LAW SOCIETY SUBMISSION

PUBLIC CONSULTATION ON THE MERGER PROVISIONS OF THE COMPETITION ACT 2002

DEPARTMENT OF BUSINESS, ENTERPRISE AND INNOVATION (DBEI)

NOVEMBER 2017

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

1.1 The Law Society of Ireland (the "Law Society") welcomes the Department of Business, Enterprise and Innovation's ("DBEI") Consultation on a review of certain provisions under the Competition Act 2002, as amended, relating to merger and acquisitions. The Law Society agrees that a review of the issues discussed in the Consultation is warranted, and is pleased to submit the following comments.

2. Summary of proposals

2.1 The Law Society supports the proposal to increase the threshold in section 18(1)(a)(ii) (the "**section 18(1)(a)(ii) threshold**"), currently requiring that "*the turnover in the State of each of 2 or more of the undertakings involved is not less than €3,000,000*." The Law Society agrees with the DBEI proposal to increase the section 18(1)(a)(ii) threshold from €3 million to €10 million.

2.2 The section 18(1)(a)(ii) threshold is currently too low and, as a result, the statutory reporting thresholds are overly-inclusive. Too many small deals with no impact on competition are caught, resulting in an undue and disproportionate compliance burden on small and medium enterprises. From the helpful information provided in the DBEI Consultation, no real policy justification exists for maintaining the section 18(1)(a)(ii) threshold at the current level.

2.3 The Law Society also agrees with the proposal to increase the section 18(1)(a)(i) threshold from €50 million to €60 million.

2.4 Given that the foregoing changes to the thresholds should materially reduce the number of filings, and thereby reduce the administration burden on the Competition and Consumer Protection Commission's ("**CCPC**") Mergers Division, the Law Society respectfully suggests that the Phase 1 review period under section 20(2) of the Competition Act 2002 should be reduced from 30 working days to 25 working days. This would align the Phase 1 period with that under the European Merger Control Regulation.

3. Background

3.1 On 29 September 2017, the DBEI issued a public consultation paper entitled "Consultation on a review of certain provisions under the Competition Act 2002, as amended, relating to mergers and acquisitions."[1]

[1] https://dbei.gov.ie/en/Consultations/Public-consultation-on-the-Competition-Act-2002-merger-provisions.html

3.2 Under the Competition and Consumer Protection Act 2014 (the "**2014 Act**"), Part 3 of the Competition Act 2002 (the "**2002 Act**") relating to mergers and acquisitions was amended with effect from 31 October 2014.

3.3 In particular, amendments were made to the financial thresholds and the number of days within which the CCPC had to make a determination on a notified merger or acquisition.

3.4 Given that these changes will soon have been in place for three years, the DBEI considers that "a review is now warranted, based on the experience to date [and, given that] the Irish economy [is] recovering, the issue of the appropriateness of the financial thresholds requires revisiting."

3.5 The consultation paper asks the following questions:

(i) If (i) the individual turnover threshold level and/or (ii) the aggregate turnover threshold level should be amended and if so, to what level;

(ii) If any or all of the "working days" provisions in Part 3 of the 2002 Act should be amended and if so, to what level; and

(iii) Whether there are any other issues relating to Part 3 of the 2002 Act we wish to raise.

3.6 Having considered these questions, the Law Society wishes to make the present submission.

4. Financial Thresholds

4.1 Revised statutory reporting thresholds introduced in the 2014 Act fundamentally altered the reach of the mandatory notification requirement in the 2002 Act.

4.2 By virtue of a requirement that at least two parties to a merger or acquisition each has worldwide turnover of €40 million in the last financial year, the old pre-2014 statutory reporting thresholds applied solely where both parties to a deal (i.e., the buyer group and the target entity) were reasonably sizeable.

4.3 At the same time, because one party only to a deal was required to have material Irish turnover, the pre-2014 thresholds caught many deals with little or no nexus to the State. In this respect, the revised 2014 thresholds must be considered a success. Those revisions brought about an immediate and significant lessening in the number of foreign-to-foreign deals with little nexus to Ireland caught by Irish merger rules. Pre-2014 thresholds caught deals if one party only had a substantial Irish presence, even if the other party had Irish sales.

4.4 As can be seen from the table below, 77% of deals notified to the CCPC in the 2015-2016 period involved an Irish target, confirming the revised 2014 filing thresholds are better designed to catch more Irish deals and fewer foreign ones (pre-2014 changes, only 34% of deals notified involved an Irish target).

