

Overview of Irish Merger Control: Key Statistics 2016

Introduction

The lowering of the Irish merger control thresholds towards the back end of 2014 prompted a significant uptick in the number of merger filings in 2015 (78 in total). The annual average number of filings over the previous five years was 39. It is undoubtedly the case that the lowering of the thresholds has cast the net wider and that net is catching an increasing number of both domestic and 'foreign-to-foreign' transactions.

These thresholds are, however, within the crosshairs, as the general consensus is that smaller, domestic transactions, which have little or no effect on competition in the Republic of Ireland, are being unnecessarily caught. However, any amendment of the thresholds would require new primary legislation. It is unlikely, in our view, that such legislation will emerge during 2017.

The 2015 total – the high water mark since 2007 – could well have been exceeded in 2016 were it not for the cooling effect of the decision by the UK to leave the European Union. The uncertainty surrounding the approach of the Trump administration towards foreign investment rules/trade deals also played a part.

In summary, 2016 was a very busy year for the mergers team at the Competition and Consumer Protection Commission, as illustrated by the headline statistics profiled in this review.

Six 'media merger' determinations by the relevant Irish Minister also emerged during 2016. A number of transactions with Irish links were notified to and cleared unconditionally by the European Commission during 2016, including the ABP Group/Fane Valley Group/Slaney Foods and McKesson/UDG Healthcare transactions on which we advised.

From the broader competition perspective, the EU Damages Directive is likely to be transposed into Irish law in the early part of 2017. On the State aid side, the Apple taxation case continues to sit in the limelight in Ireland. The Irish Department of Finance filed its appeal at the start of November 2016. It was reported that the Commission had asked for the appeal to be amended, on the basis that it was too long. It was also reported that Apple CEO, Tim Cook, declined an invitation to appear at an Irish Parliament finance committee to discuss the Commission's ruling.

So, interesting times lie ahead for 2017.

*Turnover
thresholds in
the crosshairs*

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Irish merger control is governed by the Competition Acts 2002 to 2014 (“Act”). Under the Act, notification of a proposed transaction to the Irish Competition and Consumer Protection Commission (“CCPC”) is mandatory once the following thresholds are met (and regardless of where the legal entities are based):

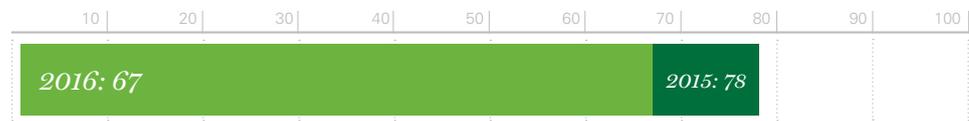
- in the most recent financial year, the aggregate turnover in the Republic of Ireland of all of the undertakings involved is not less than €50 million; and
- in the most recent financial year, the turnover in the Republic of Ireland of each of two or more of the undertakings involved is not less than €3 million; or
- the proposed transaction involves a ‘media merger’ as defined under the Act (see further below regarding media mergers).

It is a criminal offence to fail to notify a notifiable transaction and, once a transaction is notified to the CCPC, it cannot be put into effect until clearance has been obtained.

Headline Statistics

Notified mergers down 14% on 2015. Possible cooling effect of Brexit

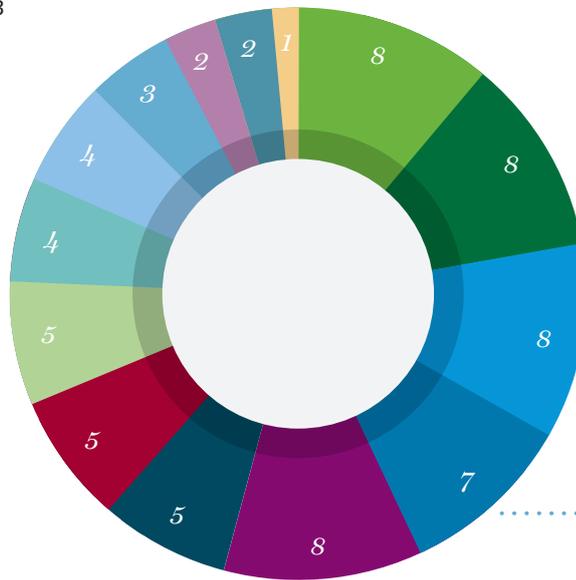
- Number of mergers notified: **67**



(compared to 78 notified in 2015, 7 remain active and 1 notification withdrawn)

- Number of mergers cleared: **70**
(11 of which were notified in 2015)
- Cleared at Phase 1: **69**
- Cleared with conditions at Phase 1: **1**
(M/16/040 Bon Secours Health System / Barringtons Hospital)
- Cleared at Phase 2: **1**
(M/16/008 PandaGreen / Greenstar)
- Cleared with conditions at Phase 2: **1**
(M/16/008 PandaGreen / Greenstar)
- Number of mergers blocked: **0**
(1 withdrawn (M/16/041 Joint Venture: Marino Point Port Company, Port of Cork et al))

Sectors Involved



Property-related transactions continue to dominate

Average Clearance Times

CCPC has 30 working days to reach a Phase 1 determination (unless it issues a formal RFI)

- Average clearance time for a non-extended Phase 1 assessment:



- Average clearance time for an extended Phase 1 assessment:



- Average clearance time for an extended Phase 1 assessment with conditions:



- Average clearance time for a Phase 2 assessment:



Requests for Information

Formal RFIs issued in 6% of cases

The CCPC generally issues informal requests for information (“RFIs”) which have no effect on the statutory timelines. Formal RFIs in Phase 1, which have the effect of resetting the clock to zero, are used relatively sparingly by the CCPC. In respect of the 69 Phase 1 mergers cleared in 2016, formal RFIs were issued in only **four cases** (6%) and in each case there were horizontal overlaps between the merging parties.

