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# Briefing

## New Powers for the Competition and Consumer Protection Commission due to commence



INSTITUTE OF DIRECTORS  
IN IRELAND

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The commencement order for the Competition (Amendment Act) 2022 (“the 2022 Act”) was published on 15 September 2023, with the effect that the Competition and Consumer Protection Commission (the “CCPC”) will have a range of new merger control and enforcement powers from 27 September 2023.

The long anticipated new powers for the CCPC will come into effect on 27 September 2023 and include:

1. expanded merger control powers, most notably, the power to call-in below threshold mergers, impose interim measures, and an updated ‘gun-jumping offence’;
2. an administrative enforcement regime for competition law infringements that will enable the CCPC to itself impose significant financial sanctions (albeit subject to Court approval), together with a new administrative leniency policy (“ALP”);
3. a new, distinct offence of ‘bid-rigging’;
4. significantly increased maximum fines and imprisonment terms under the existing criminal enforcement regime; and
5. new investigative powers for the CCPC, including the power to conduct surveillance activities and to impose itself administrative financial sanctions for breaches of procedural requirements (in both cases subject to Court approval).

In the first of our series of briefings on the new powers, we focus on the CCPC’s new merger control powers, and what they will mean for transaction planning.

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## Below threshold merger call-in

Probably the most significant development in Irish merger control since the regime commenced is the introduction in the 2022 Act of a CCPC power to call in below threshold mergers for review. The new call-in power is consistent with the increasing trend towards scrutiny of below threshold transactions across Europe, with the European Commission looking at a number of such transactions under the Article 22 of the EU Merger Regulation referral mechanism (e.g., EEX/Nasdaq Power; Qualcomm/Autotalks; and Illumina/Grail).

In Ireland, other than media mergers (which are notifiable irrespective of revenue levels), transactions need only be mandatorily notified to the CCPC if:

- (i) the combined Irish revenue of all the parties to the transaction is at least €60,000,000; and
- (ii) each of at least two of the parties to the transaction have Irish revenue of at least €10,000,000.

Parties to a transaction that falls below these revenue thresholds can voluntarily notify a transaction to the CCPC. In practice, this is an option that is exercised relatively rarely - in part because the CCPC has, to date, been limited in its powers should a transaction not be voluntarily notified.

However, following the commencement of the 2022 Act on 27 September, the CCPC will be able to call-in on a mandatory basis any merger that it believes “may” have an effect on competition in Ireland, whether or not it has been put into effect. This is an important addition to the CCPC’s merger control toolkit and will take on particular significance in transactions involving local markets and acquisitions of businesses/business lines in their infancy but with potential to develop into significant competitive forces.

### Timelines

The CCPC will have 60 working days after the earliest of the following dates to call-in the merger for review:

- (i) one of the parties to the transaction publicly announces an intention to make a bid (or a public bid is made but not yet accepted);
- (ii) the CCPC becomes aware that the parties to the transaction have entered into an agreement, the result of which would, if implemented, amount to a transaction within the meaning of the Competition Act 2002, as amended; or
- (iii) the transaction is put into effect.

## Procedure

Once the CCPC has decided to call-in a merger, the parties will be issued with a notice requiring notification, in which they will be provided with a date by which the notification must be made. The standard €8,000 statutory fee is payable at the date of notification, upon which point it will be reviewed in line with the standard procedures and timelines.

Where the parties to the transaction do not comply with the requirement to notify the merger once called-in, the CCPC can:

- (i) examine the merger as if a notification had been made, with the statutory review timelines starting to run from the deadline for notification; and
- (ii) where the risk to competition posed by the transaction is considered by the CCPC to require it, impose interim measures to prevent the transaction being put into effect ('standstill measures'). Where the transaction has already completed, the CCPC will have the power to impose further measures, which include 'hold-separate' order and the appointment of a monitoring trustee to ensure that such measures are adhered to.

The CCPC will also have the power to impose interim measures where a merger has been duly notified following a call-in notice.

Failure to comply with a notice requiring notification of a below-threshold merger is a criminal offence, and exposes the parties to the transaction to a fine not exceeding €3,000 on summary conviction, or €250,000 on conviction on indictment.

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## New gun-jumping offence

The 2022 Act closes what was a gap in the 'gun-jumping' offence. Prior to the amendment, it was an offence to fail to notify a transaction that met the thresholds, but it was not an offence to complete prior to clearance once a notification had been made. From the 27 September 2023, it will now also be an offence to implement a notified or notifiable or called-in transaction before the CCPC has issued a clearance decision authorising the transacting parties to do so. Parties who have so implemented a transaction will be exposed to a fine not exceeding €3000 on summary conviction, or €250,000 on conviction on indictment.

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## Power to 'unwind' completed transactions

The CCPC will have the power to require that transactions that have been completed prior to CCPC clearance (where the transaction was notifiable, notified or called-in) and found to result in a substantial lessening of competition in the relevant market, be unwound or dissolved. Where that is not possible, the CCPC will be able to require that the companies involved in the merger take appropriate steps to restore, as far as it is possible to do so, the pre-transaction situation.

## Impact on transaction planning

It will become increasingly important for transaction teams to conduct a preliminary competition risk assessment where there are, or may be, overlaps between the activities of the transacting parties, including when turnover thresholds have not been met. This will be important for deals that involve the acquisition of early stage/start-up businesses, particularly in the tech and pharma sectors or businesses with a strong local market presence, and time should be factored into the transaction schedule for such an assessment.

Pre-notification engagement with the CCPC may now become an important consideration for parties, particularly in light of the lack of public guidance from the CCPC on its intended approach for calling-in mergers.

*Further information is available from*



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