Transactions notified to the CCPC/Competition Authority

Transaction type	2003-2014		2015-2016	
Foreign Target	425	66%	33	23%
Irish Target	219	34%	112	77%

Source: DBEI Consultation Paper

4.5 This was doubtless an improvement, resulting in greater consistency with relevant recommendations of the International Competition Network ("**ICN**"), including that "*Jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction*" and "*Merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction.*"[2]

4.6 The Competition Authority (as it then was) had previously expressed a concern that higher thresholds in place prior to the 2014 Act may have permitted monopolisation of local Irish markets. However, evidence that lower notification thresholds serve to better protect competition on narrow or local markets is mixed at best.

4.7 The Society has reviewed a number of transactions that it believes would not have been notifiable under the previous thresholds that involved narrow or local markets (e.g. the acquisition of a single hotel,[3] a single Dublin office building,[4] or four pharmacies[5]) and observe that they were all summarily approved in Phase 1 by the CCPC on the basis that they would not substantially lessen competition.

4.8 Furthermore, it is noteworthy that the revised 2014 thresholds resulted in increased notifications of commercial property acquisitions. So far, as might be expected, all such transactions have been summarily approved by the CCPC in Phase 1.[6]

4.9 Moreover, in all events, to the extent that a concern might arise about below threshold mergers giving rise to anticompetitive effects, these concerns can be addressed by the voluntary notification procedure in respect of transactions that do not meet the turnover thresholds.[7]

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[2] ICN Recommended Practices for Merger Notification and Review Procedures: http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf (last accessed 24 October 2017).

[3] M/15/028 – Atlantic Troy / Killeshin Hotel and M/15/035 - Tetrarch / Dawson Hotel.

[4] M/15/030 - IPUT / Riverside One (the supply of commercial office premises for rent in Dublin City and surrounding areas).

[5] M/15/21 – Lloyds Pharmacy/Walsh's and Friary Allcare Pharmacies (the market for the supply of prescription medicines in retail pharmacies in the areas in which the Target Companies' pharmacies are located).

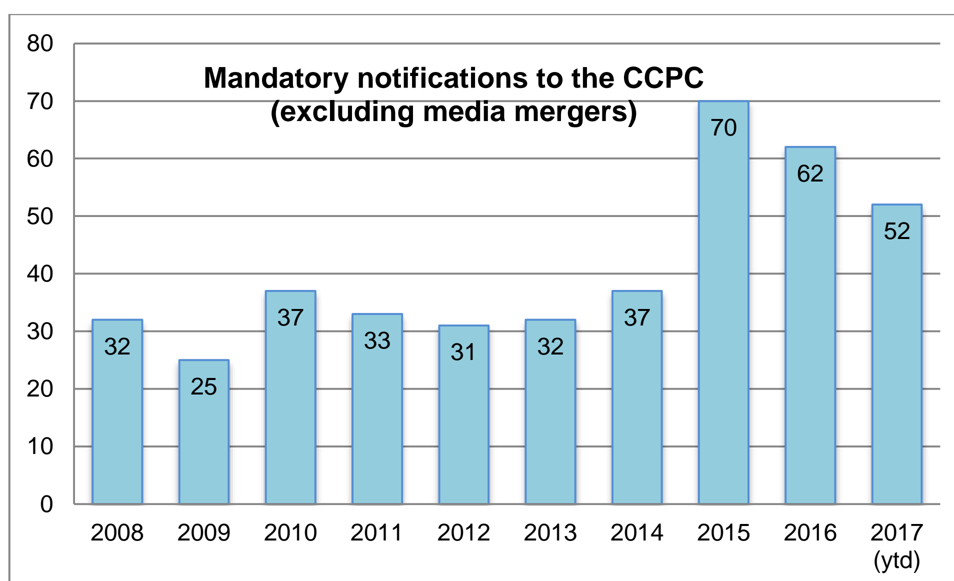
[6] https://www.ccpc.ie/business/merger-qa-una-butler-director-legal-services/
In light of the increase in commercial property deals being notified the CCPC stated that they hoped "*to publish guidance in due course for legal practitioners and businesses on its understanding of the statutory provisions governing asset acquisitions.*" We are not aware that such guidance has been published as yet.

[7] https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/CCPC-Mergers-Non-Notifiable-Mergers-1.pdf

5. Section 18(1)(a)(ii) Threshold

5.1 The 2014 Act reduced the turnover in the State threshold for "*each of two or more of the undertakings involved*" to €3 million. Pre-31 October 2014, the individual domestic turnover threshold "*for any one of the undertakings involved*" was €40 million.

5.2 As the table below demonstrates, the annual number of mandatory notifications to the CCPC (or to its predecessor the Competition Authority) has essentially doubled since the revised turnover thresholds came into effect on 31 October 2014. (Media mergers have been excluded as they are required to be notified irrespective of turnover.)



