

**A Simplified Merger
Procedure for the
Review of Certain
Mergers &
Acquisitions**

Public Consultation

DATE 07/11/2018



Coimisiún um
Iomalocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission



The closing date for receipt of submissions is **06 December 2018**. Please send your responses to:

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- 1. Confidentiality of submissions:** Respondents are requested to note that the Competition and Consumer Protection Commission (CCPC) may publish the submissions that it receives in response to this consultation on its website. If you consider that any material should be redacted from the public version of your submission, please ensure that such material is clearly indicated in your submission.
- 2. Relevant provisions of the Freedom of Information Act 2014:** We would like to draw your attention to the fact that information provided to the CCPC may be disclosed in response to a request under the Freedom of Information Act 2014. Therefore, please identify any information you consider to be confidential or commercially sensitive, and specify the reason for its sensitivity. The CCPC will consult with anyone potentially affected regarding information identified as sensitive before making a decision on any Freedom of Information request.
- 3. General Privacy Notice:** Please note that any information (including any personal data) that you provide to the CCPC in response to this consultation may be published on the CCPC's website and may in certain circumstances also be disclosed separately by the CCPC to third parties, including our third-party service providers and other recipients. The CCPC may disclose such information to third parties where required or permitted to do so by law. For further details of the situations in which the CCPC may disclose personal data to third parties and for information on how the CCPC collects and uses personal data, please see the CCPC's General Privacy Notice available at: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/03/CCPC-General-Privacy-Notice.pdf>

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1. Introduction

- 1.1 The CCPC is a statutory body with responsibilities in the fields of competition and consumer protection law.
- 1.2 The mission of the CCPC is to use our knowledge, skills and statutory powers to promote competition and enhance consumer welfare. Our vision is for open and competitive markets where consumers are protected and businesses actively compete.
- 1.3 One of the primary functions of the CCPC is to protect the interests and welfare of consumers. We carry out this function in a variety of ways including:
- (a) Reviewing mergers and acquisitions which reach a certain financial threshold, and all media mergers;
 - (b) Enforcing competition and consumer protection law using our statutory powers;
 - (c) Conducting research;
 - (d) Undertaking studies;
 - (e) Publishing papers and making submissions to inform and influence Government policy; and
 - (f) Publishing guidelines on competition and consumer protection law for businesses.

Purpose of the consultation

- 1.4 The CCPC is currently assessing whether a simplified procedure for the review of certain mergers (“simplified procedure”), on the basis that they clearly do not raise competition concerns, should be introduced in the State. As such, we are issuing this consultation to ascertain the views of external stakeholders on the possible introduction of a simplified procedure.

- 1.5 This consultation invites citizens, businesses, associations, public authorities and other stakeholders to provide observations on what action, if any, should be taken in this regard. The CCPC will consider the responses to this consultation when deciding on the introduction of a simplified procedure in the State.

Background

- 1.6 Merger control constitutes an important instrument of Irish and EU competition law. Its primary objective is to ensure that competition is not substantially lessened by corporate re-organisations between businesses in the State.
- 1.7 Under the Competition Act 2002 (as amended) (“the Act”), mergers or acquisitions which satisfy certain financial thresholds¹ must be notified to the CCPC for review. As can be seen from Table 1 below, the number of mergers and acquisitions notified to the CCPC has been steadily increasing since 2016. So far, this trend has continued in 2018 with notifications up by 50% when compared to the same period in 2017.

Table 1.0 Merger Notifications 2014-2018					
Year (or part thereof)	2014	2015	2016	2017	2018 (YTD) ²
Number of Notifications	41	78	67	72	87

- 1.8 A significant amount of time and resources are dedicated by both the CCPC and the notifying parties during the standard merger review procedure (“standard procedure”). In many cases, this is justified, as care has to be taken to accurately analyse the impact of a proposed transaction on competition in the relevant market(s).
- 1.9 Some transactions clearly do not raise concerns from a competition perspective. However, in Ireland, these non-problematic cases must be assessed under the

¹ With effect from 1 January 2019, and in accordance with amendments to section 18(1)(a) of the Act made by the Competition Act 2002 (Section 27) Order 2018 (S.I. No. 388 of 2018), undertakings will be obliged to notify the CCPC when:

- The aggregate turnover in the State of the undertakings involved is not less than **€60,000,000** and;
- The turnover in the State of each of 2 or more of the undertakings involved is not less than **€10,000,000**.

² Year to date until November 01, 2018.

standard procedure as there is no simplified procedure in place. Ireland is in the minority amongst EU Member States in this respect.

