stability of the financial system of the State. Currently, each of the Competition Authority and Minister for Jobs, Enterprise and Innovation (the "Minister") has a role as regards media mergers. Draft legislation in the form of the Consumer and Competition Law Bill is expected to be published in late 2013 and is discussed further below. It is expected that the Bill will give the Minister for Communications, Energy and Natural Resources (the "Minister for Communications") a role in media mergers for the first time.

As regards mergers involving "credit institutions", in circumstances where the Minister for Finance considers that a merger or acquisition involving a credit institution is necessary to maintain the stability of the financial system in the State, then the power to determine whether or not the merger or acquisition should be approved lies with the Minister for Finance and not the Competition Authority. Section 7 of the Credit Institutions (Financial Support) Act (the "Credit Institutions Act") provides that such mergers will be notifiable to the Minister for Finance, rather than the Competition Authority and that such mergers may not be implemented without Ministerial approval.

The draft heads of the Consumer and Competition Law Bill provide for the amalgamation and updating of the powers and functions of the National Consumer Agency ("NCA") and the Competition Authority. The new Authority will carry out all the functions currently carried out by both agencies. The NCA is the statutory body charged with defending consumer rights and interests through, *inter alia*, the enforcement of consumer law. It is possible, therefore, in order to accommodate the NCA's objectives, that the "new" Competition Authority may be required to accord consumer welfare greater prominence in the assessment of mergers.

1.2 What is the merger legislation?

Ireland's merger control regime is governed by Part 3 of the Competition Act and the Credit Institutions Act 2008.

The Competition Authority has published a number of helpful guidance notes including "Access to the File in Merger Cases" and "Revised Procedures for the Review of Mergers and Acquisitions".

1.3 Is there any other relevant legislation for foreign mergers?

Irish law contains no foreign investment control legislation.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The acquisition of shares in financial services companies is subject to additional rules under Irish law. Directive 2007/44/EC (the "Directive") has been implemented in Ireland by the European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009. These Regulations amend rules contained in the Central Bank Acts, the Markets in Financial Instruments Directive Regulations 2007, the European Communities (UCITS) Regulations 2003 and the Life and Non-Life Insurance Regulations adopted under the European Communities Act, 1972. The prior consent of the Central Bank of Ireland (the "Central Bank") is required in respect of the direct or indirect acquisition of shares which will result in a person holding more than 10 per cent of the capital or voting shares of such Irish authorised entities including, an (MiFID) investment firm (e.g. stockbroker), a UCITS management company or insurance company. The approval of the Central Bank is also required for all such entities once a 10 per cent threshold is exceeded where further acquisitions would result in the holder owning more than 20 per cent, 33 per cent or 50 per cent of the shares in the company. Similar rules apply to "local" brokers and other intermediaries regulated by the Investment Intermediaries Act 1995. Other instances when the prior consent of the Central Bank is sought arise where the holding is less than 10 per cent but where the Central Bank considers it possible to exercise control or a significant amount of influence over the management of the entity in question. Such transactions must not proceed without the approval of the Central Bank and there is a prescribed assessment period as set out in the Directive (broadly 60 working days).

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, how is the concept of "control" defined?

Under Section 16(1) of the Competition Act, a merger or acquisition is deemed to occur if:

1 two or more undertakings, previously independent of one another, merge;

2 one or more individuals or other undertakings who or which control one or more undertakings acquire direct or indirect control of the whole or part of one or more other undertakings;

3 the result of an acquisition by one undertaking (the "first undertaking") of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the "second undertaking"), is to place the first undertaking in a position to replace (or substantially to replace) the second undertaking in the business or, as appropriate, the part of the business in which that undertaking was engaged immediately before the acquisition; or

4 a joint venture is created which performs, on an indefinite basis, all the functions of an autonomous economic entity.

Tests one, two and four outlined above replicate the tests set out in the European Union Merger Regulation ("EUMR"). The term "control" is defined in Section 16(2) in similar terms to the EUMR, i.e. the ability to exercise "decisive influence" over the activities of an undertaking.

Section 16(3) of the Competition Act provides that "control is acquired by an individual or undertaking if he, she or it:

(a) becomes the holder of the rights or contracts, or entitled to use the other means, referred to in subsection (2) above; or

(b) although not becoming such a holder or entitled to use those other means, acquires the power to exercise the rights derived there from".

Section 16(5) provides that "in determining whether influence of the kind referred to in subsection (2) is capable of being exercised, regard shall be had to all the circumstances of the matter and not solely to the legal effect of any instrument, deed, transfer, assignment or other act done or made".

In interpreting concepts such as "mergers and acquisition", "control" and "decisive influence" in the Competition Act, the Competition Authority may be influenced by European Commission ("Commission") practice and decisions, including relevant parts of the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The acquisition of a minority shareholding can only amount to a "merger" in a situation where that minority interest is sufficient to give the undertaking involved joint or sole control.

2.3 Are joint ventures subject to merger control?

Part 3 of the Competition Act applies to full-function joint ventures. Section 16(4) of the Competition Act provides that "the creation of a joint venture to perform, on an indefinite basis, all the functions of an autonomous economic entity shall constitute a merger falling within subsection (1)(b)". In relation to full-function joint ventures, as with other areas outlined above, the Competition Authority is influenced by the Commission's guidance and case law.

2.4 What are the jurisdictional thresholds for application of merger control?

In respect of non-media mergers the financial thresholds which trigger the mandatory obligation to notify are found in Section 18(1)(a) of the Competition Act. Section 18(1)(a) provides that a merger or acquisition is notifiable where, in the most recent financial year:

- the worldwide turnover of at least two of the undertakings involved in the transaction is not less than €40 million;
- two or more of the undertakings involved in the transaction carry on business in any part of the island of Ireland (i.e. Ireland and Northern Ireland); and
- any one of the undertakings involved has turnover in the State (i.e. Ireland) of not less than €40 million.

The treatment of media mergers is set out in response to question 2.7 below.

The Competition Authority has published an amended Notice N/02/003 "Notice in respect of certain terms used in Section 18(1) of the Competition Act 2002" (the "Notice") to clarify the Competition Authority's understanding of the term 'carries on business'. The Competition Authority understands that term as including undertakings that either:

- have a physical presence in the island of Ireland and make sales or supply services to customers in the island of Ireland; or
- without having a physical presence in the island of Ireland, have made sales into the island of Ireland of at least €2 million in the most recent financial year.

The concept of "undertakings involved" in the transaction is broadly equivalent to the concept of an "undertaking concerned" under the EUMR, and specifically does not include the vendor.

