1. **Overview**

Merger control in Ireland is governed by the Competition Act 2002, which has been amended a number of times (the “Competition Act”), most recently by the Competition and Consumer Protection Act 2014 (“2014 Act”). The 2014 Act substantially reformed the merger process in Ireland, introducing new jurisdictional thresholds, updated the specific regime for media mergers and establishing a new national competition authority, the Competition and Consumer Commission (“CCPC”).

The CCPC amalgamated the functions of and replaced the Competition Authority and the National Consumer Council from 31 October 2014. In relation to merger control, it has
extensive legal powers and a broad mandate to examine mergers and acquisitions that fall under the Competition Act. The CCPC has maintained a busy workload since its establishment, reviewing 88 merger notifications in the period from 31 October 2014 to 31 December 2015, according to its most recent Annual Report.

Irish merger control practice and procedure follows closely the approach of the European Commission, and the processes laid down in the EU Merger Regulation and the Consolidated Jurisdictional Notice. In particular, jurisdiction (other than for media mergers) is established on the basis of turnover-based thresholds. The concepts of control and full-function joint ventures are highly similar under both regimes. Substantive assessments are based on whether or not the relevant merger or acquisition results in a substantial lessening of competition on markets for goods and services in Ireland, which is similar to the test under the EU Merger Regulation. The process can run into a second phase where the CCPC is not able to reach a decision during the first phase period of 30 working days. Economic analysis plays an important role in the assessment of cases. The design and implementation of remedies is largely based on the EU model.

While the updated merger control regime follows in many important respects the approach of the European Commission, there are points of divergence:

- New jurisdictional thresholds were introduced on 31 October 2014 consisting of two financial thresholds relating solely to turnover in Ireland (previously one of the thresholds related to global turnover). In addition, the second threshold is triggered when at least two of the undertakings involved generated turnover in Ireland of €3 million or more.

- Acquisitions of assets that constitute a business to which turnover can be attributed can also fall under the regime if the financial thresholds are met. This concept has been interpreted widely by the CCPC and includes the acquisitions of buildings that generated a rent roll.

- Media mergers in Ireland, as defined by the Competition Act, are subject to review irrespective of turnover.

The sections that follow set out the key features of the Irish merger control regime, highlighting these points of similarity and difference.
2. **Is mandatory notification compulsory or voluntary?**

A merger or acquisition within the meaning of the Competition Act is notifiable to the CCPC on a mandatory basis if either:

- It satisfies the turnover-based thresholds under the Competition Act; or
- It falls within a class of merger or acquisition that has been specified in an Order by the Minister for Jobs, Enterprise and Innovation (the “Minister”) for the purposes of the Competition Act.

To date, the Minister has specified that all media mergers (as described in more detail in Section 4.3 below) are notifiable to the CCPC, regardless of the turnover of the undertakings involved.

3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

Where a merger or acquisition is either mandatorily notifiable, or has been voluntarily notified, to the CCPC under Irish merger control rules, the parties must not put the merger or acquisition into effect until either (i) the CCPC makes a determination that the transaction may be put into effect or put in effect subject to conditions; or (ii) the applicable statutory time limit for reaching a determination has passed without the CCPC having done so.

Generally, it is not possible to carve out local completion of a merger or acquisition and any transaction put into effect prior to receipt of clearance by the CCPC is void and unenforceable under Irish law. There are no derogations for “carving out” the Irish assets and/or legal entities and transferring them at a later date. The 2014 Act closed off the “warehousing exception” previously available, by which certain temporary acquisitions of control were not notifiable.

The position under the Competition Act is now that this exception does not apply to transactions involving the future onward sale of the business to an ultimate buyer in circumstances where the ultimate buyer bears the major part of the economic risk.
4. **What are the conditions of the test for control?**

For the purposes of the Competition Act, a merger or acquisition arises if any of the following events occurs:

- Two or more undertakings, previously independent of one another, merge;
- One or more individuals who already control one or more undertakings, or one more undertakings, acquire direct or indirect control of the whole or part of one or more other undertakings;
- The acquisition of part of an undertaking, although not involving an acquisition of a corporate legal entity, involves the acquisition of assets (including goodwill) that constitute a business to which a turnover can be attributed.

