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Irish Merger Control: *Main Features*

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Global Competition Review 2018

Our EU, Competition and Procurement Law Group is widely recognised as the leader in its field and continues to be ranked among the top competition law practices in Ireland by Global Competition Review, Chambers and others. We are at the forefront of advising on Irish merger control and consistently represent clients on a significant number of Irish merger control notifications.

To which agency/agencies must an Irish merger control notification be made?

To the Competition and Consumer Protection Commission (**CCPC**) (and also to the Minister for Communications, Climate Action and Environment (**Minister**) for “media mergers”) under the Competition Acts 2002-2017 (**Acts**).

What types of merger qualify as potentially notifiable?

The types of merger which qualify as potentially notifiable are mergers, acquisitions (i.e. of shares and/or assets that constitute a business to which a turnover can be attributed) and the creation of JVs (that perform, on a lasting basis, all the functions of an autonomous economic entity). The acquisition of “control” (i.e. the ability to exercise decisive influence) or the acquisition of assets (which constitute a business) is a requirement for a merger to be potentially notifiable.

What are the thresholds for the compulsory notification of a merger to the CCPC?

As well as media mergers (see below), a merger must be notified to the CCPC where, in their most recent respective financial years:

(i) the combined turnover in Ireland of all the undertakings involved is at least €60m, and

(ii) the turnover in Ireland of each of at least 2 of the undertakings involved is at least €10m.

When/who must notify and what are the consequences of failing to notify/”gun-jumping”?

The undertakings involved in a merger must notify and obtain approval from the CCPC before the merger can be put into effect. Notification may be made before a merger agreement is signed, (i.e. where a good faith intention to conclude an agreement is demonstrated or where an intention to make a public bid has been publicly announced by one of the undertakings involved). Failure to make such a notification where required is an offence which may result in fines of up to €250,000 (plus daily default fines) being imposed on the undertakings involved as well as on persons in control of such undertakings who knowingly and wilfully authorised or permitted the breach *(recently there were convictions in one case against undertakings who failed to notify a merger).* In addition, a merger is void under Irish law if it is put into effect before CCPC approval.

What is the timing for the review by the CCPC of a notified merger?

The Phase 1 review by the CCPC lasts up to 30 working days (starting on the date of

notification). A new 30 working-day period begins once satisfactory responses are provided by the notifying parties to a formal request for information by the CCPC. Phase 1 becomes a 45 working-day period where the notifying parties offer commitments to the CCPC to obtain a Phase 1 approval. In Phase 2, the CCPC has up to 120 working days (calculated from the date of notification or from the date of receipt of satisfactory responses provided by the notifying parties to a formal request for information by the CCPC in Phase 1) to review the merger (or up to 135 working days where commitments are offered by the notifying parties to the CCPC to obtain a Phase 2 approval). Phase 2 is suspended where the CCPC requires further information from the notifying parties and the time period restarts once that information has been satisfactorily provided to the CCPC.

What decisions must the CCPC make on a notified merger and what test does it apply?

In Phase 1, the CCPC must either clear a notified merger (with or without commitments) or refer it to a Phase 2 review. In Phase 2, the CCPC must clear (with or without commitments), clear on conditions or prohibit a merger. The test applied by the CCPC is whether the merger would substantially lessen competition (**SLC**) in any market in Ireland. Certain Phase 2 decisions can be appealed to the Irish Courts.

When should the voluntary notification of a merger to the CCPC be considered if there is no obligation to notify?

The voluntary notification of a merger should be considered if a merger would be likely to SLC in Ireland. This is because the CCPC may, based on its general competition law powers under the Acts, investigate such a merger and take action (including seeking to reverse a completed merger) where it has material competition concerns about its effect in Ireland.

Are there any transaction-value or national security provisions or any exceptions under the Irish system?

There are no transaction-value or national security provisions under Irish merger control. There are certain limited global financial crisis-related exceptions in relation to credit institutions under the Credit Institutions (Stabilisation) Act 2010, the Central Bank and Credit Institutions (Resolution) Act 2011 and the Irish Bank Resolution Corporation Act 2013.

When must a media merger be notified?

