



The Irish Merger Control Regime

Introduction

The Irish merger control rules are primarily contained in Part 3 of the Competition Acts 2002 to 2014.

The main features of the Irish regime are:

- turnover thresholds for mandatory notifications;
- no completion before clearance;
- the application of the "substantial lessening of competition" test;
- special provision for "media mergers"; and
- the possibility of voluntary notification.

Qualifying Mergers

A qualifying merger or acquisition occurs where:

- two or more previously independent undertakings merge;
- there is a sole or joint acquisition of direct or indirect "control" of the whole or part of an undertaking (including the creation of a "full-function" joint venture); or
- there is an acquisition of assets (which may include goodwill) constituting a business to which turnover can be attributed.

A qualifying merger or acquisition will not occur in the case of a receivership, a liquidation or an intra-group transaction.

The concept of "control" is similar to that under the EU Merger Regulation. It will exist if *decisive influence is capable of being exercised with regard to the activities of an undertaking*, by reason of securities, contracts or other means, or any combination of these, in particular by:

- ownership of, or the right to use all or part of the assets of an undertaking; or

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

Notification Requirements

If financial thresholds are satisfied, a qualifying merger or acquisition must be notified to and approved by the Competition and Consumer Protection Commission ("CCPC") before it may be completed. The financial thresholds triggering notification are that, in the most recent financial year, in the Republic of Ireland,:

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

These thresholds entered into force on 1 January 2019, pursuant to the Competition Act 2002 (Section 27) Order 2018 (S.I. No. 388 of 2018).

The thresholds do not apply in the case of media mergers, to which a special regime applies (see below).

The qualifying merger or acquisition may be notified on the basis of a good faith intention to conclude the agreement (or on signing the agreement). In the case of a public bid, a notification may be made where there is a publicly announced intention to make the bid.

According to the CCPC, the entire group of companies to which a merging undertaking belongs constitutes an "undertaking involved". "Turnover in the State" comprises sales made or services supplied to customers within the Republic of Ireland.

Generally, the vendor is not "involved" in the merger or acquisition. In the case of an acquisition of assets (including goodwill), however, the undertaking whose assets are being acquired is considered to be involved for the purposes of determining whether the acquisition is notifiable (with the relevant turnover being the turnover generated from the assets being acquired), but is not obliged to notify the transaction to the CCPC.

Notification should be made by each undertaking involved using the prescribed merger notification form, which may be submitted jointly or separately. A joint notification is normally submitted.

A fee of €8,000 applies to each notification. Failure to notify a notifiable merger or acquisition or to supply information required is a criminal offence and can result in significant fines (€3,000 on summary conviction or €250,000 on conviction on indictment). A notifiable merger or acquisition which has not been notified is void.

Once notified, the merger or acquisition may not be put into effect until:

- the CCPC has determined that it may be put into effect;
- the CCPC has made a conditional determination; or
- specified time periods have elapsed without the CCPC informing the notifying parties of its determination.

Voluntary Notifications

Qualifying mergers and acquisitions below the financial thresholds may be notified to the CCPC on a voluntary basis. A voluntary notification should be considered where the proposed transaction is likely to give rise to competition concerns thus attracting the interest of the CCPC.

Notification Procedures

Written notification of the proposed merger or acquisition, with full details of the transaction, must be made to the CCPC before completion of the relevant transaction. Brief details of each notification are published on the CCPC's website. This is intended to make the process

transparent and thereby facilitate third party submissions.

The parties may request a meeting with staff of the CCPC's Mergers Division prior to making a notification. While not binding on the CCPC, these confidential discussions provide an opportunity to discuss the scope of information to be submitted and to identify possible competition concerns at an early stage.

There is a two-phase review procedure, the second phase of which will be initiated where the CCPC is not satisfied, during its first-phase analysis, that the merger will not substantially lessen competition in the relevant market(s).

First Phase

The CCPC must inform the notifying parties, and third parties that have made submissions, within 30 working days commencing on the date of receipt of the notification, of its Phase I determination. Where the CCPC issues a formal request for information, the clock is stopped and a new 30 working day Phase I review period starts upon the date of the provision of the complete response(s). The Phase I 30 working day deadline is extended to 45 working days where a notifying party submits a proposal aimed at addressing competition concerns. In Phase I, the CCPC's determination can either:

- allow the transaction to proceed; or
- initiate a full investigation.

The CCPC may hold discussions with the notifying and/or third parties to identify measures to limit the anti-competitive effects of a merger or acquisition; these can develop into formal commitments binding the parties.

If cleared at the end of the first phase, the merger must be put into effect within twelve months of clearance. If the CCPC fails to inform the notifying parties of its determination by the relevant deadline, the merger is deemed to be cleared and may be put into effect within thirteen months of receipt of the notification by the CCPC (or receipt by the CCPC of further information).

The CCPC must publish its determination (with confidential business secrets removed) within 60 working days of making it.

