



An Roinn Gnó, Fiontar agus Nuálaíochta
Department of Business, Enterprise and Innovation

**Consultation on a review of certain
provisions under the Competition Act
2002, as amended, relating to merger
and acquisitions**

September 2017

Background:

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 acquisition) was amended and these changes came into effect from 31 October 2014. In particular, amendments were made to the financial thresholds and the number of days in which the Competition and Consumer Protection Commission (CCPC) had to make a determination on a notified merger or acquisition.

During the Oireachtas consideration of the Competition and Consumer Protection Act 2014, a commitment was given to review the operations of the amendments by the (then) Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton T.D. As we approach the third anniversary of their introduction, it is considered that such a review is now warranted, based on the experience to date. In addition, with the Irish economy recovering, the issue of the appropriateness of the financial thresholds requires revisiting. To this end, a public consultation process is being undertaken to solicit views on the current system and to seek inputs as to possible legislative amendments that might be introduced.

Experience since 31 October 2014:

Financial thresholds:

In relation to the financial thresholds, the amendments introduced by the 2014 Act are set out below:

Provisions pre-31 October 2014

18.—(1) Where a merger or acquisition is agreed or will occur if a public bid that is made is accepted and—

(a) in the most recent financial year—

(i) 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**,

(ii) **each of 2 or more** of the undertakings involved in the merger or acquisition **carries on business in any part of the island of Ireland**, and

(iii) the turnover **in the State** of any **one** of the undertakings involved in the merger or acquisition is not less than **€40,000,000**.

Provisions post-31 October 2014

18. - (1) Where-

(a) in relation to a proposed merger or acquisition, in the most recent financial year –

(i) the **aggregate** turnover **in the State of the undertakings involved** is not less than **€50,000,000**, and

(ii) the turnover **in the State** of **each of 2 or more** of the undertakings involved is not less than **€3,000,000**,

The overall aim of these changes was to ensure that merger notifications received by the CCPC had a real nexus to the State by:

- Removing the world wide turnover requirement and instituting a more significant individual turnover threshold. This would allow the CCPC to focus on notifications with material issues and with a real nexus to the State and thus identify if there is any overlap between the activities of the parties that may well result in a greater potential impact on competition within the State.
- Having a combined turnover threshold (which was a very common aspect of other merger notification regimes) since it enquires into the role in the State's economy that the proposed merged entity would play.
- Having a minimum turnover threshold (again a very common aspect of the merger notification regimes) to ensure that the notified merger involves two firms each with a non-insignificant role in the State's economy.

Since 31 October 2014, the trend in notifications to the CCPC under the new legislation has been as follows.

Year (or part thereof)	2014 (31/10-31/12)	2015 (1/1-31-12)	2016 (1/1-31-12)	2017 (1/1-30/6)
No. notified	10	78	67	37

On the issue of determinations delivered by the CCPC, these are set out in the table below: all were made within the relevant statutory deadlines.

	2015	2016	2017 (to end June)
Phase 1 determinations cleared without proposals	72	68	34
Phase 1 determinations with proposals	0	1	1
Phase 2 positive determinations without conditions or proposals	1	0	0
Phase 2 determinations with conditions or proposals	2	1	0
Phase 2 prohibitions	0	0	0
Appeals made in relation to merger determinations	0	0	0

Since the introduction of the new financial thresholds, a number of issues have arisen which are pertinent to the review being undertaken. These include the following relating to the perceived burden for businesses that the new lower individual thresholds have engendered:

- (i) **Resource issues:** In terms of the time and energy required to submit the notification and engage in the investigation, it has been suggested that the process requires the active participation of key executives, thereby distracting them from running the day-to-day business;
- (ii) **Uncertainty:** Because the outcome is not known, it has been claimed that the obligation to obtain clearance from the CCPC is impacting heavily on bank funding.

