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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Merger Control 2019

Twenty-third edition

Getting the Deal Through is delighted to publish the twenty-third edition of *Merger Control*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Costa Rica, Egypt and Malaysia.

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

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

GETTING THE
DEAL THROUGH

London
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Ireland

Helen Kelly and Ronan Scanlan

Matheson

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

2 What kinds of mergers are caught?

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

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

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

Mergers and acquisitions (mergers) that meet the turnover thresholds set out in section 18(1) of the Act are subject to mandatory notification to the CCPC. Where these requirements are not met, mergers may still be notified to the CCPC on a voluntary basis under section 18(3) of the Act (see further the response to question 5 below for turnover thresholds and voluntary notification).

There are different thresholds, which apply to media mergers under the Act (see further the response to question 8 below).

3 What types of joint ventures are caught?

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

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

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

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

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

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

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

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.

References to 'the State' are references to Ireland, excluding Northern Ireland.

There are different thresholds that apply to 'media mergers' under the Act (see further the response to question 8 below).

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

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

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

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

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

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

Section 18(3) of the Act provides for voluntary notification of a merger that does not meet the jurisdictional thresholds (see further the response to question 5 above).

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

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

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

No special rules apply to foreign investment.

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

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

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

Where a merger qualifies as a media merger, the substantive test is 'whether the result of the media merger will not be contrary to the public interest in protecting the plurality of the media in the State' and this includes a review of 'diversity of ownership and diversity of content'.

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

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

To date, there has been only one Phase II examination of a media merger, the acquisition of seven regional newspapers (part of Celtic Media Group) by Independent News & Media (INM). This examination was not completed, as the merger was terminated by mutual consent of the parties. In 2017, there was one extended Phase I review of a media merger, *Twenty-First Century Fox/Sky plc*, which was subsequently cleared without conditions.

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, and may be made so long as the undertakings involved demonstrate a good faith intention to conclude an agreement. This approach is in line with the European Commission's practice under the EUMR.

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

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

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

In practice, no criminal sanctions have been imposed by the Irish courts on account of a failure to notify a merger in the State. However, in February 2018, the CCPC confirmed that it had launched an investigation into suspected gun jumping by Armalou Holdings Limited (through its wholly owned subsidiary, Spirit Ford Limited) of Lillis O'Donnell Motor Company Limited. This merger appears to have taken place in December 2015. This investigation remains ongoing at the date of publication.

See further the response to question 12 below with regard to the consequences of completing a merger after notifying but prior to clearance being obtained.

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

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

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

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

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

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

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

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

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

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

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

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

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

See further the response to question 9 above with regard to criminal sanctions for failure to notify.

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

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

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

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

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

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

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

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

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

No market share threshold applies for the identification of overlaps.

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

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

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

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

Pre-notification

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

Phase I

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

Phase II (if applicable)

- Communication from the CCPC setting out its decision to move to Phase II giving limited details;
- call for submissions or comments from third parties;

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

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

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

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

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

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

Substantive assessment

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. This is a similar test to that applied by other jurisdictions, such as the UK's Competition and Markets Authority (CMA).

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

20 Is there a special substantive test for joint ventures?

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

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

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

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

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

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

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

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

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

Remedies and ancillary restraints

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.

Update and trends

2017 was a busy year for the CCPC and, as at 30 June 2018, the CCPC had received 50 merger notifications (a significant increase in filings compared to this time last year). Over the last 12 months, there have been a number of noteworthy developments in the CCPC's approach, including with regard to the scope of its investigation (of both horizontal and vertical theories of harm), the type of commitments it has required (which can go beyond the scope of the harm identified), its willingness to 'call-in' mergers below threshold and its decision to take formal action against alleged failure to notify.