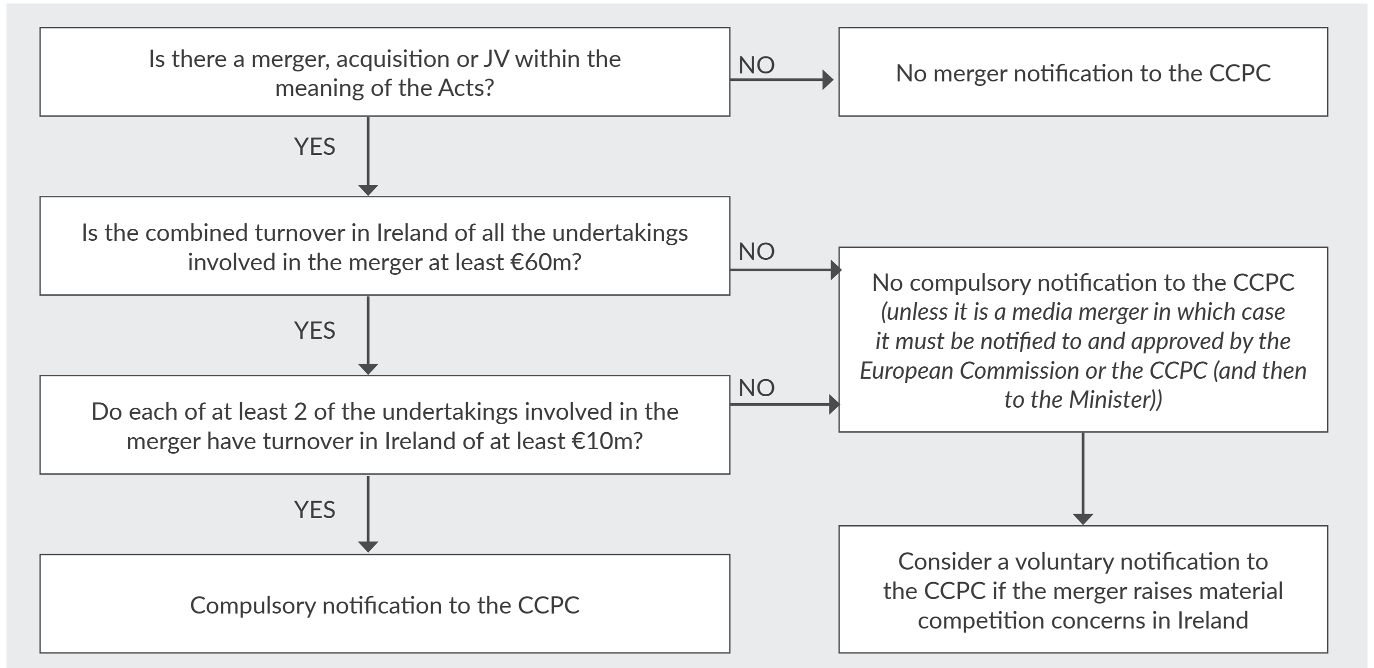
A media merger must be notified to the European Commission under the EU Merger Regulation (**EUMR**) or, if not, to the CCPC (whether or not it meets the Irish thresholds applied to all other mergers - this is because Irish merger control applies to all media transactions as defined under the Acts).

A media merger is where: (i) each of at least 2 of the undertakings involved carries on a media business in Ireland, or (ii) where at least one undertaking involved carries on a media business in Ireland and another carries on a media business elsewhere. A media business includes publications consisting substantially of news and comment on current affairs as well as broadcasting, transmission and programme material production.

What is the procedure for the review of a media merger?

Following approval of a media merger by either the European Commission or the CCPC (both of which apply a competition test to the media merger), a notification is then made to the Minister who has up to 30 working days in Phase 1 (beginning 10 working days from the European Commission or CCPC approval) to approve the media merger (with or without commitments) or to refer it to a more detailed Phase 2 review on media plurality grounds. In Phase 2, the Minister refers the notification to the Broadcasting Authority of Ireland (**BAI**). The BAI must issue a report within 80 working days giving its view as whether the media merger would adversely affect media plurality in Ireland. It invites submissions from the Joint Oireachtas Committee and may be assisted by an Advisory Panel appointed by the Minister. The Minister then has up to 20 working days after receipt of the BAI report to decide whether to clear (with or without conditions), clear on conditions or prohibit the media merger. Certain Phase 2 decisions can be judicially reviewed by the Irish Courts.

Flowchart: Conditions for an Irish Merger Control Notification to the CCPC



Summary Flowchart: Timelines for an Irish Merger Control Notification to the CCPC (not a media merger)

PHASE 1

Notify the CCPC *(either on a compulsory or voluntary basis)* before the merger is put into effect. The merger cannot, as a matter of Irish law, be put into effect until CCPC clearance is obtained

↓

The CCPC must clear the merger or go to a Phase 2 review within 30 working days of notification *(or of the receipt of satisfactory responses by the notifying parties to formal queries by the CCPC)* → Clearance

↓

Have the notifying parties offered commitments to the CCPC?

YES → The CCPC must clear the merger (with or without commitments) or go to a Phase 2 review within 45 working days of the notification *(or of the receipt of satisfactory responses by the notifying parties to formal queries by the CCPC)*

NO ↓

PHASE 2

CCPC goes to a Phase 2 review. The CCPC has up to 120 working days from notification *(or from the date of the receipt of satisfactory responses by the parties to formal queries by the CCPC in Phase 1)* to review the merger. This period can be suspended if the CCPC raises queries within 30 working days of the start of Phase 2 and the time-period restarts on receipt by the CCPC of satisfactory responses by the notifying parties (extended by up to 15 working days where the notifying parties offer commitments to the CCPC)

↓

CCPC clears *(with or without commitments)*, clears on conditions or prohibits the merger

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Summary Flowchart: Timelines for a Media Merger Notification

PHASE 1

- Is it a media merger under the Acts?
  - NO → No notification to the Minister *(though may still need to be notified to the European Commission or CCPC for merger control review)*
  - YES ↓
- Has the media merger been notified to the European Commission or the CCPC?
  - YES ↓
- Has the European Commission or CCPC approved the media merger *(with or without commitments or conditions)?*
  - NO → No notification to the Minister if the media merger has been prohibited
  - YES ↓
- Notify the Minister on or before the "Relevant Date" *(i.e. 10 working days from European Commission or CCPC approval)*
  - ↓
- In Phase 1, Minister has up to 30 working days following the Relevant Date *(or the receipt of satisfactory responses by the notifying parties to formal queries by the Minister)* either to clear the media merger or refer it to Phase 2 *(extended to 45 working days if the notyfying parties offer commitments)*
  - → Cleared by the Minister in Phase 1 *(with or without commitments)*
  - ↓

PHASE 2

- Referred to Phase 2 by the Minister for an in-depth review of the media merger's effect on media plurality in Ireland
  - ↓
- BAI has up to 80 working days *(or from the receipt of satisfactory responses by the notifying parties to formal BAI queries)* to report to the Minister whether the media merger would adversely affect media plurality in Ireland
  - ↓
- The Minister has up to 20 working days to clear *(with or without commitments)*, clear on conditions or prohibit the media merger

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