IRISH MERGER CONTROL GUIDE

MATHESON ORMSBY PRENTICE

Dublin
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CONTENTS

		Page No
1.	Introduction	2
2.	Mandatory notification	2
3.	Types of transactions caught	2
4.	Thresholds	3
5.	Increased Transparency	5
6.	Substantive test - SLC	5
7.	Two phase examination process	5
8.	System of voluntary notifications	6
9.	Media mergers	7
10.	Appeals	7
11.	Penalties for non-compliance	9
12.	Practical issues	9

MATHESON ORMSBY PRENTICE

1 INTRODUCTION

On 1 January 2003 a new merger control regime came into force in Ireland as a result of the introduction of Part 3 of the Competition Act, 2002 (the "Act"). The Act introduces significant changes to Ireland's merger control rules. Changes include widening the types of arrangements caught; altering the thresholds and timescales for merger notification and approval; giving the Competition Authority sole responsibility for merger control (with the exception

of media mergers); and changing the substantive test for merger assessment to the "substantial lessening of competition" or SLC test.

2 MANDATORY NOTIFICATION

The new merger notification regime continues to be mandatory. Mergers coming within the scope of the Act must be notified to the Competition Authority within one month of the conclusion of the agreement or the making of a public bid. All the "undertakings involved" in a transaction are required to notify but joint notification is acceptable to the Competition Authority. Failure to notify a transaction within the specified time limit is a criminal offence and mergers put into effect without approval are void (see penalties at section 11). The Competition Authority has the sole power to approve all notified mergers except media mergers, where the Minister for Enterprise, Trade & Employment ("Minister") retains the power to make the final decision.

3 TYPES OF TRANSACTIONS CAUGHT

A merger or acquisition is deemed to occur if:

(i) two or more undertakings, previously independent of one another, merge; or,

(ii) one or more individuals or other undertakings who or which control one or more undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or,

(iii) the result of an acquisition by one undertaking (the "first undertaking") of the assets, including goodwill, (or a substantial part of the assets) of another undertaking (the "second undertaking") is to place the first undertaking in a position to replace (or substantially to replace) the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

The Act also applies explicitly to full function joint ventures (i.e. those which perform, on an indefinite basis, all the functions of an autonomous economic entity). Tests (i) and (ii) replicate the tests set out in the EC Merger Regulation ("ECMR"). "Control" is defined in the Act in similar terms to the ECMR, i.e. the ability to exercise "decisive influence" over the activities of an undertaking. Therefore, the Competition Authority, in interpreting "control", is likely to be greatly influenced by European Commission decisions and guidance on the concept and European Court of Justice case law.

