

COMPETITION AND REGULATED MARKETS

The Competition (Amendment) Act 2022 – An Overview of Reforms to the Merger Control Regime in Ireland

April 2023

The Competition (Amendment) Act 2022 (the “Act”) was signed into law on 29 June 2022. The primary purpose of the Act is to implement the ECN+ Directive (“ECN+”), which ensures that national competition authorities (“NCAs”) across the EU have similar powers for investigations and enforcement.

Some of the most significant reforms introduced by the Act relate to additional powers of the Irish Competition and Consumer Protection Commission (the “CCPC”) and other Irish NCAs to investigate and penalise parties for anti-competitive conduct, which are covered in a separate briefing here.

This update covers the significant revision to Ireland's merger control regime introduced in the Act.

INTRODUCTION TO THE IRISH MERGER CONTROL REGIME

Ireland's merger control regime was first established in 2002 under Part 3 of the Competition Act 2002 (as amended) and has been updated on a number of occasions since, most notably in 2014 (when the jurisdictional thresholds were substantially modified) and 2019 (when the financial thresholds for notification were increased). The Act introduces some of the most significant reforms to date and will substantially increase the powers of the CCPC in the context of merger control.

KEY REFORMS IN THE ACT

Power to direct notification of “below-threshold” transactions:

The most significant change introduced by the Act is that the CCPC may require parties to notify transactions that do not meet the applicable financial thresholds where the CCPC considers that it may have “*an effect on competition in markets for goods or services in the State*”. This power to “call in” a transaction for review includes the following procedural elements:

The CCPC must provide the parties with written notice that they are required to notify the transaction in question and specify the period by which they are required to submit the notification (to which the parties can request an extension if necessary); and

The CCPC must issue this written notice no later than 60 working days after the earliest of: (i) the date on which one of the parties publicly announces their intention to make a public bid; (ii) the date on which the CCPC becomes aware that the parties have entered into a binding agreement; or (iii) the date on which the transaction is put into effect.

Power to investigate below-threshold mergers if no notification made

Parties to a merger or acquisition may choose to voluntarily notify their transaction to the CCPC where it does not meet the applicable financial thresholds. However, if the parties fail to notify a transaction when given notice to do so by the CCPC, the CCPC can investigate the transaction on its own initiative on the same basis and with the same powers as would be the case for a merger that had been notified.

Interim measures

The CCPC can impose interim measures in respect of:

A transaction that has been notified to the CCPC (either voluntarily or pursuant to a mandatory obligation to notify under the Competition Act); or

A below-threshold transaction that the CCPC has decided to “call in” for review as set out above,

where it considers such measures appropriate due to the risk that the merger or acquisition may have an effect on competition in any markets for goods or services in the State. Such interim measures may require the parties to refrain from taking steps towards implementing the transaction

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(e.g. exchanging competitively sensitive information) or to mitigate the impact of steps already taken towards implementation (e.g. appointing a person to supervise the carrying on of certain activities). Failure to comply with interim measures imposed may result in criminal prosecution and a fine of up to €250,000 as well as an additional daily fine of up to €25,000 in respect of each day that the party's non-compliance continues.

Enhanced remedies toolkit (including powers to unwind completed mergers)

Where a merger or acquisition was implemented without the CCPC's clearance and, following a full investigation into the transaction, the CCPC determines that it would have the effect of substantially lessening competition in the State, the CCPC will be able to require the parties to unwind or dissolve the transaction and determine the manner in which this should be done. Where the transaction cannot be unwound or dissolved, the CCPC will be able to determine the best alternative manner by which the parties will be required to restore the status quo prior to the transaction being put into effect.

Power to bring summary proceedings for non-compliance

The CCPC will be able to bring summary proceedings in the District Court where: (i) parties have failed to notify a merger or acquisition that meets the applicable financial thresholds; or (ii) the parties have failed to respond to a Requirement for Information ("RFI") that the CCPC has issued to them in relation to a notified transaction.

Updated gun-jumping offence

The offence of "gun-jumping" under the Competition Act has been updated, such that the parties to a transaction will be guilty of a criminal offence where they have either: (i) implemented a notifiable merger or acquisition without first notifying the transaction to the

CCPC; or (ii) notified such a transaction but implemented it before the CCPC has issued a clearance decision authorising them to do so. Similar to the applicable fines for failing to comply with interim measures, parties can face a fine of up to €250,000 for "gun-jumping" as well as an additional daily fine of up to €25,000 in respect of each day that the offence continues.

