

The Irish Merger Control Insight 2017 – A Year in Review

The Snapshot

We recently witnessed the passing of former Irish Attorney General and EU Commissioner Peter Sutherland. The Irish Prime Minister recently described Peter Sutherland as “*a statesman in every sense of the word: an Irishman, a committed European and a proud internationalist*”.

Speaking at the EC Merger Control 10th Anniversary Conference back in September 2000, Competition Commissioner, Mario Monti, stated:

“... [T]he Merger Regulation must allow us to quickly make a distinction between the majority of these deals, which are beneficial, and should be allowed to proceed quickly and smoothly and those, the few, which are harmful to the consumer. As Peter Sutherland put it at this conference: we must look positively and constructively at mergers; find ways to do things, rather than stop them”.

So, with those words of Peter Sutherland in mind, we have some positive news to report: mirroring the position in 2016, no transaction was blocked by the Irish Competition and Consumer Protection Commission (CCPC) in 2017. However, we believe 2017 should be appropriately characterised as evidencing a more interventionist approach by the CCPC.

Fruits of the CCPC’s Market Surveillance

The CCPC’s market surveillance endeavours bore more fruit in 2017. The CCPC became aware of the proposed Kantar Media/ Newsaccess transaction in or around February 2017. The transaction did not meet the mandatory reporting thresholds, but the CCPC was concerned that the transaction would remove Kantar’s closest competitor. Following engagement with the CCPC, the parties agreed to make a voluntary notification.

The transaction was subsequently cleared, subject to both structural and behavioural commitments, after a four month review. Unlike, for example, the CMA in the UK, the CCPC does not have a large and dedicated mergers intelligence team, which keeps under review a wide range of public sources. That said, one can expect the CCPC’s market surveillance endeavours to continue to detect non-notified, but potentially problematic transactions, in 2018 and beyond.

New Merger Thresholds

All Changed, Changed Utterly?

When the current incarnation of the reporting thresholds appeared in late 2014, the stated purpose was to bring more domestic transactions within the Irish merger control net. This has happened, but with the unintended consequence that the CCPC has been analysing a large number of transactions which are highly unlikely to raise substantive concerns.

For example, transactions in the energy/motor fuel sector were one of the most frequently notified in 2017. Seventeen notifications were made, in some cases relating to the acquisition of a single service station. This was a significant increase from the four transactions notified in 2016. Accordingly, practical experience in dealing with the thresholds dictates that they are too low. They are a burden on businesses, in particular small and medium sized businesses and, arguably, on the CCPC.

The Irish Department of Business, Enterprise and Innovation opened a consultation on the thresholds in 2017. Whilst it may take a little time for the relevant legislation to work its way through, we expect the individual threshold to increase from €3 million to €10 million and the aggregate threshold to increase from €50 million to €60 million.

Conditional Phase I Uptick and Hello 'Fix it First'

Of the 72 transactions notified in 2017, nine (12.5%), including two on-going cases, resulted in extended Phase I reviews. This compares to just two in 2016. Extended Phase I review periods were typically coupled with formal RFIs, which almost doubled in number compared to 2016, increasing from four to seven.

In 2017, the CCPC required commitments as a condition of clearance at Phase I in four transactions, up from one in 2016. Of particular interest is the increased reliance by the CCPC on behavioural or 'quasi-behavioural' commitments. For example, in Dalata/Clarion Liffey Valley/Clayton Cardiff Lane, Dalata agreed to certain notification and confidentiality commitments.

In Applegreen/JFT, Applegreen agreed to develop its third-party supply business and use its share of the Joint Fuel Terminal to develop an aviation fuel business. The CCPC required a divestment in only one transaction - Kantar Media/Newsaccess. Interestingly, the CCPC required Kantar to enter into a final binding agreement with a purchaser for the sale of certain assets prior to the CCPC issuing its conditional clearance.

This is a rare instance of the CCPC requiring a 'fix-it first' remedy, in contrast to the EU approach, where the European Commission frequently imposes such obligations.