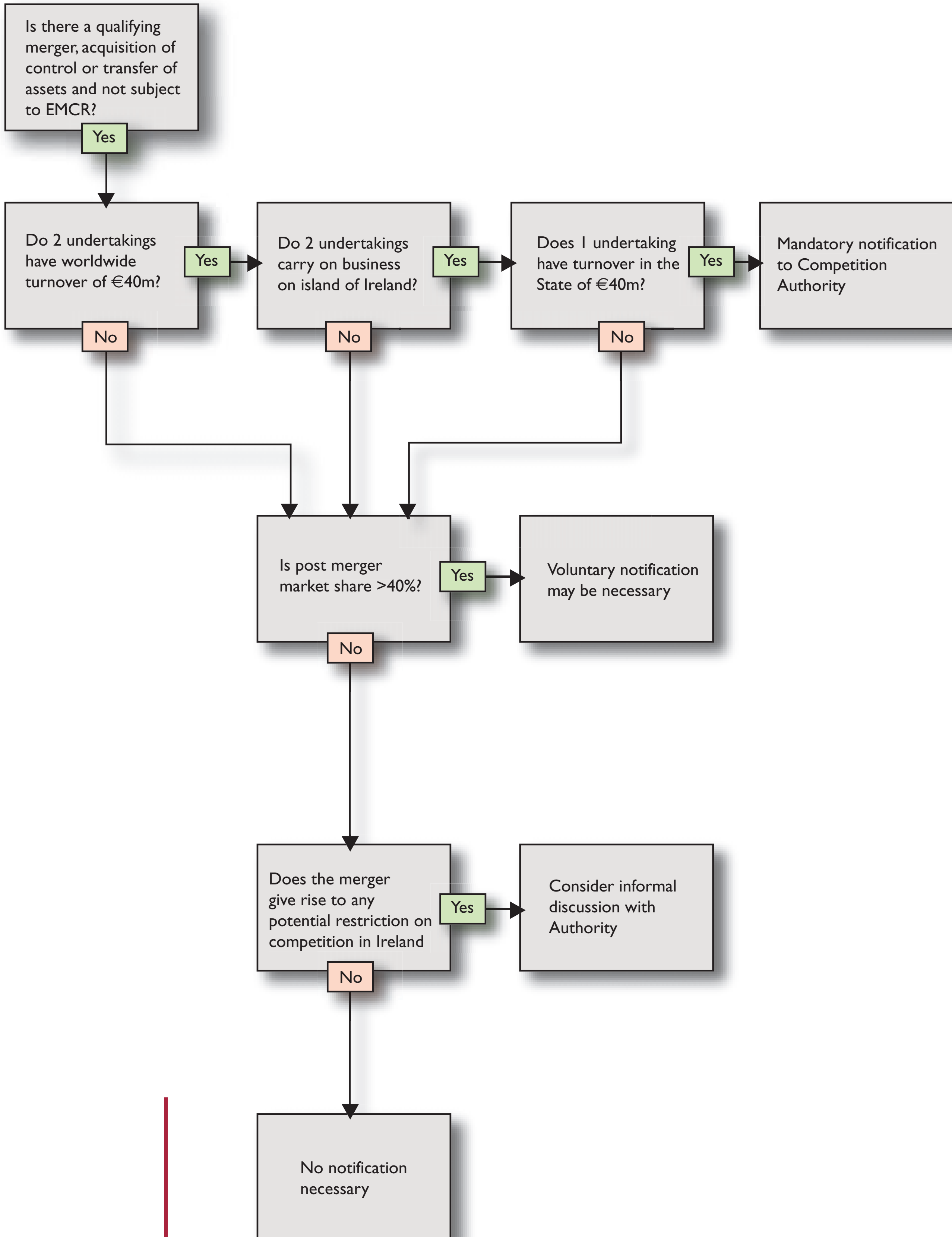
4 THRESHOLDS

The thresholds which trigger the obligation to notify are as follows:

- The worldwide turnover of at least two of the undertakings involved in the transaction is not less than €40 million; and
- Two or more of the undertakings involved in the transaction carry on business in any part of the island of Ireland (i.e. Northern Ireland and Ireland); and
- Any one of the undertakings involved has turnover in the State (i.e. Ireland) of not less than €40 million.

The term "turnover in the State" refers to sales made or services supplied to customers within the State.

IS THERE AN OBLIGATION TO NOTIFY?



5 INCREASED TRANSPARENCY

Within seven days following receipt of notifications, the Competition Authority publishes a notice of receipt inviting third party comment. The Competition Authority issues reasoned decisions on each merger. Previously, only the rather small number of Competition Authority decisions issued following a referral by the Minister were published and there was only an end of year list of mergers notified with no details given. All publications appear on the Competition Authority's website (www.tca.ie).

6 SUBSTANTIVE TEST – SLC

The substantive test for assessment, known as the SLC test, is "whether the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services in the State". The Competition Authority interprets the SLC test in terms of consumer welfare and, in particular, whether a merger would be likely to result in a price rise to consumers. The new test is a significant departure from the previous test, which involved an examination of whether the proposed merger or take-over would be likely to operate against the common good or prevent or restrict competition or restrain trade in any goods or services.

In making its assessment, the Competition Authority considers inter alia: (i) market structure – degree of concentration, relative market shares, unilateral and co-ordinated effects, vertical integration issues, etc; (ii) likely effect of the merger on the behaviour of the merged entity; (iii) the likely reaction of competitors and customers; (iv) countervailing buyer power. The Competition Authority also has regard to barriers to market entry and efficiencies, including in very limited circumstances, the "failing firm defence".

In assessing market concentration, the Competition Authority applies the Herfindahl-Hirschmann Index of Concentration, known as the HHI test, which involves adding the squares of the market shares of all market participants pre and post merger and calculating the extent to which the merger will give rise to significant changes (the "delta"). The Competition Authority uses the level and the change in the HHI as a screen for deciding whether to intensify its analysis of effects on competition. In practice, however, it is often difficult to compile reliable market share data and there may be weaknesses in attempts to rely on the HHI in Ireland.