1.10 A recent review of the merger control practices of other EU Member States³ carried out by the CCPC highlighted that:

- (a) The EU Commission operates a full simplified procedure process for certain merger notifications, which includes a short form notification and a streamlined review process⁴; and
- (b) Out of a sample of 23 EU Member States, the CCPC found that 70% operate a simplified procedure for certain types of notified transactions.

1.11 The criteria for application of a simplified procedure are similar across EU Member States. All EU Member States (except for France⁵) use some combination of the EU Commission's criteria⁶ (with turnover and market share thresholds adjusted).

1.12 The CCPC applied some of the simplified procedure criteria used by the EU Commission to 219⁷ notifications reviewed by the CCPC between the period 2016 - 2018⁸. On the basis of this analysis, the CCPC estimates that 121⁹ of these mergers, approximately 55%, would have qualified for review under a simplified procedure¹⁰. Figure 1 below, breaks down these 121 mergers into commonly-used simplified procedure criteria categories.

³ The CCPC sent voluntary requests for information on simplified procedures via the European Competition Network to National Competition Authorities ("NCAs") in all other EU Member States and received responses from 23 NCAs.

⁴ This is provided for in the EU Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04): http://ec.europa.eu/competition/mergers/legislation/simplified_procedure.html.

⁵ France has specific simplified criteria for the food and retail sectors in addition to the EU criteria.

⁶ EU Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, p. 1, para. 5.

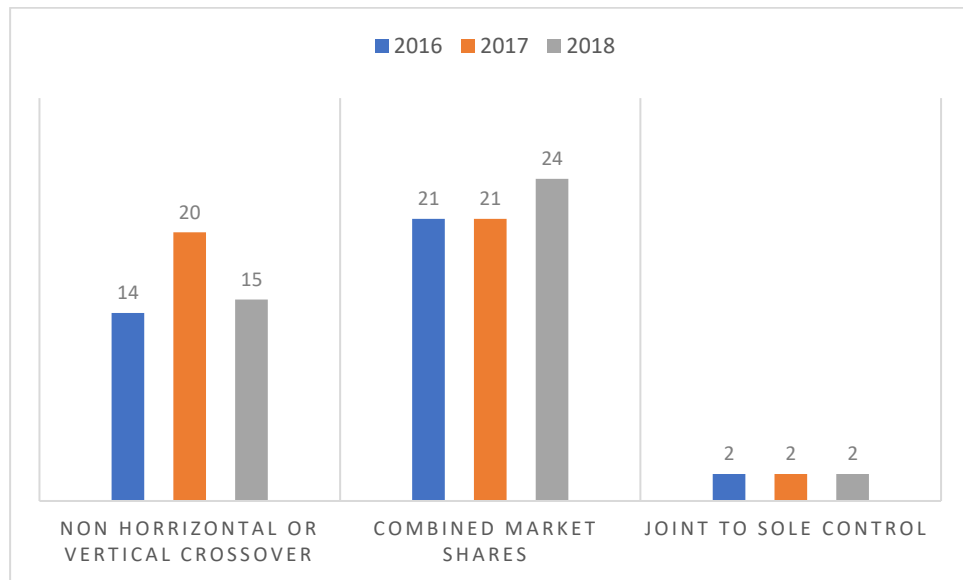
⁷ For 2018, only mergers and acquisitions with published determinations were reviewed.

⁸ Note the total number of reviewable mergers is likely to decrease when the new turnover thresholds provided for in the Competition Act 2002 (Section 27) Order 2018 (S.I. No. 388 of 2018) come into operation 1 January 2019.

⁹ This represents a conservative estimate as we used the most conservative pre-defined allowances, i.e., 15% for horizontals and 25% for verticals, and where it was not entirely clear what the parties' market shares were in the relevant markets, we did not include the relevant merger in the simplified category.

¹⁰ Note, this analysis does not include transactions which meet the simplified merger procedure criteria but were subject to extensive phase 1 or phase 2 investigations.

Figure 1: CCPC 2016 - 2018 using certain simplified procedure criteria



1.13 The CCPC considers that the introduction of a simplified procedure in Ireland could significantly reduce the time and resources needed to review mandatorily notified transactions. This may have a positive impact on the economy, as merger review periods would be shorter and the Irish merger control regime would be less burdensome for the notifying parties.

2. Consultation Questions

- 2.1 This consultation is broken down into sections under which we express our initial views and then ask specific questions.
- 2.2 The CCPC has taken a conservative approach to the introduction of a simplified procedure in order to mitigate the associated risks with this approach. However, if introduced, we will constantly monitor the outcomes of the simplified procedure and make amendments where necessary, after an initial trial period.
- 2.3 In this consultation we ask you to answer each question, where relevant, and provide specific examples and evidence to support your answers. You are free to leave questions unanswered.
- 2.4 We also invite feedback on the initial views we have provided under each of the various sections.