Ancillary Restraints

Not Just a Formality

The CCPC conditionally cleared Sean Loughnane's acquisition of certain assets of Crinkle Fine Foods following an extended Phase I review. This was one of two voluntary notifications in 2017, both of which resulted in binding commitments.

The CCPC's concerns arose from a non-compete clause in the transaction agreements, which would have prevented the purchaser from competing with a third company for a period of time following completion. Unlike the European Commission, the CCPC will assess any ancillary restraints mentioned in the merger notification and they will be covered by its determination. In this case, to address the CCPC's concerns, the parties agreed to amend the agreement and commit to not entering into any arrangement which would have the same or similar effect to the non-compete clause.

This is just one of several examples in 2017 of the CCPC relying on behavioural commitments to address its concerns.



Navigating the Media Merger Landscape

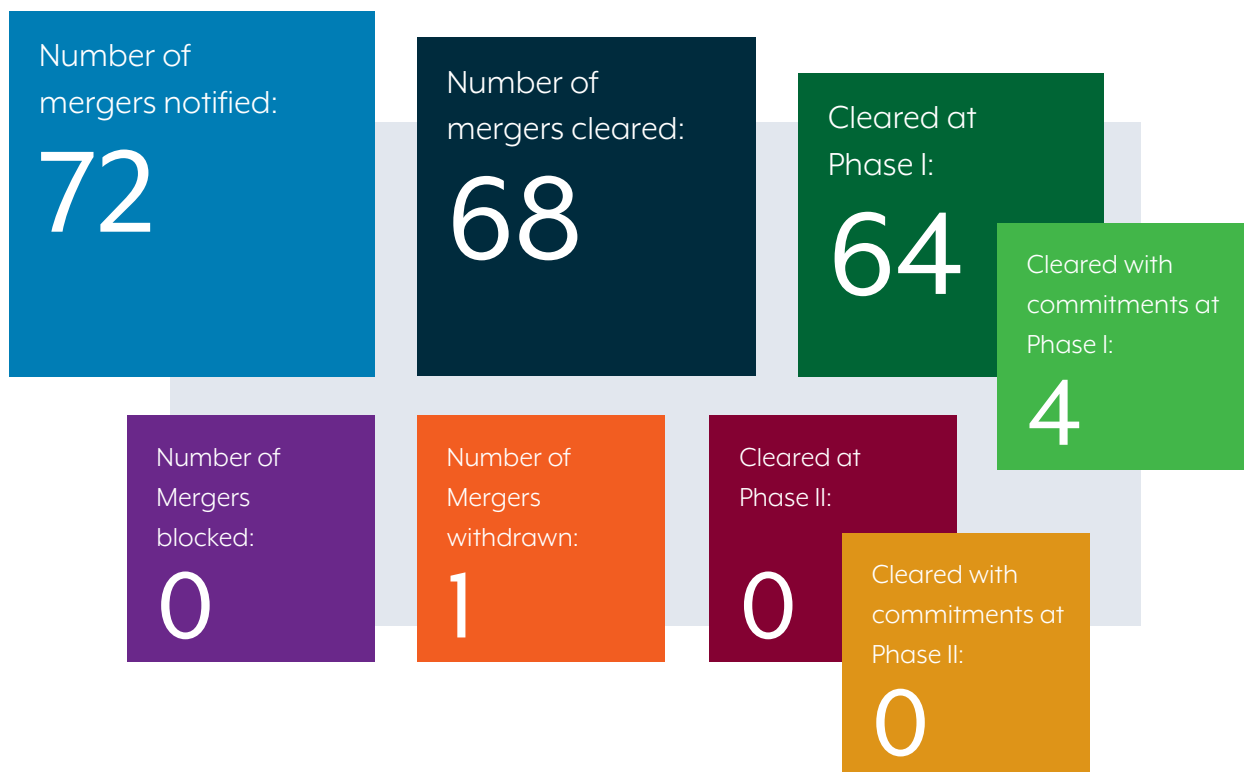
Almost seven months following competition clearance by the CCPC, the parties in *INM/CNML* ultimately walked away from the transaction following a protracted Phase II media merger investigation by the Irish Department of Communications (DCCAIE).