Source: DBEI Consultation Paper

5.3 As of 17 October 2017, 52 merger notifications were made to the CCPC this year, not counting media mergers, which already exceeds the number of notifications in any full 12-month period between 2008 and 2014.

5.4 The consultation paper contains an analysis carried out by the CCPC at the request of the DBEI on the impact that increasing the turnover thresholds would have had on the number of notifiable transactions in 2015 and 2016. From this, the Society understands that an increase of the section 18(1)(a)(ii) turnover threshold to €10 million would have caused a 38% reduction in the number of notifications in the 2015/2016 period. On that basis, there would have been 42 mandatory notifications in 2015 and 39 in 2016.

5.5 Notably, the CCPC's analysis concluded that " … *none of the cases which would have been excluded over the period 2015/2016 raised any serious issues of competition concerns in the State.*" It is not possible to confirm this analysis in the absence of identification in the DBEI Consultation of the determinations concerned. The Society notes, however, that all bar four of the transactions notified to the CCPC in the 2015/2016 period were cleared unconditionally.[8]

[8] M/15/020 *Topaz/Esso*, M/16/009 *Tedcastles/Siro Retail & Siro Property*, M/16/008 Panda/Greenstar and M/16/040 *Bon Secours/Barrington Hospital*. We would also note, however, that at least one filing in 2017 that would appear to involve a

5.6 Even if the individual turnover threshold is raised to €10 million, the number of mandatory notifications would have remained marginally above historic levels during the 2015/2016 period.

5.7 Ireland's merger control turnover thresholds are, since the changes under the 2014 Act took effect, significantly lower than those in force in most other EU jurisdictions.

5.8 While important differences exist in merger control regimes in other countries, the table below indicates that Irish thresholds may diverge from the EU norm.

Individual Domestic Turnover Thresholds

Member State	Individual Turnover (millions) (Domestic)	GDP (nominal) (Billion USD)[9]
United Kingdom	€79 *(GBP 70 m)*[10]	2,650
France	€50	2,488
Italy	€50 (*target*)	1,852
Poland	€50	474
Belgium	€40	465
Netherlands	€30	770
Germany	€25 and €5	3,495
Sweden	€21 (*SEK 200 m*)	513
Finland	€20	234
Greece	€15	195
Slovakia	€14	89
Denmark	€13 (*DKK 100 m*)	301
Czech Republic	€10 (*250 CZK*)	185
Austria	€5 (*worldwide*)[11]	387
Ireland	***€3***	***254***
Estonia	€2	23
Latvia	€1.5	28
Slovenia	€1 (*target group*)	44

Source: DBEI Consultation Paper

5.9 The fact that Ireland is a small economy may serve as a justification for lower turnover thresholds than certain other, larger Member States. However, there are a number of countries in the above table (notably Finland, Greece, Czech Republic, Slovakia and Denmark) with comparable or lower nominal GDP than Ireland that apply higher, if not significantly higher, individual turnover thresholds.

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target business with relatively low Irish turnover may have raise competition issues (see https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/M-17-027-Merger-Announcement-Dalata.pdf).

9 Gross Domestic Product is a common means of determining the size and strength of a country's economy.

10 The UK operates a voluntary notification system whereby the parties should notify if the domestic turnover of the target exceeds £70m or the combined market share post-transaction will exceed €25%.

11 Mergers are exempt from notification in Austria where (i) the domestic turnover of only one of the undertakings concerned exceeded €5 million and (ii) the worldwide combined turnover of the other undertaking(s) concerned did not exceed €30 million (*de minimis* exception).

5.10 Increasing the individual domestic turnover threshold to at least €10 million would, to quote the consultation paper, "*bring Ireland much more in line with the other jurisdictions*."

5.11 Further, we would note that the CCPC voluntary notification regime (whereby the CCPC may require parties to notify a below-the-thresholds-deal on pain of lawsuit if the deal appears to the CCPC to give rise to anticompetitive effects) provides an important backstop safeguard.

5.12 Section 18(3) of the 2002 Act provides for the voluntary notification of transactions that fail to meet the turnover thresholds laid down in section 18(1). The CCPC has issued guidance on when parties to a transaction ought to consider making a voluntary notification. This procedure has been availed of on a number of occasions since 2003.