Control, for the purposes of the Competition Act, is generally commensurate with the concept of decisive influence under the EU Merger Regulation, i.e. that it gives the acquiring undertaking the ability to affect the strategic commercial direction of the acquired undertaking or asset. Although not bound to do so, the CCPC generally follows the approach to the concept of control as set out in the European Commission's Consolidated Jurisdictional Notice.

- **What are the conditions on minority interest in your jurisdiction?**

The position on minority interests under the Competition Act is similar to the position under the EU Merger Regulation and the European Commission’s Consolidated Jurisdictional Notice. The acquisition of a minority interest in an undertaking will only amount to a merger or acquisition for the purposes of the Competition Act where the minority interest is sufficient to give the undertaking involved joint or sole control. The approach to assessing whether control is acquired through veto rights or on a de facto basis is the same as set out under the European Commission’s Consolidated Jurisdictional Notice.

- **What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?**

A merger or acquisition as defined in the Competition Act will be notifiable if the following thresholds are met in the most recent financial year of each undertaking involved:
• The aggregate turnover in the State of the undertakings involved is not less than €50 million; and
• The turnover in the State of each of two or more of the undertakings involved is not less than €3 million.

For the purposes of the Competition Act thresholds, on the acquirer side, the turnover of the entire group to which the acquiring entity belongs is taken into account. On the target business side, only the turnover of the target business is taken into account, i.e. the turnover of the remainder of the vendor’s group is not taken into account. For example, in an acquisition of sole control, the turnover to be taken into account is the turnover of the entire group to which the acquiring entity belongs and the turnover of the target business alone. In acquisitions of joint control, the undertakings involved are each of the parties (on a group basis) acquiring (and, where relevant, maintaining) joint control and, if the target is a pre-existing company, the target company.

The current thresholds were introduced as part of the 2014 reform of merger control, and now more clearly relate to transactions that have a direct connection to activities in the State. They replaced the previous thresholds which contained both a worldwide turnover test and a reference to undertakings carrying on business on the island of Ireland. The current thresholds can be triggered in respect of relatively small transactions, given the lower threshold is just €3 million. The 2014 Act also revised the concept of asset acquisitions that come within the scope of Irish merger control jurisdiction and the CCPC has interpreted the revised concept relatively broadly to include, for example, acquisitions of buildings with a rent roll.

With the exception of media mergers, which fall to be assessed under the Competition Act regardless of whether the turnover-based thresholds are met or not, the thresholds do not vary depending on industry sector. The thresholds are prescribed in the Competition Act and cannot be changed without an amendment to the Act (i.e. they are not subject to change by statutory instrument or administrative order).

- **How are turnover, assets and/or market shares valued or**
determined for the purposes of jurisdictional thresholds?

The relevant turnover for the purposes of the Competition Act thresholds is the total turnover in the State of the undertakings involved in their most recent financial year (which is generally interpreted by the CCPC, in line with the practice of the European Commission, as being the most recent year for which audited accounts are available).

While there is no statutory definition of “turnover in the State”, the CCPC has interpreted it to mean the value of services provided or sales made to customers located in the Republic of Ireland in the relevant year. Thus, turnover of companies booked as Irish turnover for accounting/tax purposes (but which do not derive from sales to customers in Ireland) would typically be excluded from the turnover calculation. The CCPC consider that this approach applies equally to the turnover of credit and financial institutions and, therefore, it does not follow the approach under the EU Merger Regulation to the geographic allocation of turnover of such institutions.

Acquisitions of assets are potentially caught by the Competition Act. The relevant turnover in that case is the Irish turnover attributable to the target assets in the most recent financial year, such as, in the case of the acquisition of a building, its rent roll in that period.

- Is there a particular exchange rate required to be used for turnover thresholds and asset values?

The CCPC does not specify the Euro conversion rates to be used in relation to the calculation of turnover, but generally follows the European Commission's approach to the calculation of exchange rates for the purposes of the EU Merger Regulation (i.e. by reference to the average rates published by the European Central Bank for the relevant period).

- Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business?)
The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity constitutes a merger or acquisition for the purposes of the merger control rules under the Competition Act. In interpreting this provision, the CCPC generally follows the approach of the European Commission on full-function joint ventures under the EU Merger Regulation and, in particular, the approach to the analysis of full-functionality set out in the Commission's Consolidated Jurisdictional Notice.

The thresholds for notification under the Competition Act are the same for joint ventures as for other types of mergers or acquisitions. The undertakings involved in the acquisition of joint control in a newly-created joint venture company are each of the parents acquiring control, while the undertakings involved in the acquisition of a pre-existing joint venture company are both the parents and the joint venture company. Changes from joint control to sole control of a joint venture also fall under the Competition Act; in such cases the undertakings involved are the shareholder acquiring sole control and the joint venture company. Where there is a situation of joint control both before and after the transaction, the undertakings involved are the shareholders (both existing and new) who will exercise joint control after the transaction and the joint venture company itself.

Where a joint venture does not qualify as full-function, it may still be assessed under the rules on restrictive agreements under the Competition Act, which are in all material respects identical to Article 101 of the Treaty on the Functioning of the European Union. In this regard, the CCPC tends to have regard to the European Commission's Guidelines on Horizontal Cooperation Agreements and the Guidelines on Vertical Restraints in its assessment.

- **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

The relevant jurisdictional thresholds apply irrespective of whether or not the transaction concerns undertakings incorporated in Ireland. However, the relevant turnover to be taken into account is the turnover in Ireland of the undertakings involved. As this effectively means turnover derived from sales to customers located in Ireland, the Competition Act is concerned with the impact of transaction on competition in Ireland.
For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

While notification to the CCPC is mandatory for transactions that meet the turnover-based thresholds, the Competition Act also provides for voluntary notifications that fall below the jurisdictional thresholds.

The CCPC’s policy is to seek to prevent the implementation of mergers or acquisitions that would substantially lessen competition in any market in the State and this applies equally to transactions that do not meet the financial thresholds for mandatory notification. In practice, where the CCPC becomes aware of a non-notifiable transaction that raises potential concerns, it will contact the parties to the transaction to request further information and, if necessary, request the parties to voluntarily notify the transaction to the CCPC under the merger control regime.

If the parties refuse to do so and the CCPC’s concerns have not been allayed, the CCPC can proceed to open an investigation into whether the transaction would breach the prohibition in the Competition Act on anti-competitive arrangements between undertakings. It has the open of issuing civil proceedings seeking declaratory and/or injunctive relief in this regard.

Additional information: Jurisdictional Test

Not applicable.

What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?

Under the Competition Act, the CCPC is required to examine whether the notified merger or acquisition will lead to a substantial lessening of competition (“SLC”) in the supply of goods or services in the State. The CCPC has stated that the SLC test must be applied in terms of the effect that the proposed merger or acquisition would have on consumer welfare which, in its view, refers to a range of variables
including price, output, quality, variety and innovation.

The CCPC’s approach in applying the SLC test is based heavily on economic analysis and, in practical terms, mirrors closely the approach of the European Commission in applying the significant impediment to effective competition test under the EU Merger Regulation. In analysing whether an SLC arises, the CCPC will first typically look to define relevant product and geographic markets by reference to demand-side and supply-side substitutability. It will then examine the impact of the transaction in relation to unilateral effects at the horizontal and vertical level, as well as the possibility of coordinated effects arising on relevant markets. The assessment will focus on the competitive constraints on the merged entity, including those exerted by competitors, customers and the threat of new entry or expansion. The CCPC will consider efficiency arguments, if presented. It will also consider the failing firm defence, although the criteria required for establishing this defence are difficult to meet. Only one transaction to date has been approved on this basis (Baxter/Fannin).

Unlike the position under the EU Merger Regulation, in which the European Commission must proceed to an in-depth Phase II investigation only where it has "serious doubts" regarding the compatibility of a proposed transaction with the internal market, there is no specific test under the Competition Act that must be satisfied in order for the CCPC to open a Phase II investigation. The CCPC will move to Phase II if it is unable on the basis of the information before it to form a view that the result of the merger or acquisition will not be to substantially lessen competition during the Phase I period of 30 working days.

