Merger Control

The international regulation of mergers and joint ventures in 71 jurisdictions worldwide

Consulting editor
John Davies

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GETTING THE DEAL THROUGH

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Ireland

Helen Kelly and Simon Shinkwin

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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), having been significantly amended by the Competition and Consumer Protection Act 2014.

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, Climate Action and Environment (the Minister for Communications). The Irish courts have jurisdiction to adjudicate on any allegation of breaches of the Act and on any appeal against a merger decision.

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:

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

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 (see question 8).

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 EU Merger Regulation, Council Regulation (EC) No. 139/2004 (EUMR). The CCPC and the European Commission adopt similar approaches in identifying whether joint ventures are subject to merger control law. Where a joint venture does not qualify as full-function, it may still be assessed by the CCPC under the rules on restrictive agreements under Section 4 of the Competition Act (based on article 101 of the Treaty on the Functioning of the European Union (TFEU)). Typically, the CCPC will have regard to the European Commission's Guidelines on Horizontal Cooperation Agreements and the Guidelines on Vertical Restraints in its assessment.

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

The Irish merger control regime does not regulate the acquisition of interests other than '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:

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

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 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 Consolidated 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 jurisdictional thresholds introduced by the 2014 Act set out in question 5 are intended to capture mergers with a closer nexus to Ireland. Many foreign-to-foreign mergers that would have required notification under

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the previous jurisdictional thresholds are now 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 extended the definition of 'media business' to include online news sources and online broadcast of certain audiovisual material. The definition of 'carrying on a media business in the State', requires undertakings involved to have either a physical presence in the state and make sales to customers located in the state, or to have made sales in the State of at least €2 million in the most recent financial year.

The Act sets out a substantive test for identifying a 'plurality of the media' concern in a media merger. The test is 'whether the result of the media merger will not be contrary to the public interest in protecting the plurality of the media in the State' and this includes a review of 'diversity of ownership and diversity of content'.

Undertakings involved are required to make two notifications of a media merger. One notification is sent to the CCPC, which 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 has responsibility for consideration of media mergers (the Minister for Jobs has 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 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. To date, there has only been one Phase II media merger examination in the state relating to the acquisition of seven regional newspapers (part of Celtic Media Group) by Independent News & Media (INM). This examination was not completed as the transaction was terminated by mutual consent of the parties.

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:

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

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 ('appropriate date'), unless either the CCPC has used its power to 'stop and re-start the clock' by issuing a formal requirement 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. The CCPC also issues 'informal' requests for information that do not 'stop and re-start the clock'.

A Phase II clearance determination must be issued by the CCPC within 120 working days of the appropriate date unless the CCPC uses its power to 'stop and restart the clock' by issuing a formal RFI within the first 30 working days of the Phase II investigation (ie, 30 working days after the Phase I determination). 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 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 merger that has been notified (both mandatory and voluntary) 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

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changes to the trigger date for making a notification (see question 9) should reduce instances of 'gun jumping'. In M/16/013 *INM/Greer*, INM completed the acquisition of assets of Greer Publications prior to notification in breach of section 19(1) of the Act. The CCPC accepted the notification on the basis that INM would not, prior to receiving CCPC clearance, combine or change the structure of the target assets; integrate any retailing or advertising functions of the target assets into INM; cross-sell advertising space between INM and the target assets; or share commercially sensitive information between INM and the target assets. The CCPC subsequently cleared the transaction.

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. 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 for doing so (in a press release or decision). 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. In M/16/013 *INM/Greer*, the CCPC accepted the notification of the transaction after completion on assurances from INM that it would not, prior to receiving the CCPC's determination, integrate the relevant target assets into its business.

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 been issued by the Department of Communications, Climate Action and Environment. The content required in the merger notification form includes a description of the proposed 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.