Introduction of a simplified procedure

CCPC initial views

- 2.5 The CCPC is proposing to introduce a simplified procedure for the review of certain mergers in the State. The CCPC has conducted a preliminary assessment of the potential benefits and risks associated with the introduction of a simplified procedure. The potential benefits include a more efficient process for those transactions that do not pose competition concerns. Another benefit is that the Irish merger review regime would be more effects-based and focused on outcomes. These benefits would arise, for example, from the possible introduction of a shorter notification form for notifying parties to complete and the issuing by the CCPC of shortened determinations (see paragraphs 2.15 to 2.17 below). The potential risks relate to mergers either not undergoing sufficient levels of assessment or being incorrectly cleared, or incorrectly cleared without commitments.

- 2.6 The degree to which the risks and benefits identified could be realised is dependent on the type of simplified procedure that is selected (this is discussed in subsequent sections of this consultation). In line with simplified procedures in other EU Member States and with the EU Commission's simplified procedure, the CCPC will reserve the right to revert to the standard procedure at any point – specifically, by invoking the provisions of section 18(12) of the Act (i.e. by declaring the notification submitted under the simplified procedure to be not valid in accordance with section 18(12) of the Act and thereby requiring the parties to submit a fresh notification using the standard procedure) or by issuing a request for information under section 20(2) of the Act requiring the notifying parties to submit more detailed information in relation to the transaction.
- 2.7 In addition to this, the analysis conducted by the CCPC as part of a simplified procedure merger will be similar to the analysis conducted in a standard merger review. However, the CCPC notes in this regard that mergers or acquisitions which would qualify for the simplified procedure are not likely to require such extensive analysis as those notified under the standard procedure.
- 2.8 The CCPC reserves the right to invoke the provisions of section 18(12)¹¹ of the Act, in the event that parties submit notifications under the proposed simplified procedure that are incomplete or contain misleading or false information. This would mean that the CCPC would declare the notification submitted under the simplified procedure to be invalid in accordance with section 18(12) of the Act and the parties would then be required to submit a fresh notification using the standard procedure. This should ensure notifying parties provide correct and complete information under the simplified procedure. The CCPC also reserves the right in all cases to issue Requests for Information under section 20(2) of the Act requiring notifying parties to provide the CCPC with more detailed information in relation to transactions.

¹¹ This provision allows the CCPC to declare merger notifications to be not valid.

- 2.9 Pre-notification consultations between the CCPC and the notifying parties will assist notifying parties in identifying whether a transaction is an appropriate candidate for assessment under a simplified procedure.
- 2.10 The CCPC considers that these measures will mitigate the risks identified.

Questions

- (a) On the basis of your experience of the Irish merger control regime, and considering the analysis presented in the Background section of this document, do you consider that there is currently scope for simplification of the Irish merger control procedure without impairing the merger regime's objective of preventing harmful effects on competition? Please explain your answer.
- (b) In your view, what are the potential benefits and risks associated with the introduction of a simplified procedure? Please explain your answer.

Simplified Procedure Criteria

- 2.11 The criteria used for the selection of a notifiable transaction for assessment under a simplified procedure will have a significant impact on the effectiveness of the procedure. The broader the criteria used, the higher the number of mergers and acquisitions which will be reviewed under a simplified procedure. This will lead, in turn, to faster merger review times. However, it is also possible that the potential for incorrectly clearing a transaction, or incorrectly clearing without commitments, may also increase in this situation. With this in mind, the CCPC is considering a conservative approach in relation to the selection of simplified procedure criteria.

CCPC initial views

- 2.12 The CCPC is proposing to introduce the following simplified procedure criteria:



1. Where none of the parties to the merger are active in the same product or geographic markets, or in any upstream or downstream product markets from one-another. The CCPC notes that, generally speaking, transactions where the parties involved are not active in any overlapping business activities to one-another are less likely to raise competition concerns in the State.
2. Where two or more of the parties involved in the merger or acquisition are active in the same product or geographic market, but their combined market share is less than 15%. Or, where one or more parties involved in the merger or acquisition are active in a market which is upstream or downstream to a market in which another party is active, but the market share of each of the parties involved in each market is less than 25%.¹² The CCPC considers that these transactions, in general, are less likely to raise competition concerns in un-concentrated markets in the State. However, the CCPC will reserve the right to request more detailed information from the notifying parties (e.g., by issuing a request for information under section 20(2) of Act at any time), in the event that factors come to light which require further investigation (for example, if all other competitors in the affected markets are relatively small, and the merging parties exert a significant competitive constraint on one another). In this instance, the CCPC will also issue a full determination.
3. Where a party, which already has joint control over a company, is to acquire sole control over that company. The CCPC considers that such transactions are, in general, less likely to raise competition concerns in the State.