As part of the ongoing review of the Competition Act, the Competition Authority has sought to have a provision included in the new legislation which would lower the turnover threshold in the State, and possibly abolish the worldwide turnover threshold test. However, there are no indications at present that such changes are likely to be included in the new legislation.

For the purposes of calculating turnover and of assessing whether business is carried on in any part of the island of Ireland, the Competition Authority has regard to the entire group of undertakings to which a party to the transaction belongs. The Competition Authority has clarified that it understands "turnover in the State" to comprise sales made or services supplied to customers within the State. In the case of asset acquisitions, the turnover thresholds are applied to the turnover generated from the assets that are the subject of the acquisition. In relation to calculating turnover, the Competition Authority normally follows the Commission's guidance on calculation of turnover in situations where there has been a significant acquisition or disposal following the end of the most recent financial year.

A very broad interpretation of the concept of the business in which the vendor was engaged immediately prior to the acquisition and of the terms of the asset acquisition test in general has allowed the Competition Authority to consider that the purchase of bare assets may, in certain cases, amount to a notifiable merger. In Stena/P&O *II*, Stena purchased P&O's ferry business on the route between Larne (in Northern Ireland) and Fleetwood (in Britain). Stena also purchased two ferries which had been used by P&O on another Irish Sea route and which Stena planned to deploy elsewhere. Although Stena therefore only truly replaced P&O as the operator of the Larne/Fleetwood route, the Competition Authority considered the acquisition of the route together with the acquisition of the two ferries as part of one "business", i.e. the provision of ferry services to and from the island of Ireland – since this was the 'general economic sector' in which the vendor operated. This view allowed it to take into account not only the turnover attributable to Larne/Fleetwood, but also the turnover generated by the two ferries (despite the fact that they would not be run by Stena on the previous P&O route), which when combined satisfied the test for mandatory notification. This broad approach means that the acquisition of assets in Ireland may in certain circumstances give rise to a mandatory notification obligation, even where the assets themselves do not amount to a business in their own right and even where the purchaser will not replace the vendor in the use of those assets as they were employed before the acquisition.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. The thresholds contained in Section 18 of Part 3 of the Competition Act relate to turnover and to the concept of "carrying on business" in any part of the island of Ireland. Therefore, any merger or acquisition which meets these thresholds must be notified to the Competition Authority, regardless of the existence of an overlap.

2.6 In what circumstances is it likely that transactions between parties outside Ireland ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

As outlined in question 2.4 above, the Competition Authority published the Notice to clarify its understanding of the term "carries on business". The Competition Authority now understands that term as including undertakings that either:

- have a physical presence in the island of Ireland and make sales or supply services to customers in the island of Ireland; or
- without having a physical presence in the island of Ireland, have made sales into the island of Ireland of at least €2 million in the most recent financial year.

A "physical presence" includes having a registered office, subsidiary, branch, representative office or agency on the island of Ireland. The Competition Authority adopted the above interpretation of "carries on business" following a public consultation which highlighted concerns that the previous (more general) test had resulted in a large percentage of foreign-to-foreign mergers (i.e. with limited connection to Ireland) requiring notification in Ireland.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Sections 18(1)(b) and 18(5) of the Competition Act provide that the Minister may specify certain classes of mergers or acquisition which must be notified to the Competition Authority regardless of the thresholds set out in Section 18(1)(a). The Minister has done so in relation to media mergers, which are defined in Section 23(10) as "a merger or acquisition in which one or more of the undertakings involved carries on a media business in the State". Therefore, media mergers are treated separately under the Competition Act.

The definition of a media merger for the purposes of the Competition Act is a merger or acquisition in which either: (a) two or more of the undertakings involved carry on a defined media business in the State; or (b) one or more of the undertakings involved carries on a media business in the State and one or more of the undertakings involved carries on a media business elsewhere.

A "media business" is defined as: (i) the publication of newspapers or periodicals consisting substantially of news or current affairs; (ii) sound and/or audio broadcasting (except over the Internet); or (iii) the provision of a broadcasting services platform (such as a cable company). The turnover thresholds for notification are disapplied for media mergers, so that they are automatically notifiable regardless of the turnover of the undertakings involved.

Currently, the initial notification in respect of a media merger is made to the Competition Authority, which reviews the transaction from a competition perspective, and a copy is sent to the Minister. Under the proposed new merger regime it is likely that a separate notification will need to be made to the Minister for Communications.

Currently, if the Competition Authority determines at the end of Phase I that the media merger will not result in a substantial lessening of competition, it must inform the Minister, who has a period of 10 days in which he may decide, on the basis of specified "public interest" criteria, to direct the Competition Authority to open a Phase II investigation. If the Competition Authority determines at the end of Phase II either to clear the media merger or to clear it subject to conditions, the Minister may, within 30 days, prohibit the merger or impose new or stricter conditions, again based on the "public interest" criteria. The public interest criteria for media mergers are:

- the strength and competitiveness of indigenous media businesses;
- the spread of ownership or control of media businesses in the State;
- the spread of ownership and control of particular types of media business in the State;
- the extent to which the diversity of views prevalent in Irish society are reflected through the activities of the various media businesses in the State; and
- the market share of the parties.

If the Competition Authority decides to prohibit a media merger on competition grounds, the Minister cannot permit it. To date no order has been made by the Minister prohibiting a media merger from being put into effect.

The Minister for Communications is reported to have stated that the new legislation would rely heavily on the principles contained in the Report of the Advisory Group on Media Mergers published in January 2009 (the "Report"). The Advisory Group was established to review the current legislative framework in respect of media mergers. The Report recommends significant changes to the media merger rules under the Act including: (i) the introduction of a new system of notification whereby a separate notification is made to, and a decision required from, the Minister in relation to media mergers (i.e. in parallel with the notification to the Competition Authority); (ii) that a new statutory test be incorporated into the Competition Act to be applied by the Minister in a review of media mergers; (iii) an expanded definition of what constitutes a "media merger" to include undertakings involved in providing print or certain audio visual content over the internet; and (iv) a reduced role for the Competition Authority in the assessment of the public interest aspects of media mergers.

The new provisions relating to media mergers will be included in the Consumer and Competition Law Bill, which is expected to be published in late 2012. The legislation will put in place a statutory definition of media plurality, referring to both ownership and content, and will provide for an on-going collection and the periodic publication of information, and the use of concrete indicators in relation to media plurality.

Pursuant to the "one-stop shop" principle in the EUMR, the Commission has jurisdiction to assess mergers where the EUMR thresholds are met. However, the Competition Authority may request the referral back of a merger which is notifiable to the Commission under the EUMR where it has concerns that the merger threatens to significantly affect competition in Ireland.