Thirteen media mergers have been notified and cleared by the CCPC and the Minister for Communications: M/15/008 *Discovery/Setanta*; M/15/018 *Southbank/N-Vision*; M/15/039 *Liberty Global/TV3*; M/15/047 *Nikkei/Financial Times*; M15/060 *Trinity Mirror/Local World*; M/15/069 *ITV/UTV*; M/15/074 *eir/Setanta*; M/16/013 *INM/Greer*; M/16/033 *News Corp/Wireless*; M/16/038 *Liberty Global/UTV Ireland*; M/16/064 *BritBox Joint Venture BBC & ITV*; M/17/009 *Irish Post/Irish TV*; and M/17/017 *Landmark/BenchWarmers*.

As referred to in question 8, the acquisition of seven newspapers (part of Celtic Media Group) by INM (M/16/044 *INM/CNML*) was cleared by the CCPC and was the first media merger to be referred to the BAI for a full media examination. No ministerial decision was made by the Minister for Communications as the parties terminated the transaction during the process by mutual consent.

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 can 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. More recently in M/16/053 *Anchorage Capital/Eircom* the CCPC cleared the transaction in 11 days as Anchorage Capital was already the largest shareholder and was acquiring 'sole control' and there were no substantive competition issues involved. The CCPC's Mergers and Acquisition Procedures allow for the CCPC to reduce the normal period of 10 days allowed for public comment after publication of notice of a merger notification on its website in individual cases, if circumstances so require. For example, in the case of M/12/048 *Endless/Imtech Suir*, the notification period was reduced from 10 days to five days in circumstances where Imtech Suir's parent company had been declared insolvent, and consequently Imtech Suir was in financial jeopardy and unlikely to operate as a going concern. In that case, the CCPC issued a clearance decision in six days.

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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 requirement 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 requirement 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 of the beginning of Phase II (rather than 120 working days from notification; this is the usual Phase II outcome) or if the investigation is to progress, the CCPC sends the parties an assessment setting out its concerns about the merger;
- oral hearing (if requested within five working days of receipt of the CCPC's assessment);
- access to the CCPC's file;
- discussion of remedy proposals from the parties (no later than 15 working days after receipt of the CCPC's assessment);
- market testing of remedy proposals of parties (depending on circumstances and at the discretion of the CCPC);
- notice to parties of determination (clearance, conditional clearance or blocking) and press release;
- merging parties may request redactions from the public version of the determination; and
- publication of Phase II determination within 60 working days of date of adoption.

Under the 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.

In M/14/026 *Valeo/Wardell/Robert Roberts*, the acquirer undertook to divest the YR brand of brown sauce in order to address the CCPC's concern that the acquirer's large post-merger market share in the market for the supply of brown sauce to the retail sector would incentivise it to increase prices to retailers, with insufficient competitive constraint from competitors or countervailing buyer power. Divestment undertakings were also accepted in M/15/020 *Topaz/Esso*, where Phase II clearance was subject to divestment commitments relating to Esso's interest in a fuel terminal at Dublin Port and certain fuel retail sites.

Most recently, in M/16/040 *Bon Secours Health System/Barringtons Hospital*, an extended Phase I merger, a number of behavioural commitments were sought from Bon Secours Health System in order for clearance to be obtained. The determination and full commitments have been published on the CCPC's website. Further, in M/16/008 *PandaGreen/GreenStar*, CCPC clearance was obtained

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Update and trends

Background

Since the introduction of the amended thresholds by the Competition and Consumer Protection Act 2014 (the 2014 Act), there has been a significant increase in the number of mergers notified to the CCPC. There was an increase from 41 mergers notifications in 2014 to 78 in 2015. This number dropped to 67 in 2016, which may be due to the impact of Brexit. However, it is clear that the amended thresholds have resulted in unprecedented numbers of mergers, which place a strain on the CCPC's resources without identifying many potentially troublesome mergers. Most recently, there has been an uptake in the number of notifications made in the retail motor fuel sector (buying of individual petrol stations), with seven notifications made in 2017 alone (accounting for approximately 29 per cent of notifications so far this year).

The changes introduced by the 2014 Act and media convergence have also had a significant impact on the number of media mergers notified. As provided in question 16, 13 media mergers have been notified and cleared by the CCPC and the Minister for Communications since commencement of the 2014 Act. In the case of M/16/044 *INM/CMNL*, the Minister for Communications referred the transaction to the BAI for a full Phase II media merger examination. No ministerial decision was made as the parties terminated the transaction during the process by mutual consent.

