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NARROWING OF SCOPE OF IRISH MERGER CONTROL THRESHOLDS

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Section 18(1)(a) of the Competition Act, 2002 (the Act) sets out three cumulative thresholds for mandatory notification of mergers or acquisitions to the Irish Competition Authority (the CA).¹ One of these thresholds requires that each of two or more of the undertakings involved in the merger must carry on business in any part of the island of Ireland (including Northern Ireland).

On 12 December 2006, the CA issued an amended Notice which revises its interpretation of the phrase “carries on business in any part of the island of Ireland”. The amended Notice states that the CA understands this phrase to include undertakings that either –

- have a physical presence on the island of Ireland (including a registered office, subsidiary, branch, representative office or agency) AND make sales and/or supply services to customers on the island of Ireland,

OR

¹ The Competition Act 2002 (Section 18(5) and (6)) Order 2007 (S.I. 222 of 2007), pursuant to Section 18(1)(b) of the Act, also provides for mandatory notification of certain specified “media mergers”.

- have made sales into the island of Ireland of at least €2 million in the most recent financial year.

The amended Notice does not have any impact on the other two thresholds in Section 18(1)(a) of the Act.²

This amendment represents a clear departure from the CA's previously broad approach to the concept of carrying on business in the island of Ireland. In an earlier amendment Notice dated 18th February, 2003, the CA stated that it understood this phrase as including undertakings which have sales into the island of Ireland without having a physical presence in the island of Ireland. This resulted in compulsory notifications by parties involved in foreign to foreign mergers despite their having little or no nexus to Ireland. In addition, the absence of a *de minimus* exception generated several technical notifications (for example, Ryanair's acquisition of Buzz airline service in 2003³).

The new interpretation means that where the parties to a merger have no physical presence in the island of Ireland and have sales into the island of Ireland of less than €2 million each, the parties are no longer obliged to notify the merger to the CA. This signifies a more economically realistic approach and is to be welcomed as it will reduce the number of mandatory notifications of transactions which have little or no nexus to Ireland.

² The other two thresholds in Section 18(1)(a) of the Act are:

- the world-wide turnover of each of 2 or more of the undertakings involved in the merger or acquisition is not less than €40,000,000; and
- the turnover in the State of any one of the undertakings involved in the merger or acquisition is not less than €40,000,000.

³ Competition Authority Determination No. M/03/005.