To date, the Competition Authority has reviewed just one merger following a successful "request back" under the EUMR. In 2008, the Commission referred the proposed acquisition by Heineken of Scottish & Newcastle's business in Ireland, Beamish and Crawford plc, to the Competition Authority (while approving Heineken's deal to buy other assets and brands of Scottish & Newcastle, in Belgium, Finland, Portugal and the UK). The decision to refer the proposed acquisition followed an application by the Competition Authority under Article 9(2) of the EUMR on the basis that the proposed transaction threatened to significantly affect competition in Irish beer markets.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Competition Act takes account of situations involving a change of control but refers only to the concept of conclusion of a binding agreement or the making of a public offer and requires that a notification be made of a proposal to put a merger or acquisition into effect. The Authority will therefore analyse the transaction to determine when the merger or acquisition occurs. It will have regard to the Commission consolidated Jurisdictional Notice in undertaking that analysis.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Yes. Ireland's merger notification regime is mandatory. Mergers coming within the scope of the Competition Act must be notified within one month of the conclusion of a binding agreement or the making of a public bid. At present, merging parties cannot notify until they have concluded an agreement or made a public bid. As part of the ongoing review of the Competition Act, the Competition Authority has proposed changes to the existing notification system whereby merging parties are able to notify: (i) on the basis of a letter of intent; or (ii) where there has been a public announcement of the intention to make a bid. There is no indication as yet as to whether these proposals will be incorporated into the new legislation.

Sections 4 and 5 of the Competition Act prohibit anti-competitive agreements and abuse of dominance respectively (equivalent at national level to Articles 101 and 102 of the Treaty on the Functioning of the European Union). If a merger is notified to the Competition Authority and cleared by it, it is immune from a subsequent challenge by the Competition Authority or any third party under Sections 4 and 5. Where a transaction does not meet the relevant turnover thresholds (set out above), Sections 4 and 5 could potentially apply. The Competition Act therefore provides for a voluntary merger notification system for mergers which do not meet the thresholds but which may raise competition issues. Once notified, voluntary notifications are dealt with in the same way as mandatory notifications.

The Competition Authority initially anticipated a large number of voluntary notifications. In practice, this has not materialised. The Competition Authority sometimes investigates whether non-notified mergers might be notifiable or otherwise give rise to a substantial lessening of competition. Where a non-notifiable merger has not been implemented, but where the parties indicate that they do not intend to notify voluntarily, the Competition Authority may open an investigation under Section 4 or 5 and seek an undertaking from the parties not to implement for a certain period or, if necessary, seek a court injunction restraining implementation. For example, the Competition Authority published a press release on 1 October 2012 stating that a merger of the only two new book wholesalers in Ireland (Easons and Argosy), a transaction that did not satisfy the mandatory notification regime, had been withdrawn by the parties following a decision by the Authority to commence legal action as a result of competition concerns that the proposed transaction would have resulted in increased prices and a reduction in the range of new books to consumers. This case demonstrates the need for parties to below-threshold mergers to conduct a detailed competition analysis. It is particularly interesting that the Authority did not become aware of the Eason/Argosy deal until after signature of a transaction agreement, indicating that competition issues should be addressed early on, in order to avoid unnecessary work and disruption.

The applicable penalties in respect of breaches of Section 4 or 5 have been significantly increased in the Competition (Amendment) Act 2012 and "hard core" offences involving horizontal price fixing, market sharing, capacity reduction and bid rigging attract ten years of imprisonment. The Act was introduced further to the Government's commitments in the EU/IMF Programme of Financial Support for Ireland to strengthen the enforcement of competition law in this jurisdiction.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

No such exceptions exist in Ireland.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Failure to notify a notifiable merger is a criminal offence punishable by fines and the implementation of such a merger, in the absence of Competition Authority approval, is void. Section 18(9) of the Competition Act provides that a person in control of an undertaking which has failed to notify the Competition Authority (or has failed to supply required information) within the specified period shall be guilty of an offence and may be liable to fines of up to €3,000 on summary conviction and up to €250,000 on conviction on indictment. Section 18(10) provides for maximum daily penalties of €25,000 for each day that an indictable offence continues after the date of its first occurrence, and €300 a day for a summary offence.

Liability attaches to the "person in control" of an undertaking, which is defined in Section 18(11) as, in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention. The Competition Authority examined failure to notify a transaction within the prescribed time period in *Radio 2000 Limited/Newstalk 106* (Determination No. M/04/003, dated 5 March 2004). The Competition Authority stated that it found insufficient evidence to seek a criminal penalty, as it was not apparent that any officer of the notifying parties "*knowingly or wilfully authorised or permitted the contravention*".

In the context of forthcoming legislation to amend the Competition

Act, the Competition Authority has indicated that it would like to have the power to seek civil penalties for failure to notify.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

It is not usually possible to carve out local completion of a merger to avoid breaching the prohibition on implementation of a merger not cleared by the Competition Authority.

3.5 At what stage in the transaction timetable can the notification be filed?

The obligation to make a notification to the Competition Authority is not triggered until the conclusion of a binding agreement or making of a public bid, at which point the parties have one calendar month in which to notify. A notification will not be accepted prior to the conclusion of a binding agreement, e.g. on the basis of a "memorandum of understanding" or a "heads of agreement". In its submissions in respect of the new legislation governing competition law, the Competition Authority has proposed changes to the existing notification system whereby merging parties are able to notify: (i) on the basis of a letter of intent; or (ii) where there has been a public announcement of the intention to make a bid. There is no indication as yet as to whether these proposals will be incorporated into the new legislation.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Competition Act provides for a two-phase examination process for mergers. In Phase I the Competition Authority has an initial period of one month in which to decide whether to allow the merger to be put into effect on the grounds that it would not substantially lessen competition, or to carry out a more detailed investigation. Most Phase I cases take close to the full one-month period, although the Competition Authority is prepared to consider requests for an accelerated investigation period in exceptional cases. The one-month period runs from the date of notification. If the Competition Authority makes a formal request for information, the timeframe is suspended and the clock starts *de novo* on receipt by the Competition Authority of the information requested. In practice, the Competition Authority frequently affords the parties an opportunity to respond to an informal information request, before "stopping the clock" by making a formal request for information but formal requests for information have become more frequent in the last 18 months. Failure to comply with a formal request within the time period specified by the Competition Authority is a criminal offence (see question 3.3 above). The one-month period may also be extended to forty-five days where the parties and the Competition Authority negotiate undertakings or commitments to secure "measures which would ameliorate the effects of the merger".

If, at the end of Phase I, the Competition Authority is unable to form the view that the proposed merger will not result in a substantial lessening of competition (SLC), then a Phase II investigation is initiated. In such cases, the Competition Authority has an additional three months (i.e. a total of four months from notification or receipt of response to a formal information request) within which to further investigate the merger and decide whether it should be cleared, cleared subject to conditions, or blocked.