Key decisions

2016 saw the conclusion of a challenge taken by the CCPC against the acquisition of Breeo Food Limited and Breeo Brands Limited by Rye Investments Limited, an indirect, wholly owned subsidiary of Kerry Group plc. In 2008 the CCPC had prohibited the proposed acquisition when it concluded that the transaction would 'substantially lessen competition in the markets for rashers, non-poultry cooked meats and processed cheese in the state'. Kerry Group had successfully appealed the decision to the High Court. In April 2016, the CCPC announced that it was not proceeding with its appeal to the Supreme Court of the High Court's annulment of the CCPC's prohibition of Kerry Group's acquisition of Breeo Foods and agreed a settlement with Rye Investments Limited in relation to the costs of the court proceedings.

Merger control filings

A total of 67 filings were made in 2016. One notification was withdrawn at the request of the parties (M/16/041 *Joint Venture: Marino Point Port Company, Port of Cork et al*). There were a total of two extended Phase I's (M/16/044 *INM/CMNL* & M/16/040 *Bon Secours Health System/Barringtons Hospital*). There was one Phase II in 2016 (M/16/008 *PandaGreen/Greenstar*) which involved PandaGreen acquiring the entire issued share capital of Greenstar – both parties involved in the provision of retail domestic waste collection services. CCPC approval was conditional on divestment of Greenstar's domestic waste collection business in two Dublin areas.

The longest time taken for the CCPC to reach a Phase I decision was 47 days (extended Phase I M/16/044 *INM/CMNL*). For non-extended Phase I mergers, the longest period taken to clear was 29 days: M/16/002 *Dunnes/Whelan/Tipperary*. The shortest time was 11 days (M/16/053 *Anchorage Capital/Eircom*).

So far in 2017, there have been 15 merger notifications to the CCPC. There have been no Phase II mergers; however, there have been four extended Phase I mergers; M/17/005 *Vhi Investments DAC/Vhi Swiftcare Clinics*, which cleared after 68 days, and M/17/012 *Mediawatch Limited t/a Kantar Media/Newsaccess Limited*, M/17/021 *Applegreen/JFT*, which was cleared after 50 working days and M/17/027 *Dalata/Clarion and Clayton Hotels*, which is still ongoing. A substantive determination for the M/17/005 *Vhi Investments DAC/Vhi Swiftcare Clinics* has yet to be released.

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where PandaGreen made divestment undertakings in relation to Greenstar's domestic waste collection businesses in Fingal and Dun Laoghaire-Rathdown.

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 Phase 1 deadlines tend not to allow merging parties sufficient time to design and obtain approval for any 'complex' remedies.

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

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

Thus far, the CCPC has not previously required remedies or commitments in foreign-to-foreign mergers.

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 that 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 (as noted in question 17, this 10-working-day period may be reduced depending on the facts of the merger).

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

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

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

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.

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

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

We understand that the CCPC maintains regular contact with competition authorities in other jurisdictions, including in particular the UK

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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 lodged an appeal to the Supreme Court in respect of the High Court judgment but decided in April 2016 not to proceed with the appeal.

Enforcement practice and future developments

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 2015, one of which was cleared subject to a divestment condition (M/15/020 *Topaz/Esso*) and the other cleared on 'failing firm' grounds (M/15/026 *Baxter Healthcare/Fannin*). In 2016, the CCPC initiated one Phase II investigation, which was also cleared subject to binding divestment commitments (M/16/008 *PandaGreen/Greenstar*) (see question 25).

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 were 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?

We are not aware of any imminent plans to change domestic applicable merger control legislation at this time. We note the recent proposals made at EU level in relation to amending the current merger control analysis from a pure turnover-based jurisdictional threshold to a 'size-of-transaction' test. Any such change to merger control analysis would be particularly pertinent to certain sectors such as the digital and pharmaceutical industries, where the target company may have turnover below the national turnover thresholds but has the potential to impact in the internal market going forward. Any alterations of the current system in this regard would have a significant impact on Ireland as a European hub for the digital and pharmaceutical industries.

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