RFIs to third parties

As well as their current power to issue compulsory RFIs to the notifying parties, the CCPC will also be able to issue compulsory RFIs to third parties who they consider "may have information relevant to the Commission's consideration of the merger or acquisition". The same rights and obligations that currently apply to the notifying parties in respect of the RFI process will be relevant for these third parties, and the CCPC will be able to impose the same penalties for non-compliance on these third parties (see above).

IMPACT OF THE MERGER CONTROL REFORMS

The changes to the Irish merger control regime introduced by the Act substantially increase the powers of the CCPC to investigate transactions that do not meet the financial thresholds for mandatory notification, and radically revise the position on voluntary notification of below-threshold transactions.

The CCPC will be able to require notification of transactions that do not meet the relevant financial thresholds for mandatory notification simply on the basis that they may have "an effect" on competition in a market or markets in Ireland. The CCPC will also have the power to investigate completed mergers for an extended period (up to 60 working days) after they have been put into effect (or are otherwise made known).

This very low bar jurisdictional bar is likely to create considerable uncertainty for

merging parties, including for international transactions that may have an effect on competition in Ireland. To date, the CCPC has not issued guidance as to how and when these powers will be applied in practice.

In addition to the extensive jurisdictional changes introduced, the Act gives the CCPC a greatly enhanced toolkit by which to impose interim measures and remedies to address competition concerns, as well as the ability to compel third parties not directly involved in a merger to respond to RFIs. The Act also gives the CCPC the ability to issue civil fines for "gun-jumping" and to bring summary proceedings for other offences in the District Court on the CCPC's own initiative (as opposed to relying on the Director of Public Prosecutions to do so).

As regards the long term impact of these reforms on the Irish merger control regime, it seems clear that businesses considering entering into a merger or acquisition with another party will need to conduct a detailed analysis of not only whether the transaction would meet the applicable financial thresholds in Ireland, but also whether it could otherwise be considered to have an effect on competition in a particular market or markets in Ireland. Moreover, parties to a potential merger or acquisition will need to pay close attention to the procedural aspects of notifying and implementing such a transaction, as any failure to comply with these requirements could result in significant penalties.

The merger provisions of the 2022 Act are expected to come into operation by Ministerial order by the end of 2022.

For further information on the Competition (Amendment) Act 2022, please contact a member of the Competition and Regulated Markets team.

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Dublin
+353 1 920 1000
dublin@arthurcox.com

Belfast
+44 28 9023 0007
belfast@arthurcox.com

London
+44 207 832 0200
london@arthurcox.com

New York
+1 212 782 3294
newyork@arthurcox.com

San Francisco
+1 415 829 4247
sanfrancisco@arthurcox.com

arthurcox.com

Our team



Richard Ryan
Partner
+353 1 920 1240
richard.ryan@arthurcox.com

"I can't speak highly enough of Richard Ryan. The support and advice Richard and his team provided was critical."
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"He is an excellent lawyer, pragmatic, responsive and committed to delivering and getting the right result for his client. His dedication to the task at hand is second to none."
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Patrick Horan
Partner
+353 1 920 1063
patrick.horan@arthurcox.com

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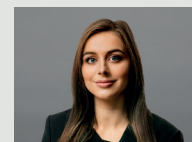
Ronan Scanlan
Of Counsel
+353 1 920 2446
ronan.scanlan@arthurcox.com



Simon Breen
Senior Associate
+353 1 920 1971
simon.breen@arthurcox.com



Edel O'Connell
Associate
+353 1 920 2112
edel.oconnell@arthurcox.com



Bridget Clinton
Associate
+353 1 920 1298
bridget.clinton@arthurcox.com



James Dowling
Associate
+353 1 920 1930
james.dowling@arthurcox.com



Ailbhe Ó Faoláin
Associate
+353 1 920 2136
ailbhe.ofaolain@arthurcox.com



Robert Byrne
Associate
+353 1 920 2111
robert.byrne@arthurcox.com

Dublin
+353 1 920 1000
dublin@arthurcox.com

Belfast
+44 28 9023 0007
belfast@arthurcox.com

London
+44 207 832 0200
london@arthurcox.com

New York
+1 212 782 3294
newyork@arthurcox.com

San Francisco
+1 415 829 4247
sanfrancisco@arthurcox.com

Arthur Cox LLP
arthurcox.com