A Phase II investigation, of its nature, involves a more detailed examination by the Competition Authority of the merger. Notifying parties are given an initial period of 21 days to make additional submissions to the Competition Authority. The Revised Merger Procedures provide that the Competition Authority may change this time limit by notice on its website in individual cases, if the circumstances so require. Parties are also likely to receive detailed information requests from the Competition Authority (formal information requests have no effect on timing in Phase II), and may be requested to attend meetings with the Competition Authority to allow the Competition Authority to gather additional information by asking questions directly to the parties. Depending on the case and the industry concerned, the Competition Authority may also request (or the parties may wish to offer) a site visit.

If, after eight weeks from the opening of the Phase II investigation, the Competition Authority is satisfied on the basis of all submissions and information it has received that the result of the merger will not be to substantially lessen competition, it may, at that stage, issue a clearance decision or a clearance subject to conditions.

Otherwise, the Competition Authority (within an eight-week period or shortly thereafter) furnishes a written assessment to the notifying parties, setting out its competition concerns. The written assessment is a reasonably lengthy document which outlines the initial conclusions of the Competition Authority on the relevant product and geographic markets, its competitive assessment of those markets, and the key factors which it believes may give rise to a SLC. It also summarises the sources and evidence relied on by the Competition Authority in forming its initial views including information provided by the parties, market enquiries, and third party submissions.

At the same time, the notifying parties are given access to the Competition Authority's file of documents in accordance with the criteria set out in its publication regarding the Procedures for Access to the File in Merger Cases. The Competition Authority may withhold access to or delete information from certain documents either to protect confidentiality (i.e. to protect the identity of a third party or confidential business information) or because the document is stated to be an "internal document of the Competition Authority". An "internal document" is one related to discussions or communications within the Competition Authority itself (e.g. between the staff and the members), between the Competition Authority and other government departments or bodies, or between the Competition Authority and other competition authorities (for example, the Commission or another national authority). The Competition Authority has shown some reluctance to provide comprehensive access to all relevant documents, with the risk that the merging parties may be left with an incomplete picture of the Competition Authority's investigation.

The notifying parties must respond to the Competition Authority's written assessment within three weeks of receipt if they contest the issues raised by the Competition Authority. As soon as possible after furnishing the assessment, and at the latest 10 weeks after the determination to open the Phase II investigation, the notifying parties may request the opportunity to make an oral submission. Third parties may also be invited to attend a separate oral hearing. However, the Revised Merger Procedures set out some changes to the Competition Authority's practice in relation to oral hearings. The Revised Merger Procedures envisage that all-party hearings will no longer take place, but notifying parties and interested third parties may be entitled to make oral submissions in Phase II.

The final determination of the Competition Authority (i.e. that the merger may be put into effect, may be put into effect subject to conditions, or may not be put into effect), must be communicated to the parties no later than twelve weeks from the opening of the Phase II investigation. The new competition legislation may extend timeframes in line with the Competition Authority's request for: (i) the extension of the Phase II consideration period from three months to four months; and (ii) the introduction of a "stop the clock" provision equivalent to that under Phase I.

Additional procedures apply in respect of media mergers. Under the current regime, if the Competition Authority clears a media merger at the end of Phase I, the Minister may, within 10 days and under Section 22 of the Act, direct the Competition Authority to carry out a Phase II investigation. If, on completion of a Phase II investigation the Competition Authority clears a media merger (with or without conditions), the Minister may, within 30 days and having regard to the relevant criteria as defined in Section 23(10) (see above), order that the media merger be put into effect (with or without conditions) or may not be put into effect. Such an order of the Minister is then placed before each House of the Oireachtas (the Irish Parliament) and, if a resolution annulling the order is passed by either House within 21 days, the order is annulled. If the order is annulled, the Competition Authority's Phase II determination has effect. As discussed, the media merger regime will be altered pursuant to the provisions of the Consumer and Competition Law Bill.

Should the proposed legislation implement the proposals contained in the Report, parties will require a separate approval from the Minister for Communications prior to implementation of a media merger. The Report suggests a two-phase system for review, in which Phase I would last until 30 days after the date of notification to the Minister for Communications or after the decision of the Authority, European Commission or BAI, whichever is the later (i.e., effectively a two-month period for mergers notified to the Competition Authority). At the end of this period, the Minister for Communications may decide to approve the media merger on the basis that it does not contravene the public interest test, approve the media merger with conditions or proceed to a Phase II examination.

It is proposed that Phase II should last no more than four months from the date of the Phase I decision. In addition, at any stage in the process (Phase I or II), the Minister for Communications would be entitled to look for further information and extend time limits by the time required to respond. In the event of a Phase II review, the Report calls for the establishment of a five-person consultative panel, including experts in law, journalism, media, business or economics, to advise the Minister for Communications on the application of 'relevant criteria' (and to replace the existing role of the Authority in this regard). At the end of Phase II, unless concluded in the intervening period by a ministerial decision, the Minister for Communications shall decide whether to approve, approve with conditions or block a media merger.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

A merger, which comes within the jurisdictional tests described above, must not be implemented before clearance has been obtained or the compulsory waiting period has ended. Section 19(1) provides that a notifiable merger shall not be put into effect until the Competition Authority has determined it may be put into effect or the relevant time periods (described in question 3.6 above), have elapsed without the Competition Authority making a determination. Section 19(2) of the Competition Act provides that a notifiable merger which is put into effect prior to a clearance determination is void. Completing prior to clearance (i.e. where clearance is ultimately given) is not a criminal offence. However, contravention of a Competition Authority decision blocking a concentration or allowing it subject to conditions does amount to a criminal offence punishable by fines and imprisonment.

The Competition Act does not state whether a transaction which is completed prior to clearance is rendered void for all time, or merely until such time as the Competition Authority makes a clearance determination. In May 2003, the Competition Authority issued a Press Release on alleged "gun jumping", stating that "*parties must be very careful to ensure they maintain separate and independent operations until the Competition Authority has made its determination*". In that case, the Competition Authority conducted an investigation and ultimately found that implementation had not in fact taken place so no breach of the pre-merger waiting period had occurred.

The point was considered in detail by the Competition Authority. In Radio 2000/Newstalk 106, where Radio 2000 acquired operational control of the target radio station before the transaction had been approved by the Competition Authority. The Competition Authority concluded that the Section 19(2) of the Competition Act is designed to protect the Competition Authority's right of review and is not intended to render a merger or acquisition void indefinitely. The effect is that a transaction which has been implemented prior to clearance remains void until such time as the Competition Authority issues a decision approving the transaction. While this practical approach provides much needed clarity to merging parties on the issue of "voidness", it is somewhat at odds with a previous statement by the Competition Authority that it views "gun jumping" as a very serious matter and will give high priority to investigating allegations that merging parties have put a transaction into effect before expiry of the mandatory waiting period.

