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Law. Tax

**Elaine Davis**edavis@efc.ie
+353 1 202 6465

Recent changes in Irish Merger Control and Antitrust

By Elaine Davis

On the 31 October 2014 the Competition and Consumer Protection Act 2014 (2014 Act) came into effect bringing with it significant changes to the merger control regime in Ireland, both substantively and procedurally, along with structural change to the Irish Competition Authority.

The Irish Competition Authority and the National Consumer Agency have been dissolved and replaced by the Competition and Consumer Protection Commission (CCPC) which is now responsible for promoting competition and protecting consumer welfare. A number of substantive changes have also been made.

New Merger Thresholds

Under the 2014 Act, a merger requires pre-notification (and clearance by) the CCPC where, in the most recent financial year:

- (α) the combined turnover in the State of the undertakings involved is €50 million or more, and
 - (β) the turnover in the State of each of 2 or more of the undertakings involved is €3 million or more.
- Previously, the requirement was that at least two of the entities involved

would have over €40 million turnover worldwide and the turnover in the State of one of the entities was at least €40 million. It is also worth noting that the new €3 million sales threshold need not be by a company with a physical presence within the State and that online sales will be sufficient in this regard.

The new thresholds will mean that smaller companies will trigger a mandatory notification requirement where only one of the companies involved in a transaction has significant sales in the State. The impact of this provision is obvious when comparing the 22 notifications in the period starting 1 January 2014 to 31 August 2015 with the 42 for the corresponding period in 2015. The number of acquisitions of hotels has also seen a sharp increase since the coming into effect of the 2014 Act. In 2014, prior to the coming into effect of the Act, no transactions involving acquisitions of hotels were notified. Following the coming into effect of the Act, four transactions of acquisitions of hotels were subsequently notified before December 2014. This trend continues in 2015 with nine notifica-

tions of acquisitions of hotels made before 31 August 2015.

Increased Number of Notified Property Transactions

The reduced financial thresholds have had a significant increase on the number of single property transactions notified to the CCPC since the coming into effect of the 2014 Act. While in the past, transactions were only caught where the undertakings had an aggregate worldwide turnover of at least €40 million and one of the undertakings had a turnover in the state of at least €40 million, this is no longer the case. Under the 2014 Act, the sale of a property asset with a turnover of €3 million in the state being acquired by an undertaking with a turnover of at least €47 in the State would require notification to the CCPC.

The addition to the 2014 Act that the acquisition of an asset had to “constitute a business to which a turnover can be attributed” has meant that the acquisition of certain buildings (e.g. those with rental revenues of 3 million per annum) now constitutes a notifiable transaction.

EUGENEFCOLLINS

The first single property notification was the acquisition of the Atrium Buildings (two office blocks covering 32,144 square metres in an industrial estate on the outskirts of Dublin city) by Blackstone, a “a US based global alternative asset manager and provider of financial advisory services” required notification to the CCPC (M/15/004 – Blackstone/ Atrium Buildings).

While the Blackstone/ Atrium acquisition was approved by the CCPC, the consequences for not notifying the transaction could have meant that the transaction was deemed void. Failure to make a compulsory notification is also an offence which will result in liability being attached to both the undertaking in question and the person in charge who knowingly and wilfully authorised or permitted the breach, who could be liable to a fine of up to €250,000 plus daily default fines.

Notably, the acquisition of Riverside One (a building in Dublin City Centre comprising of 10,200 square metres and 58 basement parking spaces) by a regulated property fund, also re-

quired notification – and was of interest as the sole occupant was Irish law firm McCann Fitzgerald.

There has also been an increase in notifications involving the acquisition of multiple properties, a trend that due to the continued internationalisation of Irish asset ownership, looks set to increase in the future.

Extension of Time Limit for CCPC Review

Another significant change brought about by the 2014 Act was a substantial extension to the statutory time limits allowed to the CCPC to review merger notifications. Previously the Competition Authority had one month from the date of notification to assess a Phase 1 merger, if time was not extended by way of an information request. Under the 2014 Act, the CCPC has “30 working days” to conduct its phase 1 assessment. This effectively increases the time limit for the CCPC to assess a Phase 1 merger by 50%, to approximately 6 weeks.

In addition, a formal request for in-

formation still stops the clock and the clock begins to run again when the CCPC has received all the information it requested. The time limit for the CCPC to assess a Phase 2 merger has also been extended from “4 months” to 120 working days (effectively 6 months).

Media mergers

The 2014 Act also made significant changes to the media merger regime in Ireland, introducing the requirement that all media mergers are notified to both the CCPC and the Department of Communications, Energy and Natural Resources (DCENR). Disappointingly, the 2014 Act proposed that media mergers cannot be submitted DCENR until after the CCPC has reached its determination, adding substantially to the period of review where a merger comes within the definition of a media merger.

The remit of the DCENR is to assess the merger in light of media plurality and whether the proposed transaction would curtail media diversity. Should the Minister believe that the merger would be contrary to the

public interest in maintaining plurality in the media, the Minister can refer the matter to the Broadcasting Authority of Ireland for a Phase 2 assessment. The first media mergers notified since the introduction of the new provisions is Liberty Global’s acquisition of the TV3 Group, which at the time of writing is being evaluated by the CCPC in an extended Phase I procedure.

Timing of Notifications

The point at which a transaction can be notified has also been changed by the 2014 Act. While in the past this could only occur on foot of a signed agreement or public bid, under the 2014 Act a notification can be made once “the undertaking demonstrate to the CCPC a good faith intention to conclude an agreement”. This brings the Irish regime in line with the European Commission’s merger control policy and should be of commercial assistance as the merger review process can run concurrently with the negotiations – somewhat offsetting the inconvenience of the longer timetable for merger review by the CCPC.

Additional Significant Changes

The 2014 Act provides additional powers in the area of cartel enforcement by the inclusion of the cartel offences as one of the relevant offences in the whistleblowing provisions of the Criminal Justice Act 2011.

Elaine is a barrister and member of the EU, Competition and Regulated Markets Group in Eugene F. Collins, Dublin. Having previously worked for a number of large firms in Brussels, Elaine has advised clients on many aspects of competition and State aid law including merger control, anti-competitive agreements, cartels, and abuse of dominance. Elaine has provided advice on market investigations and dawn raids by the European Commission and by national competition authorities and strategic advice to clients regarding responses to Requests for Information from both the European Commission and National Competition Authorities. Elaine’s practice covers a wide range of industries and sectors including waste, airports and cement, with a particular focus on EU and regulatory law.