In practice, however, the majority of cases reviewed by the CCPC are cleared at Phase I. The CCPC’s latest Annual Report notes that, between 31 October 2014 and 31 December 2015, just 6 of the 88 cases reviewed by the CCPC were subject to an extended Phase I review, while only 2 received a full Phase II investigation (Topaz/Essso and Baxter/Fannin).

- **Are non-competitive factors relevant?**

All transactions notified to the CCPC are investigated by reference to whether or not a substantial lessening of competition arises. No other factors, such as
employment or broader industrial or economic policy, are taken into account by the CCPC in its investigation.

Media mergers are subject to an additional process involving the Minister for Communications, Climate Action and Environment (“Minister for Communications”) (and, if relevant, the Broadcasting Authority of Ireland (“BAI”)). This additional review takes place after the transaction has been cleared by the CCPC. The test applied under this additional process relates to the impact of the transaction on plurality of the media in Ireland. See the next section for further details.

- **Are there different tests that apply to particular sectors?**

Media mergers are not subject to the turnover-based thresholds set out in the Competition Act and may be assessed on the basis of their impact on the plurality of views in the media. This assessment is conducted by the Minister for Communications in a distinct review process following the CCPC’s assessment of the merger from a competition perspective.

A media merger is defined in the Competition Act as:

- A merger of acquisition in which two or more of the undertakings involved carry on a media business in the State; or
- A merger or acquisition in which one or more of the undertakings involved carries on a media business in the State and one or more of the undertakings involved carries on a media business elsewhere.

A media business is defined in the Competition Act as:

- Publishing newspapers or periodicals consisting substantially of news and comment on current affairs, including the publication of such newspapers or periodicals on the Internet;
- Transmitting, or re-transmitting or relaying a broadcasting service;
- Providing any programme material consisting substantially of news and comment on current affairs to a broadcasting service; or
- Making available on an electronic communications network any written,
audio-visual or photographic material consisting substantially of news and comment on current affairs that is under the editorial control of the undertaking making available such material.

“Carrying on a media business in the State” is defined in the Competition Act as (i) having a physical presence in the State, including a registered office, subsidiary, branch, representative office or agency and making sales to customers located in the State; or (ii) having made sales in the State of at least €2 million in the most recent financial year.

In June 2015, the Department of Communications, Climate Action and Environment (“DCCAE”) adopted guidelines on the assessment of media mergers. In line with information required under the guidelines, the DCCAE has issued a specific notification form on which media mergers must be notified.

- **Are ancillary restraints covered by the authority’s clearance decision?**

  The CCPC notification form contains a specific section in relation to ancillary restraints and the CCPC will assess the impact of notified restraints in its determination. Ancillary restraints which are referred to in the notification, and which constitute restrictions that are directly related to the implementation of the transaction approved by the CCPC, will also benefit from the approval of the transaction.

  The CCPC generally follows the approach of the European Commission to the assessment of ancillary restraints as set out in the European Commission’s Notice on Ancillary Restraints.

- **For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

  Prior to reform of the merger control rules in 2014, notifications had to be made within one month of the conclusion of the agreement or the making of the public bid. This deadline no longer applies. Now, a transaction must only be notified in advance of implementation but may not be put into effect until the CCPC clears
the transaction or the applicable statutory period for a CCPC determination expires without the CCPC making a determination.

- **What is the earliest time or stage in the transaction at which a notification can be made?**

A notification to the CCPC may be made after any of the following events occurs:

- One of the undertakings involved has publicly announced an intention to make a public bid or a public bid has been made but not yet accepted.
- In relation to a scheme of arrangement, the scheme document is posted to shareholders.
- The undertakings involved demonstrate to the CCPC a good faith intention to conclude an agreement, or a merger or acquisition is agreed. It is not necessary for a binding transaction agreement to be signed to demonstrate this, but typically the CCPC will look for at least a heads of terms or term sheet that is in agreed form as between the parties. This early notification trigger was introduced as part of the 2014 reforms of the merger control regime, and follows closely the approach taken by the European Commission under the EU Merger Regulation.