A related issue concerns the potential commercial damage which this uncertainty can have on the operation of the business to be acquired, which in turn means that transactions are increasingly subject to Material Adverse Change clauses;

(iii) **Financial costs:** While the notification fee of €8,000 has not been increased since 2003, it is nevertheless a cost to be borne by the parties in addition to the legal fees charged by the law firms (which anecdotally are in the region of €16,000 to €20,000 for the most straight-forward of cases);

(iv) **Asset Acquisitions:** It is suggested that the low individual financial threshold means that acquisitions of a number of assets subject to leases, thus qualifying as asset acquisitions (being a business to which a turnover can be attributed) as contemplated in section 16(1)(c) of the 2002 Act, such as aircraft, office buildings, shopping centres and hotels, now have to be notified, although such acquisitions will normally not have any substantial effect on the market and would more often than not operate in smaller, localised markets only.

In light of the above, the CCPC, at the request of the Department of Business, Enterprise and Innovation, has undertaken an analysis of possible amendments to the financial thresholds to determine the impact any changes would have had on the number of mergers notified (using the merger notification figures for 2015 and 2016 as a basis). In this context, the analysis used the following notional figures to determine this hypothetical impact viz. for €5 million or €10 million for individual domestic turnover and €60 million for aggregate turnover in the State (up from €3 million and €50 million respectively).

During the two year period (2015/2016), a total of 145 mergers were notified to the CCPC. This included 12 media mergers (7 in 2015 and 5 in 2016) which are excluded from the analysis since turnover is not a relevant factor for requiring notification of media mergers. The analysis (set out in the following table) shows that of the remaining 133 merger notifications examined, an increase in the financial thresholds from the current €3 million to €5 million would have resulted in a total of 19 fewer notifications in 2015 and 2016 (12 in 2015 and 7 in 2016) while an increase in the financial thresholds from the current €3 million to €10 million would have resulted in a total of 51 fewer notifications in 2015 and 2016 (28 in 2015 and 23 in 2016).

Of particular note is the fact 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.

Summary of the number of merger notifications which would not have required notification to the CCPC between January 2015 and December 2016 depending on the notification threshold

	2015		2016		Total	
No. of merger notifications excluding media mergers	71		62		133	
	No. of mergers notified that would not have been required to be notified	% of mergers notified that would not have been required to be notified	No. of mergers notified that would not have been required to be notified	% of mergers notified that would not have been required to be notified	No. of mergers notified that would not have been required to be notified	% of mergers notified that would not have been required to be notified
Not less than €5 million individual domestic turnover	12	16.9%	7	11.3%	19	14.3%
Not less than €10 million individual domestic turnover	28	39.4%	23	37.1%	51	38.3%

In the context of comparisons with international merger thresholds, over the last decade, there has been increased focus among international organisations and competition agencies (e.g., the International Competition Network (ICN) and the OECD) on the criteria for the mandatory notification of mergers. This has been driven partly by the very significant increase in merger review regimes around the world during that period and concerns about the burden that poorly designed notification criteria impose both on businesses and on

competition agencies. This has led to an increasing consensus regarding designing appropriate notification criteria and the adoption of recommendations regarding jurisdictional nexus by bodies such as the ICN.

The following table provides a summary of the individual undertaking financial thresholds in some comparable European jurisdictions. Some care has to be taken when comparing across jurisdictions because of the legal nuances in the different legislative texts. However, the headline figures show that the lower boundary in Ireland for domestic turnover is significantly lower than those in comparable jurisdictions. Based on these figures, a higher individual undertaking financial threshold would appear to bring Ireland much more in line with the other jurisdictions.

Selected international merger regimes financial thresholds

Country	GNI per capita	Individual threshold as of August 2016
Ireland	US\$ 52,550	Turnover in the State of each of 2 or more of the undertakings involved is not less than €3 million
Belgium	US\$ 44,510	At least two of the parties have an individual Belgian turnover of at least €40 million
Czech Republic	US\$ 18,150	Each of at least two of the parties to the concentration for the last completed accounting period has domestic turnover (in the Czech Republic) exceeding 250 million Czech koruna (€9 million)
Denmark	US\$ 60,270	The aggregate turnover in Denmark of each of at least two of the undertakings concerned is more than 100 million kroner (€13.4 million)
Finland	US\$ 46,560	The aggregate turnover in Finland of each of at least two of the undertakings concerned exceeded €20 million