7 TWO PHASE EXAMINATION PROCESS

There is a two phase examination process for mergers similar to that provided for in the ECMR. Phase One gives the Competition Authority an intial period of one month from notification to decide whether to allow the transaction to be put into effect on the grounds that it would not substantially lessen competition, or to carry out a more detailed investigation. The Competition Authority also has the power to request additional information within one month of receipt of the notification. A formal request for information will have the effect of "stopping the clock" so that time will only begin to run again when the information requested has been submitted.

In difficult cases, the Competition Authority has the power to receive and negotiate undertakings/commitments from the parties to secure "measures which would ameliorate the effects of the merger" in Phase One and Phase Two. In such cases, an additional fifteen days is allowed in Phase One for the parties to negotiate such measures with the Competition Authority.

Where there are significant competition concerns, a Phase Two investigation is initiated. In such cases, the Competition Authority has an additional three months, i.e. a total of four months from notification (or receipt of responses to a request for information), within which to investigate the merger and decide whether it should be cleared or blocked. A Phase Two investigation, of its nature, involves a more detailed examination by the Competition Authority of the merger. Notifying parties are granted the opportunity to make additional submissions to the Competition Authority within 21 days of its determination to carry out a Phase Two investigation. If the Authority is satisfied on receipt of such additional submissions that there is not a substantial lessening of competition, it issues an approval decision within six weeks of the determination to open a Phase Two investigation.

Otherwise, the Competition Authority (within the same six week period) furnishes its assessment to the notifying parties, setting out its concerns. Together with the assessment, the Competition Authority grants the notifying parties access to its file (except for documents containing business secrets, internal working documents of the Competition Authority or documents which the parties already have or to which they can get easier access).

As soon as possible after furnishing the assessment, and at latest ten weeks after the determination to open the Phase Two investigation, the notifying parties are granted the opportunity to attend an oral hearing if they so wish. Third parties may also be invited to attend a separate oral hearing.

The notifying parties are expected to respond to the Competition Authority's written assessment within three weeks of receipt if they contest the issues set out therein. The final determination of the Competition Authority (i.e. that the merger may be put into effect, may be put into effect subject to conditions, or may not be put into effect) must occur no later than twelve weeks from the determination to open a Phase Two investigation.

8 SYSTEM OF VOLUNTARY NOTIFICATIONS

Section 4 of the Act contains a prohibition on restrictive agreements and section 5 prohibits abuse of dominance. If a merger is notified to the Competition Authority and cleared by it, it will be immune from subsequent challenge by third parties under sections 4 and 5. The Act introduces a voluntary merger notification system to take account of the possible application of sections 4 and 5 to a non-notifiable merger (i.e. one which does not meet the thresholds set out at section 4 above). Such a notification will be dealt with in the same way as a mandatory notification. As a result, even where a transaction falls below the relevant turnover thresholds, the parties may need to consider submitting a

voluntary notification. Much will depend on the structure of the market in question, the position of the parties to the merger and the approach that the Competition Authority adopts in such cases.

9 MEDIA MERGERS

Media mergers are treated separately under the Act. A media merger is one in which one or more of the undertakings involved is engaged in (i) publishing newspapers, periodicals or magazines; (ii) sound and/or audio visual broadcasting (except over the internet); or (iii) the provision of a broadcast service platform, such as a cable company; in the State. The turnover thresholds for notification are disapplied for media mergers, so that they are automatically notifiable regardless of the turnover of the undertakings involved.

The initial notification is made to the Competition Authority which has the power to review it from a competition perspective and a copy is sent to the Minister. The Minister makes the final decision on media mergers following delivery to the Minister of the Competition Authority's report. If the Competition Authority wants to approve a media merger at the end of Phase One, it must inform the Minister who can direct it to undertake a Phase Two investigation. If the Competition Authority approves a merger at the end of Phase Two, either absolutely or conditionally, the Minister has the power to block it or can apply new or stricter conditions on "public interest" grounds.