- **What is the basic timetable for the authority’s review?**

In an initial Phase I investigation, the CCPC has 30 working days from the "appropriate date" as defined under the Competition Act to either clear the transaction or open a Phase II investigation. The "appropriate date" is the date of notification or, where the CCPC makes a formal request for information in writing ("RFI") during Phase I, the date on which the RFI is complied with.

In a full Phase II investigation, the CCPC has 120 working days from the “appropriate date” to make a Phase II determination. For example, provided the “appropriate date” is the date of notification (and is not reset by an RFI during Phase I) and the CCPC takes the full 30 working days in Phase I, a further 90 working days in Phase II. If the CCPC makes an RFI during the first 30 working days of the Phase II process, the running of the clock is suspending until the request is complied with.
In its Phase II determination, the CCPC may clear the transaction unconditionally, clear it subject to conditions being complied with, or prohibit the transaction.

Parties to a merger or acquisition can request a pre-notification meeting with the CCPC to discuss jurisdictional and other legal issues that may arise. The CCPC has stated that it welcomes the opportunity to have pre-notification discussions with parties who have expressed a good faith intention to proceed with a transaction, either in the form of a meeting or conference call. However, unlike the practice of the European Commission, in most cases the CCPC does not require the parties to engage in detailed pre-notification discussions prior to submission of the notification.

**Under what circumstances the basic timetable may be extended, reset or frozen?**

There are two circumstances in which the CCPC’s initial Phase I investigation period may be extended:

- The CCPC may issue an RFI at any point during Phase I, which has the effect of resetting the process timetable to start from the date on which a complete response to the RFI is received. An extension of this type can only occur once.
- The Phase I period is automatically extended to 45 working days where remedy proposals are made by the notifying parties to overcome competition concerns.

There are two circumstances in which the CCPC’s Phase II investigation period may be extended:

- If the CCPC issues an RFI within 30 working days of the opening of Phase II, the running of the clock is suspended until a complete response to the RFI is received. A suspension of this type can only occur once.
- the deadline by which the CCPC must issue a Phase II determination may be extended from 120 to 135 working days from the “appropriate date” where proposals are made by the parties.
Are there any circumstances in which the review timetable can be shortened?

The CCPC does not have a formal process for shortening its review period, but it is also not obliged to take the full 30 working day investigation period at Phase I or the full 120 working day investigation period at Phase II to reach its determination and clear transaction. In practice, the CCPC regularly clears transactions more quickly than the maximum timeframe allowed for under the Competition Act (between 31 October 2014 and 31 December 2015, the average time to clear Phase I transactions was 24 working days), although this depends on the nature of the transaction and the workload of the CCPC at a particular point.

Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?

Under the Competition Act, each of the undertakings involved in a merger or acquisition has an obligation to notify is responsible for notification. For example, in an acquisition of a company by one acquirer, the obligation to notify falls on both the acquirer and the target company. In an asset acquisition, the vendor has no obligation to notify, i.e. the obligation to notify falls on the acquirer only.

It is usual practice for the parties to notify the transaction jointly, although this is not a requirement under the Competition Act.

What information is required in the filing form?

Notifications to the CCPC must be made on the standard notification form, which is available on the CCPC’s website.

The notification form sets out the scope of information required from the parties, which includes a detailed description of the undertakings involved and the rationale for the proposed transaction, an analysis of the horizontal overlaps and vertical relationships arising, definitions of the relevant product and geographic markets, the market shares of the parties and their competitors in relevant markets, and the views of the parties as to the effect of the transaction on
competition in the State.

There is no “short form” version of the CCPC notification form. However, in cases where no material overlaps or competition issues arise, the notifying parties may request waivers from the CCPC in respect of certain detailed information required in the notification.