5.13 To illustrate, just this year the CCPC contacted the parties to the *Kandar Media/Newsaccess Limited* transaction, having become aware of their transaction though "market surveillance", and advised them to submit a voluntary notification. They did so and, in July 2017, the CCPC cleared the transaction subject to binding divestiture and behavioural commitments following an extended Phase 1 investigation.[12]

5.14 As this example demonstrates, where the CCPC becomes aware of a non-notifiable transaction that may cause competition concerns it has the ability to invite the parties to make a voluntary notification. Alternatively, the CCPC may investigate a non-notifiable merger or acquisition under section 4 of the 2002 Act, as it did in *Eason/Argosy* in 2012.

5.15 These powers, in our view, serve to alleviate any concerns that a genuinely anticompetitive transaction might slip through the net if the merger notification thresholds are raised.

5.16 On the basis of the foregoing, the Law Society supports the DBEI's proposal to increase the section 18(1)(a)(ii) turnover threshold to €10 million.

6. Section 18(1)(a)(i) Turnover Threshold

6.1 Since 31 October 2014, when the amendments under the 2014 Act came into effect, the aggregate turnover in the State threshold for "*[all of] the undertakings involved*" has been set at €50 million.

6.2 Prior to 31 October 2014, Part 3 of the 2002 Act did not include an aggregate turnover threshold. It involved instead an individual worldwide turnover threshold of €40 million "*for each of two or more of the undertakings involved*."

6.3 From our analysis of merger control regimes in other EU Member States, there appears to be a relatively even split between Member States that have opted for a worldwide aggregate turnover threshold and those that have chosen a domestic aggregate turnover threshold. We understand the removal of the worldwide turnover threshold by the 2014 Act was a policy decision designed to "*allow the CCPC to focus on*

[12] M/17/012 - Kandar Media/Newsaccess Limited

notifications … with a real nexus to the State.” The Law Society does not express any view in this regard.

6.4 The table below lists a number of EU Member States whose merger control jurisdictional tests contain a domestic aggregate turnover threshold, with the corresponding Gross Domestic Product for each State in 2016.

Aggregate Domestic Turnover Thresholds

Member State	**Aggregate Turnover (millions) (Domestic)**	**GDP (nominal) (Billion USD, 2016)**
Italy	€499	1852
Spain	€240[13]	1252
Denmark	€121 *(DKK 900 m)*	301
Sweden	€104 *(SEK 1 Bn)*	513
Belgium	€100	465
Portugal	€100	205
Czech Republic	€58 *(CZK 1.5 Bn)*	185
Ireland	***€50***	***254***
Hungary	€49 *(HUF 15 Bn)*	118
Slovakia	€46	89
Slovenia	€35	44
Austria	€30[14]	387
Latvia	€30	28
Estonia	€6	23

Source: DBEI Consultation Paper.

6.5 This table indicates that Ireland’s aggregate turnover threshold is lower that that applied in several comparable EU countries based on GDP, such as Denmark, Belgium, Portugal and Czech Republic.

6.6 The CCPC has carried out an analysis at the request of the DBEI which shows that increasing the section 18(1)(a)(i) turnover threshold from €50 million to €60 million (assuming the individual turnover threshold is set at €10 million) would have resulted in only marginally fewer mandatory notifications – four fewer in 2015 and two fewer in 2016.

6.7 Given that Ireland’s aggregate turnover threshold level is lower than in a number of comparable EU Member States, and since the net effect on the volume of notifications would be small, the Law Society favours increasing the aggregate turnover in the State threshold to €60 million.

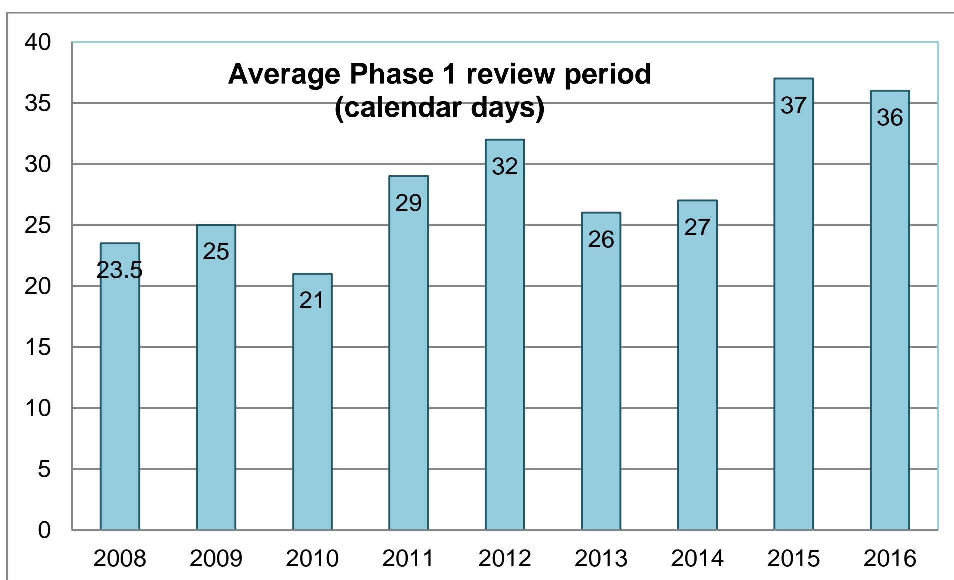
[13] Spanish Merger control rules contain an alternative jurisdictional threshold based on market shares, subject to minimum domestic turnover of the target company of €10 million.

