



EU, COMPETITION AND REGULATED MARKETS

Simplified Merger Notification Procedure in Ireland

by **Marco Hickey**

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The Competition and Consumer Protection Commission (CCPC) has announced that a simplified merger notification procedure regime (Simplified Procedure) will commence on 1 July 2020.

The Simplified Procedure will apply to mergers unlikely to create a substantial lessening of competition in the Irish market. Notifications under the Simplified Procedure will be dealt with more efficiently by the CCPC, leading to faster turnaround times for decisions, and reduce the notification burden for businesses.

We examine the Simplified Procedure in more detail below.

Background

The Simplified Procedure is the outcome of a consultation process initiated by the CCPC to determine whether a simplified procedure was necessary for mergers that would not lead to a substantial lessening of competition in Ireland, and to bring Ireland in line with the EU Commission and the majority of other EU Member States that operate a simplified procedure for certain types of merger review.

Between 2016-2018, approximately 55% of the notified mergers would have qualified for review under a simplified procedure, had such a procedure existed under the Irish notification process.

The detail

The Simplified Procedure is not a replacement for the current standard merger notification procedure (Standard Procedure) already in place.

Under the Simplified Procedure the CCPC will endeavour to complete a Phase 1 review as soon as is reasonably practicable. The timeframe for a Phase 1 review under the Standard Procedure is 30 working days.

The CCPC will inform the notifying parties as soon as possible after the deadline for third-party submissions on the merger (10 working days after the notification) as to whether the Simplified Procedure is appropriate, and provide an initial indication within 7 days of notification if the Simplified Procedure is suitable, when publishing the notification on its website.

Information no longer required to be submitted

The notifying parties will no longer be required to provide certain information to the CCPC in circumstances where a transaction does not raise significant competition concerns. For example, notifying parties will not have to provide detailed information regarding their competitors, customers and suppliers; and where there is no overlap between their activities, they will not have to furnish information in relation to the industry and products concerned, the parties turnover in the State, and estimated market shares.

Criteria for the Simplified Procedure

Subject to certain exemptions, the Simplified Procedure will apply to a merger or acquisition where:

1. None of the undertakings involved are active or potentially active in the same product and geographic markets, or in any market(s) which is upstream or downstream to a market(s) in which another undertaking involved is active or potentially active,
2. The combined market share of two or more of the undertakings involved are active in the same product and geographic market, but their combined market share is less than 15%.
3. Where one or more undertakings involved are active in any market(s) which is upstream or downstream to a market(s) in which another undertaking involved is active, but the market share of each of the undertakings involved in each market is less than 25%.
4. An undertaking involved, which already has joint control over a company, is to acquire sole control over that company.

Unsuitability of the Simplified Procedure

The CCPC has published a list of criteria in its guidelines on the Simplified Procedure setting out when the Simplified Procedure may be unsuitable. For example where:

1. It is difficult to ascertain the relevant geographic or product markets.
2. The merger or acquisition involves concentrated markets.
3. A merger or acquisition involves businesses that act as mavericks.
4. A merger or acquisition involves businesses with pipeline products, particularly in the digital and pharmaceutical sectors.
5. At least two undertakings involved in a merger or acquisition are present in closely related neighbouring markets, particularly where (a) one or more of the undertakings involved holds a market share of 20% or more in any product market(s); and (b) there is potential for the merged entity to leverage its position in the market referred to in (a) above into a neighbouring market where another undertaking involved is active.
6. A third-party submission raises serious competition concerns.
7. The mergers or acquisitions take place in new or novel markets.

The CCPC can seek further information pursuant to section 20(2) of the Competition Act 2002 (as amended), if it decides for any reason that the Simplified Procedure should not continue. If this occurs, the CCPC's review period is reset and the time under Phase 1 will begin again once the CCPC is in receipt of the further information.

Reversion to the Standard Procedure

The CCPC can revert to the Standard Procedure at any time. It can also require parties who have submitted a Simplified Procedure notification to submit a new notification procedure using the Standard Procedure. The 30-working day Phase 1 timeframe begins to run once the notification has been submitted to the CCPC.

Recommendation of pre-merger notification discussions

Although not a mandatory requirement, the CCPC is encouraging those who are considering using the simplified procedure to engage in pre-merger notification discussions with the CCPC. These discussions can help parties clarify whether the Simplified Procedure is appropriate for the transaction, which should avoid parties having to resubmit the notification under the Standard Procedure. Resubmission would inevitably lengthen the review process where there is no overlap between the activities of the parties.

Thoughts

The roll-out of a properly managed Simplified Procedure will benefit both businesses and the CCPC alike, particularly for transactions involving little or no overlaps (either vertical or horizontal or both). However, the

use of market share as a criterion could potentially be time-consuming and administratively burdensome for both the notifying parties and the CCPC, as this may require quite a substantial analysis of the relevant product and geographic markets and the calculation of market share.

Although caution must be adhered to when relying on market share as a criterion under the Simplified Procedure, the Simplified Procedure is to be welcomed for improving the speed at which merger notification and review processes take place, and will allow the CCPC to focus on transactions which pose a real risk to competition.

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