**Which supporting documents, if any, must be filed with the authority?**

The CCPC notification form sets out the documents that must accompany the notification. The requirements are similar to those for Form CO under the EU Merger Regulation and include the latest annual reports and accounts of the undertakings involved, along with copies of all surveys, reports, analyses, studies, presentations and comparable documents assessing or analysing the notified transaction. The parties are also required to provide a copy of the agreement bringing about the merger or acquisition. There is no obligation on the parties to notarise these documents.

The notification must be signed by an individual (director or officer) that is authorised to act for and on behalf of each undertaking making the notification. Alternatively, a legal representative may sign on behalf of an undertaking if given the power of attorney to do so. The signatory must declare that the information provided in the notification is, to the best of their knowledge and belief, accurate and complete and that all opinions and estimates provided in the notification are sincere.

**Is there a filing fee? If so, please specify the amount in local currency.**

A filing fee of €8,000 applies in respect of each notification made to the CCPC, irrespective of the size of the transaction or of turnover of the notifying parties. The filing fee must be paid electronically at the time of notification.

**Is there a public announcement that a notification has been filed?**
The CCPC publishes a notice of the notification on its website within 7 working days of receipt of the notification and the filing fee. The notice sets out the date the notification was received, the parties and sectors involved in the transaction and details of the principal case handler for the matter.

- **Does the authority seek or invite the views of third parties?**

The notice of the transaction on the CCPC website invites third parties wishing to make submissions about the merger to do so within 10 working days of the publication of the notice. This invitation is open in all cases; the CCPC will not differentiate between cases that raise prima facie competition issues and those that do not. However, the CCPC may change the time limit for third party submissions by notice on its website in individual cases if required. Submissions from third parties should clearly indicate any information that should be treated as confidential. The CCPC will make reference to whether any third party submissions were received in its determination.

In addition to inviting submissions from third parties when posting notice of the transaction on its website, the CCPC merger notification form requires notifying parties to provide contact details for their top 5 customers, competitors and suppliers (worldwide and in Ireland), as well as any trade associations of which the notifying parties are members. It is open to the CCPC to contact these parties in the course of its investigation and to send them requests for information concerning the notified transaction, although it is under no obligation to do so. The CCPC’s market testing will generally be carried out within the first 10 working days of receipt of the notification.

If a Phase II investigation is initiated, any third party is entitled to make submissions and the CCPC must consider all submissions received. Submissions from third parties must be received in writing within 15 working days of the date of the opening of the Phase II investigation. The CCPC may change this time limit by notice on its website in individual cases, if required.

The CCPC is not required to hear third parties in the context of a merger investigation. During Phase II, third parties that have made submissions to the CCPC may be requested to make oral submissions, but this is at the discretion of
What information may be published by the authority or made available to third parties?

In general, all confidential information relating to the notifying parties will be kept confidential by the CCPC. The CCPC will, in particular, keep confidential business secrets of the parties, such as technical and/or financial information relating to a party's knowhow, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing and business plans, cost and price structures and sales strategies. However, information that is publicly available or that is already otherwise known outside the party making the confidentiality claim will not normally be considered confidential by the CCPC.

The CCPC does not publish notifications it receives, or any supporting documents provided with the notification. A short summary of the parties and the sectors involved in the transaction is included as part of the notice of the notification published on the CCPC’s website. Similarly, the CCPC does not publish submissions received from third parties either at Phase I or Phase II.

The CCPC will publish a notice of its determination on its website once made. The text of the CCPC's determination of a merger is also published on its website, typically within 1-2 weeks of the determination being made. Confidential information will be redacted from the determination and the notifying parties are given an opportunity to make representations as regards to confidentiality redactions.

Does the authority cooperate with antitrust authorities in other jurisdictions?

The CCPC cooperates with competition agencies in other jurisdictions. The CCPC is a member of the International Competition Network (“ICN”) and the European Competition Network (“ECN”). The ECN facilitates cooperation in the consistent application of EU competition rules through arrangements for information sharing, assistance and consultation.
The CCPC notification form requires notifying parties to state whether the transaction is subject to review by any other competition or regulatory agency. If the transaction has been notified to another agency, the parties can expect the CCPC to contact each other. The CCPC’s practice is to seek a waiver from the parties in respect of the exchange of information if it intends to contact a merger control authority in another jurisdiction.