Remedies were also sought, but ultimately not required, in *Twenty-First Century Fox/Sky plc*. This case is also interesting for other reasons. In particular, it is now clear that the DCCAIE interprets the relevant legislation as only requiring the

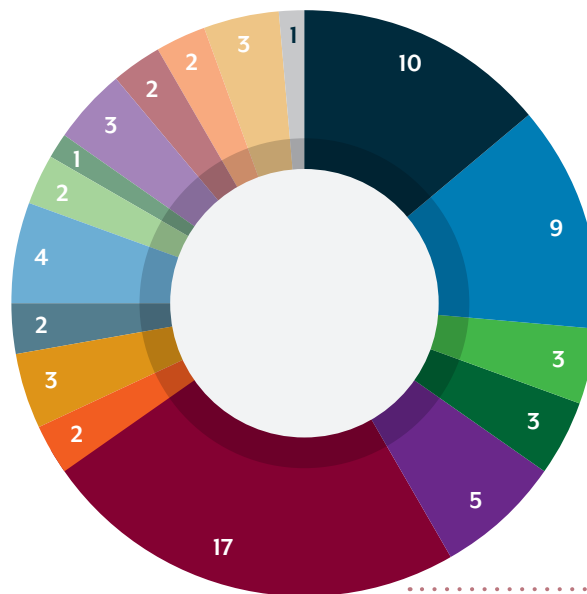
Minister of Communications to consider ‘*the end-state of*’ rather than ‘*changes induced by*’ a merger, ie the Minister’s considerations need not be merger-specific. However, it is difficult to reconcile this interpretation with the DCCAIE’s own Guidelines which speak about the ‘impact’ of a merger.

Also, it is important to note when navigating the media merger landscape, that formal requests for information from the DCCAIE will stop and reset the clock, as was the case in *Twenty-First Century Fox*. This can make effective pre-notification engagement with the DCCAIE crucial to achieving timely clearance of a merger.

Headline Statistics from 2017



Sectors Involved



Energy/Fuel transactions dominate

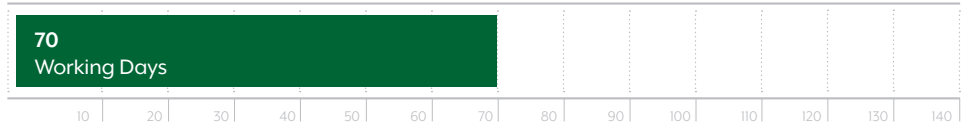
Average Clearance Times

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

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



- Average clearance time for an extended Phase I assessment:



- Average clearance time for an extended Phase I assessment with commitments:



- Average clearance time for a Phase II assessment:



Our Team

Our internationally recognised, market-leading team has been centrally involved in setting new precedent in Irish competition and merger control law.

We are an experienced team with diverse backgrounds and our members have previously worked with leading practices in the UK, the US and in Brussels.

We aim to offer clear, tailored and strategic advice and support to best serve our clients' interests in this complex area. We aim to do this in a way which minimises the intrusion and impact on our clients' day-to-day business.

Our Expertise

- Merger notifications under the Irish Competition Acts 2002-2014
- EU merger notifications
- Cartel investigations and immunity and leniency applications
- Competition compliance programmes and dawn raids
- Joint ventures and strategic alliances
- State aid
- Follow-on actions for damages
- Economic regulation / sector-specific regulation

What Others Say About Us

“Smart, effective and very responsive.”

”

Chambers & Partners, 2017

“Knows and works well with regulators”

”

Legal 500, 2017

“Fantastic, in-depth knowledge of so many industries.”

”

Chambers & Partners, 2016

“Well known internationally”

”

Chambers & Partners, 2016

Mergers Team



Niall Collins

Partner, Head of Competition & Antitrust

+353 1 614 2411

ncollins@mhc.ie



Tara Kelly

Senior Associate

+353 1 614 2424

tarakelly@mhc.ie



Laura Durning

Associate

+353 1 614 2380

ldurning@mhc.ie



Michael Madden

Senior Associate

+353 1 614 5226

mmadden@mhc.ie

Dublin

London

New York

San Francisco

MHC.ie