A further mechanism employed by merging companies completing a transaction prior to clearance is to provide the Competition Authority with "hold separate" undertakings. In Noonan Services Group Limited/Federal Security Group (Determination No M/09/014, dated 14 August 2009) the parties informed the Competition Authority that they would "hold separate" until clearance was issued by the Competition Authority. In Stena/DFDS (Determination No M/10/043, dated 7 April 2011) the parties completed the transaction prior to notification. The Competition Authority issued a press release stating that the parties had infringed section 19(1) of the Act, and therefore the implementation of the acquisition was void. However, the Competition Authority proceeded to assess the notified transaction in accordance with the provisions of the Competition Act. The Competition Authority noted that the parties had given 'hold separate' undertakings under UK legislation to the Office of Fair Trading (OFT) (the transaction was notified in the UK as well). Therefore, while the Authority will nonetheless take the view that a breach of the Competition Act has occurred, to date it has not taken any action against the parties in such circumstances.

In September 2011 the Competition Authority cleared the proposed acquisition by Musgrave Group plc of the Superquinn grocery retail business and certain properties at Phase I (Determination No M/11/022 dated 28 September 2011). The Competition Authority noted that it had become aware at the outset of the investigation that Musgrave was to provide certain consultancy services to the receivers appointed to Superquinn, the objective of which was to maintain the value of the target business pending a determination by the Competition Authority. The Competition Authority was concerned that these arrangements might amount to prior implementation of the merger in breach of section 19(1) of the

Competition Act and sought further information from both parties. The parties' responses satisfied the Competition Authority that the then level of interaction between the parties had been limited and did not extend to the management or operational issues of the Superquinn business, and the Competition Authority concluded that the limited level of interaction between Musgrave and Superquinn did not amount to a breach of section 19(1).

3.8 Where notification is required, is there a prescribed format?

There is a standard form for notifications (Form M). All parts of the Notification Form must generally be completed unless expressly waived by the Competition Authority in pre-notification discussions. In particular, the requirement to complete question 4 of the Notification Form (which relates to overlapping products and/or services) may be waived by the Competition Authority, and the parties may be exempted from completing some or all of question 4, where there is no overlap or the overlap is *de minimis*.

In general, it is not necessary to have pre-notification meetings with the Competition Authority, unless the merger has particular competition concerns, or the overlap is *de minimis* and the parties are seeking an exemption from responding to some or all of question 4. It is possible to engage in "pre-notification discussions" with the Competition Authority prior to the conclusion of a binding agreement, where the parties can show a bona fide intention of proceeding with the transaction. This may be evidenced by, for example, a letter of intent signed by the parties. Pre-notification discussions offer the possibility to discuss jurisdictional and other legal issues, as well as those outlined above in relation to completion of the Notification Form. However, the Competition Authority states that it is not bound by any comments made in the course of such discussions. Pre-notification discussions are also subject to conditions of strict confidentiality.

Any information which is related to the notified transaction should be contained in the notification. In Alpha Group/Newry Democrat (Determination No. M/10/030) Tontine Rooms Holding Company Ltd ("Tontine") was acquiring the business and assets of the newspaper, the Newry Democrat from TCH Democrat Media Limited ("TCH"). In the course of its investigation, the Competition Authority discovered a call option agreement ("COA"), which gave TCH the option, within ten years, to buy the goodwill and intellectual property rights in the Roscommon Champion, another one of Tontine's newspapers. Following a further request for information to both parties, the Competition Authority formed the preliminary view that the COA was related to the notified transaction, and consequently information regarding the COA should have been included in the notification. The Competition Authority also formed the preliminary view that the COA raised competition concerns since TCH published the Roscommon Herald, which appeared to be the main competitor to the Roscommon Champion. Each of the parties disagreed with the Competition Authority's preliminary view and asserted that the COA was only notifiable under the Act when exercised. However, as the parties subsequently delivered a copy of the termination agreement terminating the COA, the issue did not fall to be decided upon.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The procedure is the same for all mergers. However, parties can petition the Competition Authority to speed up the process by reducing or eliminating the period for third party notice under section 20 of the Competition Act. The Competition Authority has demonstrated a willingness to accommodate the specific circumstances of individual mergers by expediting the review process, for example insolvency concerns, the HMV Ireland/Zavvi merger (Determination No M/09/002, dated 23 January 2009) was cleared in nine days. However, the Competition Authority is unlikely to use such accelerated procedures save in the most exceptional of circumstances.

3.10 Who is responsible for making the notification and are there any filing fees?

The obligation to notify is on all of the "undertakings involved" in a transaction (this does not include the vendor), although in practice most notifications are submitted jointly. The filing fee is currently €8,000 and is payable on filing.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

There are no special rules applicable to public offers for listed businesses. As discussed at question 3.5, the obligation to make a notification to the Competition Authority in such circumstances is triggered by the making of a public bid.

3.12 Will the notification be published?

The notification itself is confidential and will not be published on the Competition Authority's website. However, within seven days from receipt of the notification, the Competition Authority will publish notice of it on its website. Notice of notification will give the following information: (i) the name(s) of the undertakings involved; (ii) the reference number of the transaction; (iii) the name and contact details of the case officer assigned to the transaction; (iv) the business activities of the undertakings involved; and (v) notice to third parties wishing to make submissions about the merger that they must do so within ten days of publication of the notice.

The Competition Authority will publish the text of a determination on its website at the earliest possible date (and in any event, within two months of the date of determination) after allowing the undertakings involved to indicate any information that the parties feel is confidential and should be redacted (discussed further in question 4.6).

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

Section 20(1)(c) of the Competition Act provides that the substantive test for assessment 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 Authority interprets the SLC test in terms of consumer welfare and, in particular, whether a merger would be likely to result in a price rise to consumers. The Competition Authority's Notice in respect of guidelines for merger analysis (Notice in Respect of Guidelines for Merger Analysis, (N/02/004), 16

December 2002) comments in detail on the approach it takes in applying the SLC test in assessing transactions. This approach is based to a significant extent on economic analysis. While the Competition Authority initiated a consultation on this Notice in December 2010, no new Notice has yet been issued.

In assessing market concentration, the Competition Authority applies the Herfindahl-Hirschmann Index of Concentration ("HHI"), which involves adding the squares of the market shares of all market participants pre- and post-merger and calculating the extent to which the merger will give rise to changes (the delta). The Competition Authority uses the level and the change in the HHI as a screen for deciding whether to intensify its analysis of effects on competition.