Market Enquiries

Market enquiries conducted in 7% of cases

The CCPC carried out only **five market enquiries in merger cases in 2016** and in each case there were horizontal overlaps between the parties which gave rise to potential competition concerns. In four of the five cases, the CCPC’s enquiries were by way of questionnaires sent to customers and competitors of the notifying parties.

In one case, in addition to sending a questionnaire to competitors of the notifying parties, the CCPC engaged an independent third-party to undertake an online consumer survey with respect to the online betting industry.

Third Party Involvement

Third party submissions received in 9% of cases but in 50% of media mergers

Once a merger is notified to the CCPC, a notice is published on the CCPC’s website and third parties are typically given 10 working days to make submissions in respect of any concerns.

In 2016, third-party submissions were made to the CCPC in less than 9% of cases. Third-party submissions were made to the CCPC in a total of six cases, three of which involved media mergers.

Ancillary Restraints

CCPC assesses ancillary restraints in c. 50% of cases

The assessment of ancillary restraints is relatively common in Irish merger control. In 2016, the CCPC assessed ancillary restraints in approximately 50% of cases. In assessing ancillary restraints, the CCPC is guided by the European Commission’s Notice on restrictions directly related and necessary to concentrations. The majority of ancillary restraints assessed by the CCPC were considered directly related and necessary to the proposed transaction.

It is interesting to note that, in addition to assessing restrictive covenants contained in share purchase agreements and other transaction documents, the CCPC has also reviewed restraints contained in the constitutional documents of the purchasing entity and in separate manufacturing agreements. The CCPC has also requested parties to provide copies of draft documents and has assessed restraints contained in such drafts.

Media Mergers

Media mergers attract most third party interest

Media mergers receive special treatment under the Act and this is an area on which we continue to regularly advise our national and international clients. The general turnover thresholds noted above do not apply (different thresholds apply, see below) and parties are required to make two separate notifications, one to the CCPC, or the European Commission where appropriate, and a second to the Minister for Communications, Climate Action and Environment (“**Minister**”).

The CCPC investigation continues to be based purely on competition law review, whereas the Minister, with the assistance of the Broadcasting Authority of Ireland in a Phase 2 assessment, is tasked with carrying out a media plurality assessment.

For a media merger to be notifiable, at least two of the undertakings involved must carry on a ‘media business’ and at least one of those undertakings must ‘carry on a media business in the State’, i.e.:

- has a physical presence in the Republic of Ireland and has made sales to customers in the Republic of Ireland; or
- has made sales in the Republic of Ireland of at least €2 million in the most recent financial year.

Importantly, a media merger can only be notified to the Minister **after** the CCPC or the European Commission as appropriate, has given its determination. The applicable review periods cannot run in parallel.

In 2016, six media mergers were notified to the Minister. Another media merger was notified to the CCPC in December 2016, but had not been notified to the Minister by year end.

Of the six media mergers notified to the Minister, four concerned the TV and radio broadcasting sector, whereas the other two concerned the publication of newspapers/magazines.

Six determinations were issued by the Minister in 2016 (one in relation to a media merger notified to the Minister in late 2015). All six mergers were cleared at Phase 1.

The average duration for the Minister’s review was 31.5 working days, with the shortest review time being 26 working days. This clearly shows that the Minister has tended to utilise the full statutory period to reach a determination.

The Minister has, to date, chosen not to publish the reasoning for any of the 10 determinations reached since the introduction of the new media merger regime in 2014. This is disappointing given the obvious importance of media mergers to the wider public interest. Published determinations would also assist interested parties and their advisors in better understanding how the Minister approaches the statutory media plurality test for future cases.

Average clearance times indicate Minister using full statutory timelines

What others say about us...

Our Competition & Antitrust team

"The team advises clients on an impressive roster of cases."

Global Competition Review, GCR 100, 2017

Our Competition & Antitrust team

"Known for its high-end competition offering"

Chambers & Partners Europe, 2016



Our Competition & Antitrust team

"The firm has a great reputation which is well known internationally."

Chambers & Partners Europe, 2016

Our Competition & Antitrust team

"Acts for household names in competition investigations and merger control matters."

Legal 500, 2016



Client Service Law Firm of the Year
Chambers Europe Awards for Excellence, 2016

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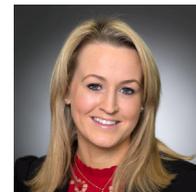
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