- **What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

The CCPC has not published any formal guidelines on its approach to remedies. However, its practice to date has indicated a strong preference for structural (divestiture) remedies over behavioural remedies in merger cases. This is consistent with the approach taken by the European Commission and other international merger control agencies.

In determining the scope of divestitures, the CCPC approach follows closely that of the European Commission, in seeking to ensure that the divested business constitutes a viable standalone business that, if acquired by an appropriate purchaser, would have both the means and incentive to compete with the merged parties on a long-term basis (Premier Foods/RHM). The CCPC has not laid down any specific criteria by which it would assess a suitable purchaser, although the purchaser would need to demonstrate that it had the resources and capability of running the divestment business on a long-term basis. Similarly, while the CCPC has not adopted any general policy in relation to upfront buyers, it has previously required parties to suspend closing a transaction until an agreement with an approved purchaser for the divestment business was in place (Communicorp/SRH).

The CCPC is generally reluctant to accept behavioural remedies, but has done so in a small number of cases, where the imposition of a structural remedy would be disproportionate, inappropriate or unfeasible. The acceptability of such remedies is dependent on the facts of the particular case. For example, in eircom/Meteor, the CCPC’s predecessor, the Competition Authority, cleared the acquisition of Meteor Mobile Communications by eircom subject to eight conditions designed to address concerns regarding the transparency of cost allocation and internal transfers.
within eircom. These conditions allowed the Communications Regulator to obtain specific information about allocation of costs and internal transfers, as well as detailed accountancy statements from Meteor.

**What procedure applies in the event that remedies are required in order to secure clearance?**

The CCPC may enter into discussions with the undertakings involved in a transaction with a view to identifying measures which would ameliorate any effects of the merger or acquisition on competition. The CCPC is concerned with the competitive impact of the transaction in the State; to that extent, it will consider whether a remedy proposal made or agreed in another jurisdiction addresses the competition issues identified in Ireland.

Proposals can be submitted to the CCPC at any stage during Phase I or Phase II, although the CCPC has made clear that early remedies discussions are desirable as the CCPC may have questions on the proposals and the proposal remedy may be market tested. Commitments at Phase I and Phase II must be proposed by the parties. If the remedy proposals are agreed between the parties and the CCPC, they will become binding on the parties as a commitment decision, which is published.

The Competition Act provides for the enforcement of obligations arising from commitments accepted by the CCPC. The High Court can grant an injunction to enforce compliance with the terms of commitments. Any person who contravenes such commitments is guilty of an offence and liable to fines and/or imprisonment (see below).

**What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

Failure to notify a notifiable merger or acquisition (and failure to supply information required under an RFI within the time period specified by the CCPC) is an offence under the Competition Act. An undertaking, or the person in control of an undertaking, convicted of such an offence may be liable on summary conviction to a fine not exceeding €3,000 or, on conviction on indictment, to a fine not
exceeding €250,000.

In addition, if the failure continues one or more days after the date of its first occurrence, the undertaking or person concerned is guilty of a separate offence for each day that the breach occurs and may be liable on summary conviction to a fine not exceeding €300 or, on conviction on indictment, to a fine not exceeding €25,000.

For the purposes of these offences, the person in control of the undertaking is:

- In the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the offence to occur;
- In the case of a partnership, each partner who knowingly and wilfully authorises or permits the offence to occur; and
- In the case of any other form of undertaking, any individual in control of that undertaking who knowingly and wilfully authorises or permits the offence to occur.

Once a transaction is notified to the CCPC, there are no criminal sanctions for closing prior to receipt of clearance from the CCPC. However, if a transaction is put into effect prior to clearance it is void as a matter of Irish law, meaning it is legally unenforceable and ineffectual.

While closing prior to clearance does not attract criminal sanction, any person who fails to observe a determination of the CCPC or commitment decision (or any person who aids, abets or assists another person, or conspires with another person to contravene such determination or commitment decision) is guilty of an offence and may be liable:

- On summary conviction, to a fine not exceeding €3,000 or to a term of imprisonment not exceeding 6 months, or both; and
- On conviction on indictment, to a fine not exceeding €10,000 or to imprisonment for a term not exceeding 2 years, or both.