In assessing market power, the Guidelines on Merger Analysis state that the Competition Authority considers, *inter alia*: (i) the market structure – degree of concentration, relative market shares, unilateral and co-ordinated effects, vertical integration issues, etc.; (ii) the likely effect of the merger on the behaviour of the merged entity; (iii) the likely reaction of competitors and customers; and (iv) countervailing buyer power. The Competition Authority also has regard to barriers to market entry and efficiencies, including in very limited circumstances, the "failing firm defence". The Competition Authority places emphasis on issues such as market concentration, capacity and capacity utilisation, pricing trends and practices, barriers and incentives to entry and expansion, and countervailing buyer power.

The Competition Authority undertakes an economics-based analysis, particularly in complex cases. It regularly appoints outside economic experts to assist it in Phase II cases, and even in Phase I cases in some circumstances. For example, the Competition Authority appointed external economists to advise it on its most recent Phase 2 merger investigation (Uniphar/CMR M/12/027). Furthermore, in another Phase 2 investigation by the Authority (SRH/FM104 M/03/033) the Authority undertook upward pricing pressure analysis of sorts, estimating the likely price rises arising from the proposed merger based on estimates of (i) diversion ratios, and (ii) profit margins generated by the merging parties.

The Competition Authority has blocked three mergers since the introduction of the Competition Act: IBM/Schlumberger, Kingspan/Xtratherm and Kerry/Breeo.

The Kerry/Breeo merger was blocked by the Competition Authority on 29 August 2008 after a full Phase II investigation. According to the Competition Authority, the transaction would substantially lessen competition in the markets for the production, supply and distribution of rashers, non-poultry cooked meats and processed cheese. In particular, the Competition Authority believed that in those markets there would be, post-merger, no credible alternative brands capable of constraining the merged entity from permanently raising the price of the relevant products. Further, the Competition Authority considered that private, own-brand labels were not credible or close competitors to branded products. Finally, the Competition Authority rejected the parties' claims that retailers could exercise sufficient buyer power or that the merger would lead to significant efficiencies.

In March 2009 the High Court annulled the decision of the Competition Authority prohibiting the merger, finding that the Competition Authority had erred in finding that there was a substantial lessening of competition in the markets for non-poultry cooked meats and rashers. The High Court held that the Competition Authority had not rationally weighted the evidence available to it as there was sufficient countervailing buyer power to deter any potential price increase in the above-mentioned markets. The High Court also found that the Competition Authority had erred in its definition of the relevant product market for the cheese sector. According to the High Court, the Competition Authority had erroneously divided that market into processed and natural cheese, with the result that its conclusion as to a resulting substantial lessening of competition in a product market comprising processed cheese was fundamentally flawed. In April 2009, the Competition Authority initiated an appeal to the Irish Supreme Court against the ruling of the High Court. The issue is yet to be heard by the Supreme Court at the time of writing.

If a merger involves a credit institution and the Minister for Finance exercises his jurisdiction under Section 7(2) of the Credit Institutions Act, he may approve the merger if he takes the view that: (i) it will not result in an SLC in markets for goods or services in the State; or (ii) even if the merger will result in an SLC, the merger is necessary having regard to: (a) maintenance of the stability of the financial system in the State; (b) the need to avoid a serious threat to the stability of credit institutions; or (c) the need to remedy a serious disturbance in the economy of the State. The Minister for Finance has exercised this power once, when he approved the proposed acquisition by Allied Irish Banks plc (AIB) of EBS Building Society (EBS) on 26 May 2011. In approving the AIB/EBS merger the Minister for Finance indicated that he made his decision on the basis that the result of the acquisition will not give rise to an SLC and because there was no realistic alternative which would ensure that competition from EBS would be preserved.

4.2 To what extent are efficiency considerations taken into account?

The Competition Authority is still somewhat circumspect about arguments based on efficiencies and there is a high burden of proof on merging parties to demonstrate that claimed efficiency gains are a direct and specific result of the merger, are sufficient in magnitude to outweigh any anti-competitive effect, and are clearly verifiable, quantifiable and timely.

4.3 Are non-competition issues taken into account in assessing the merger?

As discussed in question 1.1, non-competition issues will be taken into account when considering media mergers and mergers involving credit institutions. Aside from these instances, non-competition issues are not considered.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Section 20(1)(a) of the Competition Act provides that, within seven days following receipt of notifications, the Competition Authority is obliged to publish a notice of receipt inviting a third party comment. The Revised Merger Procedures state that third parties who wish to make submissions about a merger must do so within ten days of publication of the notice. The Competition Authority may, however, change this time limit by notice on its website in individual cases, if circumstances so require.

Section 20(1)(b) provides that the Competition Authority may enter into discussions, at any stage of its investigation, with the undertakings involved or third parties, with a view to identifying measures which would ameliorate any adverse effects of the merger or acquisition on competition. Third parties can make submissions and may meet with case officers at any time in Phase I or Phase II if they can demonstrate a legitimate interest in the merger and the

Competition Authority can actively request views of third parties in Phase I. Phase II investigations provide another opportunity for third parties to make submissions and comment and the Competition Authority is likely to actively seek third party views and request that third parties respond to questions and provide the Competition Authority with documentation as requested. Pursuant to Section 31, the Competition Authority may invoke its powers to summon witnesses, including third parties, to appear before it to be examined on oath and to produce documents.

The Competition Authority's document on Access to the File in Merger Cases states that access to the file in the context of merger review will remain limited to those undertakings to whom the assessment is addressed (see question 3.6 above). Third parties have no right to appeal merger determinations to the courts.

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The Competition Authority has considerable information-gathering powers. The main source of information for the Competition Authority in merger control cases is the information submitted with the notification form and subsequently by the notifying parties. However, the Competition Authority publishes notice of receipt of notifications on its website and welcomes submissions from any third parties including competitors, customers and consumers, as well as seeking views and information both formally (under witness summons) and informally. The Competition Authority will usually undertake its own "market investigation" contacting customers, suppliers and competitors for their views and sometimes engaging in market surveys, etc. The Competition Authority also places a high degree of reliance on parties' internal documentation. In a number of cases (Grafton/Heiton and HJ Heinz Company/HP Foods Limited), it has pointed out that internal documents, prepared by undertakings in their ordinary course of business, provide a strong and clear indication as to where an undertaking views itself in an industry.

The Competition Authority may also make a formal written request to the notifying parties to provide further information within a specified time period pursuant to Section 20(2). Failure to comply with a formal request within the time period specified by the Competition Authority is a criminal offence pursuant to Section 18(9) (see question 3.3 above for details of fines).