Second Phase

If the CCPC initiates a second-phase investigation, it has 120 working days from the notification date (or the date of provision of additional requested information in Phase I) to make a determination. The 120 working day period can be extended where the CCPC issues a formal request for information within the first 30 working days of Phase II (the time period is suspended until a complete response is received). Where proposed remedies are submitted in Phase II, the CCPC has 135 working days rather than 120 to make its decision.

The CCPC may then decide that the merger or acquisition may:

- take effect;
- take effect subject to conditions; or
- not take effect.

If the CCPC concludes that the merger will not substantially lessen competition, it will make an early determination within 40 working days of the beginning of this second phase (adjusted as appropriate where there has been a suspension of time due to the issuance of a formal request for information), allowing the merger to proceed. If not, it can furnish an Assessment to the notifying parties, who may make written and oral submissions to the CCPC prior to its determination.

If cleared, the merger must be put into effect within twelve months of the determination. If the CCPC fails to make a determination within the Phase II review period, the transaction is deemed to be cleared and may be put into effect within 12 months after the expiry of the Phase II period. The CCPC's determination must be published after allowing parties an appropriate period to indicate whether any information contained in it is confidential.

The Substantive Test

The substantive test is whether the result of the merger or acquisition will be to substantially lessen competition in markets for goods or services in the State. This test is used in the US and is similar to the "significantly impedes effective competition" test contained in the EU Merger Regulation.

In carrying out its analysis, the CCPC first considers the relevant product and geographic markets in terms of supply- and demand-side substitutability (applying the SSNIP test). It then assesses the effect of the transaction on market structure in terms of market concentration, using the HHI test as an initial indicator of pre- and post-merger concentration levels. Finally, it assesses whether the merger will result in a substantial lessening of competition, taking into account factors such as:

- whether the merged firm is enabled to raise prices unilaterally;
- whether the merger facilitates overt or tacit collusion between competitors, resulting in raised prices;
- opportunities for market entry;
- countervailing buyer power; and
- the "efficiency defence" - the extent to which the merger leads directly to efficiency gains that cannot be realised by other means and which offset any anti-competitive effects.

Appeals

Any notifying party can appeal to the High Court within 40 working days against a decision to block a merger, or to allow a merger subject to conditions. Issues of fact and law may (subject to certain limits) form the subject of such an appeal. As far as practicable, the High Court must rule on such an appeal within two months. The High Court can annul the CCPC's decision or confirm it (with or without changes). There is no provision in the Act for appeal by third parties in the event of clearance by the CCPC. Such parties may, however, seek remedies under normal principles of judicial review.

Media Mergers

Media mergers must be notified regardless of the turnover of the undertakings involved, in cases where at least one undertaking involved carries on a media business in the State and at least one other undertaking involved carries on a media business either in the State or elsewhere.

"Carries on a media business in the State" means, in relation to a media business: (a) having a physical presence in the State, including a registered office, subsidiary, branch, representative office or agency, and making

sales to customers located in the State; or (b) having made sales in the State of at least €2 million in the most recent financial year. "Media business" is defined broadly to include the publication of newspapers, transmitting a broadcasting service, providing content to a broadcasting service and making available an online service consisting substantially of news and comment on current affairs.

In the case of media mergers, separate notifications must be made to both the CCPC and the Minister for Communications, Climate Action and Environment (the "Minister"). The CCPC will consider competition aspects of the merger, while the Minister will consider whether the media merger is likely to be contrary to the public interest in protecting the plurality (i.e., diversity of ownership and of content) of the media in the State.

The usual merger control timetable (as set out above) applies to the CCPC's review. The Minister has 30 working days for an unextended Phase I review. Where the Minister opens a second phase examination, this will take the form of a referral to the Broadcasting Authority of Ireland ("BAI"). In an unextended Phase II review, the BAI has 80 working days to report and then the Minister has 20 working days to make a determination. These periods are extendable where formal information requests are issued or where commitments are offered. There is no fee for notifying the Minister but the BAI has the power to recover its costs from the undertakings involved.

The notification to the Minister may not be made until clearance has been obtained from the CCPC (or the European Commission, as the case may be). Given that the notifications are consecutive rather than concurrent, the review timeframe may be lengthy.

Application of Sections 4 and 5 of the Competition Acts 2002 to 2014

Provisions of the Competition Acts 2002 to 2014 dealing with anti-competitive arrangements (Section 4) and abuse of a dominant position (Section 5) will not apply to mergers cleared under the Act or to ancillary restrictions in the relevant agreements covered by the clearance.

Contacts

For further information, please contact:



Cormac Little - Partner
T. +353 1 639 5114
E. cormac.little@williamfry.com



Claire Waterson - Partner
T. +353 1 639 5176
E. claire.waterson@williamfry.com



Sheila Tormey - Partner
T. +353 1 489 6512
E. sheila.tormey@williamfry.com



Sarah Lynam – Associate
T. +353 1 489 6556
E. sarah.lynam@williamfry.com

January 2019

WF-18671279-4