In addition, if the breach continues for one or more days after the date of its first
occurrence, the person is guilty of a separate offence and may be liable on summary conviction to a fine not exceeding €300 and, on conviction on indictment, to a fine not exceeding €25,000.

The Competition Authority (the predecessor of the CCPC) published a notice on “gun jumping”, i.e. failing to notify a notifiable transaction and implementing the transaction prior to clearance, in which it outlined that it takes “gun jumping” very seriously. The CCPC has investigated a number of “gun-jumping” cases in recent years. In those cases, the parties agreed to notify the transaction in question and, in those circumstances, the CCPC did not pursue the imposition of fines for failure to notify. The CCPC will typically publish a press release when it becomes aware of a “gun jumping” incident.

- **What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?**

The Competition Act provides that where the information contained in a notification is false or misleading in any material respect, or the CCPC is of the opinion that the full details required in the notification (or subsequently specified) have not been provided, the notification is invalid and any determination made by the CCPC on foot of such a notification is void.

Where the CCPC issues an RFI, failure by the parties to whom the RFI is addressed to provide the information required within the period specified by the CCPC is an offence under the Competition Act. An undertaking, or the person in control of an undertaking, convicted of such an offence may be liable on summary conviction to a fine not exceeding €3,000 or, on conviction on indictment, to a fine not exceeding €250,000.

In addition, if the failure continues one or more days after the date of its first occurrence, the undertaking or person concerned is guilty of a separate offence for each day that the breach occurs and may be liable on summary conviction to a fine not exceeding €300 or, on conviction on indictment, to a fine not exceeding €25,000.

For details of the concept of “a person in control of an undertaking”, please see
Can the authority’s decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?

An appeal may be taken by the notifying parties to the High Court in respect of a Phase II determination prohibiting a transaction or allowing it subject to conditions. Any issue of fact or law concerning the determination may be the subject of an appeal, but, with respect to an issue of fact, the High Court, on the hearing of the appeal, may not receive evidence by way of testimony of any witness and shall presume, unless it considers it unreasonable to do so, that any matters accepted or found to be fact by the CCPC in exercising its relevant powers were correctly so accepted or found. Such an appeal must be brought before the High Court within 40 working days of the relevant determination. The High Court may, at its discretion, expend this period. A further appeal may be taken from a decision of the High Court to the [Supreme Court] on a point of law only.

Third parties do not have any rights of appeal in respect of merger determinations.

What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

The CCPC continues to maintain a high workload of cases in the area of merger control, particularly as the Irish economy continues to recover and the new procedures established under the 2014 Act bed in. While it may yet be too early to discern specific trends emerging in relation to the CCPC’s general policy approach to merger control, there have been a number of notable features under the new regime:

- First, the amendments in the 2014 Act and the revised financial thresholds for notification (particularly the lower threshold of €3 million) have resulted in a large number of asset acquisitions (including the acquisitions of property generating rent rolls) being notified to the CCPC. The need to obtain CCPC approval prior to closing in reportable cases is now a significant consideration for those considering property acquisitions in Ireland.
Second, the DCCAE has published detailed guidelines on the media merger process, and the Minister for Communications has begun to examine cases under the media plurality rules in the Competition Act (including Liberty Global/UTV and NewsCorp/Wireless). The sector has seen a considerable degree of consolidation in recent years and, given the potentially broad definition of "media mergers" under the Competition Act, there is likely to be a number of such cases examined over the coming years.

Third, the decision in Baxter/Fannin saw the CCPC for the first time clear a transaction under the “failing firm” defence. While it is clear that the criteria for establishing the defence will continue to be difficult to meet, Baxter/Fannin shows a clear willingness on the CCPC’s part to use sophisticated analyses and apply the latest thinking when reviewing complex transactions.

Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

The Irish merger control system underwent a significant reform in 2014 as a result of the changes introduced by the 2014 Act. While the CCPC continues to monitor the effectiveness of its merger control regime, we are not aware of any proposals for further reform of the Irish merger control system at this time.