Pursuant to Section 31, the Competition Authority may do any or all of the following: issue a witness summons; examine under oath; and/or require production of a document. Failure to comply with any of the above is a criminal offence and if found guilty a person is liable on summary conviction to a fine of up to €3,000, or to imprisonment for a term not exceeding six months, or both. The Competition Authority also invokes its powers to summon witnesses (whether from the notifying parties, or third parties) to appear before it to be examined on oath, or to produce documents in cases where it considers the information requested to be important to its analysis.

Section 45 of the Act gives the Competition Authority "dawn raid" powers i.e. authorised officers have the power to enter and search business premises and vehicles, as well as the private dwellings of directors, managers or members of staff. Authorised officers of the Competition Authority may include and/or be accompanied and assisted on dawn raids by members of the Garda Síochána.

Dawn raid investigations are carried out pursuant to a warrant of the District Court. During the dawn raid, authorised officers may inspect, copy, seize and/or retain for a given period books, documents and records relating to the business, or take appropriate steps to preserve them. Authorised officers may also question directors or employees about the carrying on of the business or any other information they may reasonably require. Obstructing an authorised officer is a criminal offence.

On a dawn raid an authorised officer is entitled to require officers or staff of the undertaking concerned to provide any information he may require in regard to the activity carried on by the business. As set out above, the Competition Authority may also summon witnesses to appear and examine them under oath. Where a witness is examined on oath by the Competition Authority the procedure is the same as for a witness of the High Court including the privilege against self-incrimination.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

When submitting a notification, notifying parties are invited to identify commercially sensitive information that they believe should remain confidential, together with reasons why the information should be classified as confidential. The Competition Authority considers all reasonable requests to maintain confidentiality. The Competition Authority also allows the notifying parties an opportunity to make submissions on deletion of possible confidential information from the public version of its determination. Third parties, including complainants, are also offered the opportunity to protect information which amounts to a business secret or is otherwise confidential.

Where the Competition Authority intends to reject a claim of confidentiality, it will inform the relevant person or undertaking in writing of its intentions and reasons and set a time limit within which such undertaking may inform it in writing of its views.

Information which is already known outside the undertaking making the claim will not normally be considered confidential. Also, information that has lost its commercial importance, due, for instance, to the passage of time, can no longer be regarded as confidential. As a general rule, turnover, sales and market share data which is more than five years old is no longer considered confidential.

The provisions of the Freedom of Information Act, 1997 as amended (the "FOI Acts") have applied to the Competition Authority since 1998. The FOI Acts allow public access to information held by the Competition Authority, which is not routinely available from other sources.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The Competition Act provides for a "determination" to be issued in all cases. The Competition Authority must inform the notifying parties and any other third parties who have made submissions, within one month of the "appropriate date" whether it has determined that the merger or acquisition will not substantially lessen competition in markets for goods or services in Ireland, or that it intends to carry out a full Phase II investigation. The "appropriate date" is the date of receipt of the notification or, if the Competition Authority requests further information from the parties in writing within one month of receipt of the notification, one month from the date the Competition Authority receives the requested information. It also publishes its determination on its website at the earliest possible date thereafter (and in any event no later than two months from the date of the determination).

If, within eight weeks of its decision to conduct a full Phase II investigation, the Competition Authority is satisfied that the merger will not substantially lessen competition in the market, it may determine that the merger may be put into effect.

When having considered all the relevant information, evidence and submissions, the Competition Authority forms a view of whether there will be a substantial lessening of competition, it will at the end of the three-month Phase II period, provide a written determination that the merger may be put into effect, blocked or cleared subject to conditions. Pursuant to the Revised Merger Procedures, on the date the Competition Authority makes its determination, it will publish a notice of the making of such a determination on its website. As discussed in the response to question 3.6 above, it is important to note that the Competition Authority has requested that new legislation on mergers extends the period of time allocated for Phase II investigations.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The Competition Authority may discuss divestment, undertakings or other measures with notifying parties during the course of the examination of the merger. Pursuant to Section 20 of the Competition Act, such commitments may be accepted in either Phase I or Phase II. In Phase I, where such undertakings are discussed, forty-five days will be allowed for the Phase I review period. However, while the parties can volunteer commitments in Phase I, the Competition Authority may only impose conditions on its determination after a Phase II investigation. Once commitments have been agreed with the Competition Authority, they become binding on the party which gives them and are ultimately published by the Competition Authority as part of its determination.

The Competition Authority can seek to enforce any such commitments or conditions by injunction in any court of competent jurisdiction and, under Section 26 of the Competition Act, any person who contravenes a provision of a commitment or determination of the Competition Authority or order of the Minister will be guilty of a criminal offence attracting both a fine and imprisonment.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

The Competition Authority has not subjected any foreign-to-foreign merger to conditions. However, remedies have been offered by/imposed on Irish subsidiaries with foreign principals. For example in Alphyra/Eason Electronic (Determination No. M/05/050) Alphyra Holdings Limited (ultimately owned by Benchmark Capital, a US-based investment company) agreed to behavioural remedies including the requirement to inform the Competition Authority in advance of all proposed mergers or acquisitions in the mobile phone top-up sector in the island of Ireland where it is the proposed acquirer. In Premier Foods/RHM (Determination No. M/06/098) Premier Foods, the acquirer, agreed to divest its entire Erin brand business as part of its acquisition of RHM Foods where both Premier Foods plc and RHM plc were UK companies publicly listed on the London Stock Exchange.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Sections 20(1)(b) of the Competition Act provides that the Competition Authority may enter into discussions with the undertakings involved in the merger or acquisition or with any individual or any other undertaking with a view to identifying measures which would ameliorate any effects of the merger. Sections 20(3) of the Competition Act provides that the negotiation of remedies or commitments may be commenced at any stage of a Phase I or Phase II investigation.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Because the provisions of the Competition Act require mandatory pre-notification of all mergers or acquisitions falling within its scope and provide that that implementing a merger prior to clearance is void, a divestment remedy is not normally required. However, in the event that a non-notifiable merger was put into effect or a notified merger still implemented, and the Authority found the transaction to be anticompetitive, it could seek to use the provisions of Section 4(1) of the Act and seek the Court's declaration that any such transaction was an agreement that had as its object or effect the restriction of competition so that it is void or seek to enforce any determination blocking a merger which ultimately proceeds. As explained in response to question 5.3 above, the Competition Authority has the power to make a merger subject to a structural divestment condition, Premier Foods/RHM.

5.6 Can the parties complete the merger before the remedies have been complied with?

This will depend on the nature of the conditions imposed by the Authority in the case in question.