Specifically, in 2017–18, the CCPC:

- required parties to a proposed merger between media-monitoring companies, falling below the relevant financial thresholds, to make a voluntary notification, resulting in binding commitments (M/17/02 *Kantar Media/NewsAccess*);
- required parties to a proposed acquisition of two hotels to commit to notify future acquisitions or hotel management agreements even where those fall below the financial thresholds triggering mandatory notification and despite finding no competition concerns with regard to the notified merger (M/17/027 *Dalata/Clarion/Clayton*);
- carried out a detailed assessment of potential vertical concerns (including with regard to potential input foreclosure) relating to the acquisition by the largest private health insurer in Ireland of 100 per cent of the shares of two primary healthcare clinics, before clearing that merger unconditionally (M17/05 *VHI/Swiftcare Clinics*);
- also with regard to vertical concerns, required parties to give firewall and confidentiality commitments designed to protect foreclosure of a supplier (M/18/009 *BWG/4Aces*);
- required parties to commit to remove a notified purchaser non-compete clause that was found not to qualify as an ancillary restraint (M/17/36 *Sean Loughnane/Crinkle*); and
- opened a formal investigation regarding an alleged failure to notify a transaction in 2015 that met the thresholds triggering mandatory notification, which is ongoing at the time of publication (*Armalou Holdings Limited/Lillis O'Donnell Motor Company Limited*).

Looking forward, the CCPC expects to see an increase to the financial thresholds triggering mandatory filings (as per the response to question 35), which could reduce the number of notifications by between 10 per cent and 38 per cent annually (depending on whether the single undertaking turnover threshold increases to €5 million or €10 million). Once implemented, this should reduce the administrative burden on CCPC case officers, affording them more time to focus on mergers giving rise to potential competition concerns.

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

For example, in M/16/008 *PandaGreen/GreenStar*, CCPC clearance was obtained where PandaGreen made divestment undertakings in relation to Greenstar's domestic waste collection businesses in Fingal and Dun Laoghaire-Rathdown. In M/14/026 *Valeo/Wardell/Robert Roberts*, the acquirer undertook to divest the YR brand of brown sauce 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. This interest was subsequently divested to Applegreen during the course of 2017, with a binding commitment that Applegreen would import and supply refined fuel products, including aviation fuel (Jet A1), through the JFT.

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

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

The Phase II timetable allows the merging parties more time to satisfy the CCPC that their remedies proposal effectively resolves any identified 'theories of harm' or competition law concern. 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?

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

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

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

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

Involvement of other parties or authorities

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 of 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 18, 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.

The CCPC maintains regular contact with competition authorities in other jurisdictions, including in particular the UK CMA and the European Commission regarding, respectively, cases that are subject to parallel reviews in the United Kingdom and Ireland and EU cases that may impact on Ireland. For example, in 2017 the CCPC closely monitored six mergers with an Irish dimension investigated by the European Commission:

- M.8084 *Bayer/Monsanto*;
- M.8354 *21st Century Fox/Sky*;
- M.7421 *Orange/Jazztel*;
- M.8601 *Greenergy/Inver*;
- M.8228 *Facebook/WhatsApp*; and
- M.8306 *Qualcomm/NXP Semiconductors*.

The CCPC also undertook a parallel review of a merger alongside the CMA in M/17/035 *Dawn Meats/Dunbia*.

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

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

Enforcement practice and future developments

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

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). In 2017, there were 72 notifications to the CCPC, of which two were voluntarily notified (M/17/036 *Sean Loughnane/Crinkle Foods* and M/17/012 *Kantar Media/Newsaccess*) and one was withdrawn at the request of the parties (M/17/055 *Siris/Synchronoss*). Of the nine extended Phase I investigations, four required binding commitments at Phase I (M/17/012 *Kantar Media/Newsaccess*, M/17/021 *Applegreen/50% of Joint Fuels Terminal*, M/17/027 *Dalata/Clarion Liffey Valley/Clayton Cardiff Lane* and M/17/036 *Sean Loughnane/Crinkle Fine Foods*). There were no Phase II investigations or prohibitions in 2017. Four media mergers were notified to the CCPC in 2017.

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 mergers involving material overlaps in consumer-facing markets and key infrastructure assets (eg, telecoms, electricity and gas, transport networks).

35 Are there current proposals to change the legislation?

The Irish government conducted a consultation late in 2017 on proposals to increase the relevant turnover thresholds from £3 million to either £5 million or €10 million (for one or more undertakings in the State) and from £50 million to €60 million (for the combined turnover of the undertakings concerned in the State). An amendment to the Act would be required in the Irish Houses of Parliament. This is currently with the relevant government minister and there is currently no firm timetable for when these changes will be effected. We also 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. We are not aware of any such plans in Ireland and note that 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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