2.13 The CCPC is mindful that, where there is overlap in the activities of the parties involved, market definition will be important when assessing if a notifiable transaction should qualify for assessment under a simplified procedure. In

¹² Note, the EU Commission's criteria is 20% for parties active in the same product market and 30% for parties active in upstream or downstream markets. The CCPC is suggesting conservative market share thresholds.).

this regard, the CCPC believes pre-notification consultations will be useful to both the parties and the CCPC in identifying the possible affected markets and the availability of data to measure market shares. The CCPC is proposing to take a cautious approach to market definition, in which we will assess if any other conceivable¹³ markets would qualify the transaction for review under the standard procedure. If we find this to be the case, then the merger or acquisition will be reviewed under the standard procedure.

Questions

- (a) In your opinion, what criteria should be applied to select a merger or acquisition for assessment under a simplified procedure? Please make specific reference to the CCPC's proposed approach, outlined above. Please explain your answer.
- (b) What type of screening tools/procedures do you think the CCPC should consider to ensure that the correct transactions are selected for review under a simplified procedure? Please explain your answer.

What Procedures should be simplified?

2.14 In accordance with section 18(1) of the Competition Act 2002, as amended, each business involved in a proposed merger or acquisition, which satisfies the relevant turnover thresholds¹⁴, is obliged to notify the CCPC, in writing, of the proposed transaction. Currently, all notifications are made using the CCPC's [Notification Form](#)¹⁵. All accepted notifications are reviewed under the CCPC's Mergers and Acquisitions Procedures, details of which can be found [here](#). The notification form often requires parties to submit a significant volume of information to the CCPC. The CCPC's merger review process is thorough and wide-ranging, and culminates in the issuing of a detailed merger determination. The EU Commission's simplified procedure involves

¹³ It should be noted that this would not involve the CCPC making any definitive decision or expressing any binding view on market definition at this stage in the process.

¹⁴ Media mergers must be notified to the CCPC irrespective of the financial turnovers involved.

¹⁵ Notifications can be made individually or jointly.

the use of a specific notification form, which requires less information than the standard notification form, as well as the publication of a shorter determination. In addition, the EU Commission may clear such cases without conducting detailed investigations into the effects of the proposed deal.

CCPC initial views

- 2.15 The CCPC is proposing to introduce a shorter notification form and shortened determination for mergers or acquisitions which qualify for assessment under a simplified procedure.
- 2.16 The shorter notification form would be similar to the CCPC's current notification form, except notifying parties would not be obliged to answer questions 4.5-4.10. These questions require notifying parties to provide detailed information on markets where there is a vertical overlap and/or horizontal overlap (please note, the CCPC will still require information on market shares and other market characteristics which are requested in questions 4.1-4.5). These market-specific details are normally needed in potentially complex cases, as the CCPC requires detailed information on all potentially affected markets in order to ensure that the merger or acquisition will not lead to a substantial lessening of competition. However, mergers or acquisitions which are assessed under a simplified procedure should, by their nature, not lead to a substantial lessening of competition, meaning the information currently requested in questions 4.5-4.10 of the CCPC notification form is not required. It is important to note that, where the impact on competition of a notifiable transaction is unclear, the CCPC will revert to a standard merger review procedure, which will require notifying parties to complete all sections of the current notification form. It is proposed that this would in most cases be effected by means of the CCPC requesting additional information from the notifying parties (e.g., by issuing a Request for Information under section 20(2) of the Act as amended). Similarly, in such cases, the CCPC will issue a full determination rather than the shortened determination envisaged under the simplified procedure. This will mitigate the risks associated with the shorter notification form.

2.17 The CCPC is proposing to issue a shortened determination for simplified procedure cases. As part of the standard procedure, the CCPC issues merger determinations which include detailed descriptions of the affected market(s) and provide interested parties with the reasoning behind the CCPC's determination. This brings transparency to the CCPC's merger review process. The CCPC considers that a detailed determination is not necessary for mergers or acquisitions which are assessed under a simplified procedure, as it should be self-evident that these transactions will not raise competition concerns. The shortened determination will outline our reasoning for selecting the merger or acquisition for review under a simplified procedure, as well as the CCPC's opinion that the merger or acquisition will not lead to a substantial lessening of competition in the State. The CCPC has not identified any specific risks associated with issuing a shortened determination.

Questions

- a) Under a simplified procedure, what current CCPC merger procedures do you believe should be simplified/eliminated? Please explain your answer.
- b) Should the CCPC provide a shorter notification form for transactions which qualify for assessment under a simplified procedure? If so, what sections of the current notification form do you believe should be amended/eliminated? Please explain your answer.

Other Views

2.18 Please provide any further views you may have on the introduction of a simplified procedure in Ireland.

ENDS