5.7 How are any negotiated remedies enforced?

Once commitments have been agreed with the Competition Authority, they become binding on the party which gives them and are ultimately published by the Competition Authority as part of its determination. Binding commitments may be enforced by the Competition Authority by High Court injunction and breach of a binding commitment is also a criminal offence. A person who fails to comply with a commitment may be liable to a fine of up to €10,000 or to imprisonment for up to two years or both a fine and imprisonment.

5.8 Will a clearance decision cover ancillary restrictions?

A merger clearance decision by the Competition Authority covers not only the notified transaction itself, but also any arrangements constituting restrictions which are directly related to and necessary for the implementation of the merger, and which are referred to in the notification. Sections 4 and 5 of the Competition Act specifically provide that putting a merger into effect, together with "any arrangements constituting restrictions which are directly related and necessary to the implementation of the merger and are referred to in the notification" shall not be prohibited by Sections 4(1) or 5(1). Merger notifications are the only occasion on which such restrictions can be "notified" to and cleared by the Authority, so there is an incentive to refer to them in the notification.

There is a Competition Authority Notice in respect of agreements involving a merger and/or sale of business. The Notice applied from 1 July 2002 to 1 January 2003. The Notice states that an ancillary restriction must be limited in terms of its duration, geographic coverage and subject matter to what is necessary to secure the adequate transfer of goodwill. Although no new guidance has since been issued under the Competition Act, ancillary restrictions are frequently considered by the Competition Authority. In Musgrave Limited/Express Checkout, the Competition Authority objected to the terms of non-compete restrictions on the vendor as originally notified. The provisions in question restricted the vendor, *inter alia*, from competing with the target supermarket businesses anywhere in Ireland, from soliciting customers or suppliers of the targets for any purpose, and from soliciting its employees for any purpose, for a period of two years after completion. The parties subsequently gave a voluntary commitment to the Competition Authority to revise the restrictive covenants to a prohibition on the above activities for the purpose of any competing business in the respective geographic areas of the target companies for a period of two years.

5.9 Can a decision on merger clearance be appealed?

Yes. Parties to a merger may appeal a decision of the Competition Authority prohibiting a merger or imposing conditions to the High Court on a point of fact or law. As discussed below at question 5.10, a special accelerated appeals process applies.

A further appeal on a point of law only may be made to the Supreme Court. The Competition Act provides no right of appeal against a decision to clear a merger and third parties are not given a right of appeal. In September 2008, the Kerry Group successfully appealed the decision of the Competition Authority to block its acquisition of Breeo before the High Court. While the transaction subsequently went ahead, the Competition Authority has initiated an appeal of the High Court decision to the Supreme Court. At the time of writing the hearing of the appeal is pending.

5.10 What is the time limit for any appeal?

The appeal must be made within one month of the Competition Authority's decision. The High Court should then issue its decision within two months, if practicable.

5.11 Is there a time limit for enforcement of merger control legislation?

Section 19(1)(a) of the Competition Act states that a merger shall not be put into effect until the Competition Authority has so determined. Section 19(2) of the Act states that any such merger or acquisition which purports to be put into effect is void. There is no time limit in this regard. (See question 3.7 above for more details.)

Section 18(9) of the Competition Act provides that a person in control of an undertaking which has failed to notify the Competition Authority or failed to provide required information within a specified time period is guilty of an offence. Summary proceedings must be brought within six months. However, there is no time limit for bringing proceedings on indictment.

6 Miscellaneous

6.1 To what extent does the merger authority in Ireland liaise with those in other jurisdictions?

Section 46 of the Competition Act permits the Competition Authority to enter into arrangements with competition authorities in other countries for the exchange of information and the mutual provision of assistance. In relation to the exchange and use of confidential information, Section 46(3) provides that the Competition Authority shall not furnish any information to a foreign competition body unless it requires and obtains from that body an undertaking in writing by it that it will comply with terms specified in that requirement, being terms that correspond to the provisions of any enactment concerning the disclosure of that information by the Competition Authority. In effect, parties may give a waiver to enable the Competition Authority to engage with other officials from other competition authorities in a meaningful way.

The Competition Authority is in regular contact with regulatory authorities in other jurisdictions in relation to merger control. The Competition Authority is also a member of the International Competition Network and the European Competition Network.

6.2 Are there any proposals for reform of the merger control regime in Ireland?

As discussed above, the Minister for Communications announced that he is working with the Department of Jobs, Innovation and Enterprise with a view to introducing changes to the Competition Act in order to, *inter alia*, amend provisions dealing with media mergers. It is expected that the amendments to the Act will involve adopting many of the recommendations in the Report. The most significant recommendations are:

- The definition of what constitutes a media merger should be expanded. Currently, publication of content over the internet is specifically excluded from the definition of "media business". The Report suggested amending this definition to include undertakings involved in providing print or certain audio-visual content over the internet.
- A reduced role for the Competition Authority in the assessment of the public interest aspects of media mergers (the Competition Authority has publicly stated its view that this requirement obliges it to do something 'outside its area of expertise' and should therefore be abolished).
- A new notification system for media mergers, whereby a separate notification would be made to the Minister on a specific notification form and attracting a separate fee, in addition to any notification to the Competition Authority or the European Commission, etc.
- While the Competition Authority would continue to review the competition aspects of media mergers under the SLC test, it is recommended that the Minister would apply a statutory test to ensure that the merger is not contrary to the public interest in protecting plurality in media business in the State. Plurality of the media is defined in the Report as including "both diversity of ownership and diversity of content". The Report recommends the adoption of a revised set of "relevant criteria" to be considered in applying the statutory test, and guidelines will be published to assist undertakings in ascertaining how the Minister will apply that test.

As discussed above, a draft Consumer and Competition Law Bill is expected to be published in late 2013. The Bill will also include provisions regarding the amalgamation of the powers and functions of the NCA and the Competition Authority.

6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of 31 August 2013.

Helen Kelly

Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: *+353 1 232 2000*
Fax: *+353 1 232 3333*
Email: *helen.kelly@matheson.com*
URL: *www.matheson.com*

Helen is a partner and head of the EU, Competition and Regulatory Law Group at Matheson. Helen has particular expertise in EU and Irish merger control work and has experience in dealing with large scale mergers and complex joint venture arrangements under the EU Merger Regulation as well as advising on Irish merger control issues. Helen has advised on a number of Phase II investigations including Phase II unconditional and conditional clearances.
Helen is a graduate of Trinity College Dublin and the London School of Economics and is a solicitor in Ireland and England and Wales.
Helen regularly publishes articles and speaks at leading conferences. Helen has frequently been recognised as one of Ireland's leading EU competition and regulatory lawyers in international legal reviews.

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GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

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