The aggregate turnover thresholds applicable in some of the international jurisdictions and more specifically the relationship between the individual threshold and the aggregate threshold were also examined for certain countries (Austria, Belgium Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Greenland, Hungary, Italy, Norway, Portugal, Sweden and Switzerland). In those countries using an aggregate turnover of the undertakings generated in the specific country, as well as individual turnovers, the combined, aggregate turnover of the undertakings involved are on average 6 times the applicable individual threshold. This suggests that if, for example, an individual threshold of €10 million was set for Ireland, this would result in a figure of €60 million for the aggregate thresholds.

The analysis showed that taking a notional higher financial threshold into account (€10 million), as well as an increased notional aggregate level of €60 million, the number of merger notifications for the period 2015 to 2016 would have been reduced by an additional 4 and 2 notifications respectively.

“Working days” issue:

In relation to the number of days in which the CCPC has to make a determination on a notified merger or acquisition, the concept of “*working day*” was introduced to replace the term “*day*” across all of Part 3 of the 2002 Act to take account of weekends and holiday periods and reflect the more widespread use of such terminology across the EU. For example, a Phase 1 determination must be made within 30 working days from the appropriate date.

A breakdown of the merger determinations by reference to “*working days*” that were made by the CCPC in 2015, 2016 and 2017 (to end June) is set out below, broken down into three categories (viz. less than 20 working days, between 20 and 24 working days inclusive, and between 25 and 30 working days inclusive).

All were made within the relevant statutory deadlines. Note, due to the fact that some mergers are carried forward into the following year, the number of mergers for which determinations are made does not necessarily match the number of notifications in any given year. Also, the complexity of the mergers is not comparable across the data sets for each year.

	2015	2016	2017 (to end June)	Total 2015-2017
Mergers determined in under 20 working days	20 (27%)	2 (3%)	9 (27%)	31 (17%)
Mergers determined in 20-24 working days (inclusive)	7 (9%)	13 (19%)	10 (30%)	30 (17%)
Mergers determined in 25-30 working days (inclusive)	47 (64%)	55 (78%)	15 (44%)	117 (66%)

More complex notifications always require the most time to examine and this is not expected to change even if new financial thresholds were to be introduced.

Public consultation:

In light of the above, this consultation is seeking inputs to the following questions.

- In relation to the financial thresholds introduced in the 2014 Act, should the individual turnover threshold level be amended, and if so, what level do you suggest it be set at? Supporting arguments for any such suggested changes should be supplied.
- In relation to the financial thresholds introduced in the 2014 Act, should the aggregate turnover threshold level be amended, and if so, what level do you suggest it be set at? Supporting arguments for any such suggested changes should be supplied.
- In relation to the number of “*working days*” set out in Part 3 of the 2002 Act, do you believe that any or all of these should be amended, and if so, what levels do you suggest they be set at? Reference to specific sections of the 2002 Act is requested. Supporting arguments for any such suggested changes should be supplied.
- While this review is focussed on the issues of the financial thresholds and the number of working days in which the CCPC has to make a determination on a notified merger

or acquisition, are there any other issues relating to the merger and acquisition provisions of the 2002 Act which you wish to raise as part of this consultation?

Response deadline and associated issues:

Responses to the consultation should be sent by Thursday 30 November 2017 at the latest either by e-mail to conspol@dbei.gov.ie or by post to Competition and Consumer Policy Section, Department of Business, Enterprise and Innovation, Earlsfort Centre, 1 Lower Hatch Street, Dublin D02 PW01.

Responses to the consultation may be made available on the website of the Department of Business, Enterprise and Innovation. Thus, any material contained in submissions to the consultation which respondents do not wish to be made public in this way should be clearly identified as confidential in the submission.

Respondents should also be aware that submissions may be disclosed by the Department in response to requests under the Freedom of Information Act 2014. Any information that is regarded as commercially sensitive should be clearly identified and the reason for its sensitivity stated. In the event of a request under the Freedom of Information Act, the Department will consult with respondents about information identified as commercially sensitive before making a decision on such a request.