[14] Austrian merger control rules contain a third cumulative condition of aggregate worldwide turnover exceeding €300 million.

7. Review Periods

7.1 The 2014 Act amended the review periods under Part 3 of the 2002 Act by introducing the concept of "working days" into the legislation. Previously, the Competition Authority (now the CCPC) was required to make a Phase 1 determination in respect of a notified merger or acquisition "*within 1 month after the appropriate date*." Since 31 October 2014, the review period has been increased to "*30 working days*". The extended Phase 1 review period (where proposals are made to ameliorate the effects of the transaction on competition) was increased from "*45 days*" to "*45 working days*". Similarly, the Phase 2 (full investigation) review period was increased by the 2014 Act from "*4 months*" from the appropriate date (c. 122 calendar days) to "*120 working days*."

7.2 The Law Society considers that the Phase 1 and Phase 2 review periods are overall excessive, particularly given the CCPC's ability to reset the clock to zero and otherwise delay the review process. In practice, the CCPC often attempt to truncate the review period to allow deals to be cleared in cases of urgency. But this is arbitrary and, because it largely depends on the case load of the case team, can be unreliable. We note also that the average duration of Phase 1 reviews has increased since the changes under the 2014 Act were introduced, as shown in the chart below.



7.3 The Law Society has also compared the headline Phase 1 review period in Ireland with the applicable period under the EU Merger Regulation and in many other EU member states.[15] The below table shows that Ireland's Phase 1 review period is around one week (or 5 working days) longer than that of most other jurisdictions.

[15] These are the 'headline' review periods. The applicable merger control rules in each jurisdiction generally provide for the statutory review period to be extended or paused through various mechanisms, such as where the regulator issues requests for further information or where insufficient information was provided in the initial notification.

Phase 1 Review Periods: EU member states

Jurisdiction	Phase 1 review period
Austria	4 weeks
Netherlands	4 weeks
Czech Republic	30 days
Hungary	30 days
Italy	30 days
Spain	1 month
Germany	1 month
Finland	1 month
EU	25 working days
Denmark	25 working days
Slovenia	25 working days
Sweden	25 working days
Slovakia	25 working days
Sweden	25 working days
Ireland	***30 working days***
Portugal	30 working days
Belgium	40 working days
France	60 working days

Source: Getting The Deal Through, Merger Control 2017

7.4 If the turnover thresholds are increased to €10 million and €60 million, as the Law Society proposes, this would be expected to substantially decrease the case load of the CCPC (based on the CCPC's own analysis of notified transactions in 2015 and 2016). In such circumstances it may be justifiable to reduce the Phase 1 review period to 25 working days, which would bring Ireland into line with the European Commission and most other Member States.

7.5 On that basis, the Law Society would favour reducing the Phase 1 review period from 30 working days to 25 working days.

8. Any other issues

8.1 To provide greater certainty and clarity for business, and thereby reduce compliance costs, the Law Society respectfully suggests that the CCPC adopts a more detailed guidance on the application of the statutory reporting thresholds.

8.2 In practice, the CCPC relies to a large extent on the European Commission Jurisdictional Notice, a practice that promotes consistency and one that the Law Society welcomes. But the CCPC also diverges from that provided for in the Jurisdictional Notice, for instance in the geographical allocation of turnover of financial institutions. It would be helpful if the CCPC could codify its practice in a guidance notice. (The Law Society notes that the CCPC had intended to adopt a notice on the application of the statutory reporting thresholds to real estate transactions.)

9. Conclusion

9.1 The Law Society supports the DBEI proposals to increase the section 18(1)(a)(ii) turnover threshold from €3 million to €10 million and the section 18(1)(a)(i) turnover threshold from €50 million to €60 million.

9.2 The Law Society also supports the proposal to reduce the Phase 1 review period under section 20(2) of the 2002 Act from 30 working days to 25 working days.

9.3 The Law Society hopes that the Department will find the above comments constructive and helpful and is available to engage further with the Department if required.

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