The public interest criteria for media mergers are:

(a) strength and competitiveness of indigenous media businesses;

(b) spread of ownership or control of media businesses in the State;

(c) spread of ownership and control of particular types of media business in the State;

(d) reflection of diversity of views prevalent in Irish society through the activities of the various media businesses in the State; and

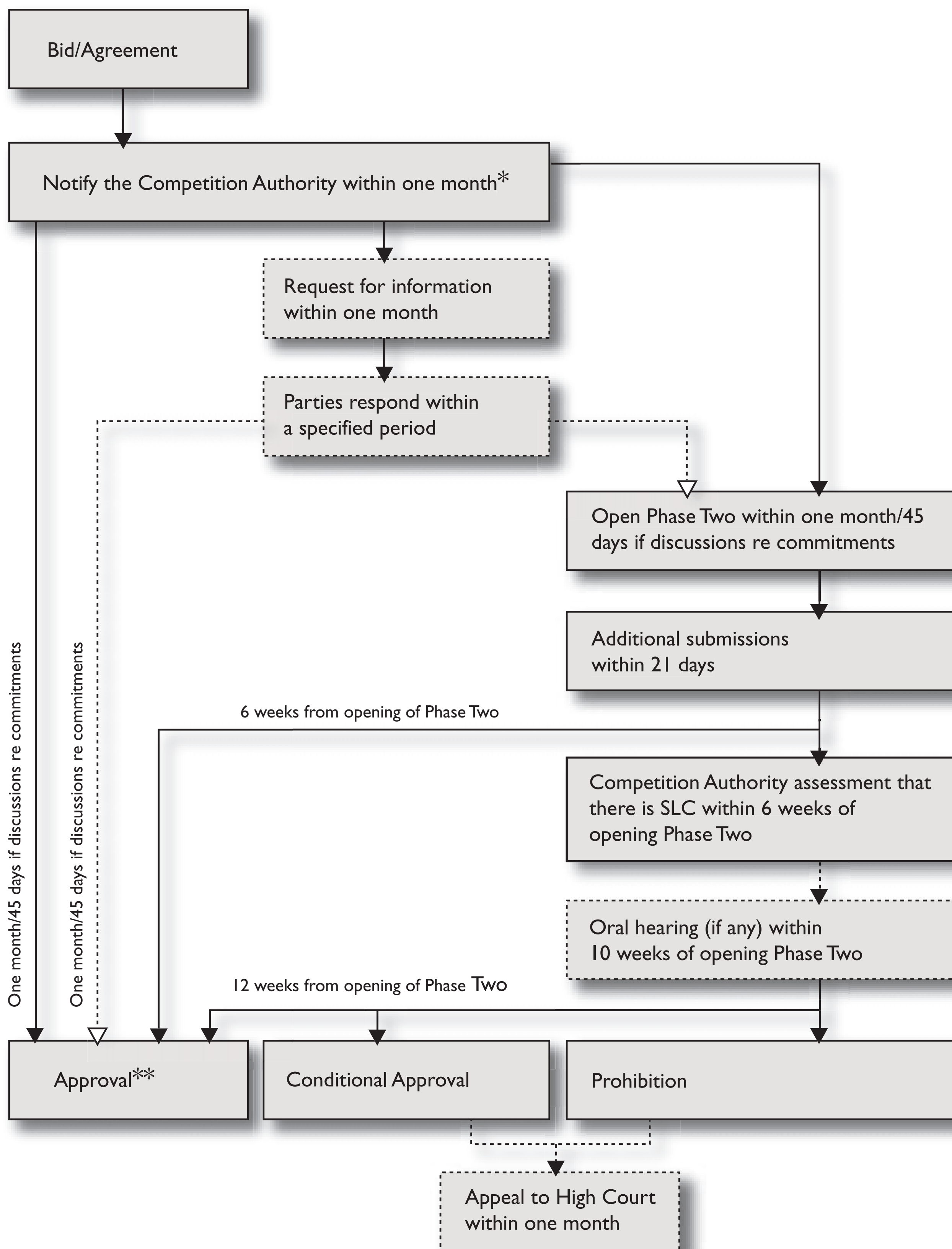
(e) market share of the parties.

The Competition Authority in dealing with a media merger can form an opinion on how the application of the public interest grounds should affect the exercise by the Minister of her powers, and must inform the Minister of the opinion formed on her request. However the Minister's decision on public interest grounds is final. If the Competition Authority blocks a media merger on competition grounds, the Minister cannot permit it.

10 APPEALS

Parties to a merger may appeal a decision of the Competition Authority prohibiting a merger or imposing conditions on approval to the High Court on a point of fact or law. Third parties are not given a right of appeal. A special accelerated appeals process applies. The appeal must be made within one month of the Competition Authority's decision. The High Court should then issue its decision within two months, if practicable. Given that the High Court may be asked to revisit issues of fact, it may be difficult to meet this aspirational

PROCEDURES AND TIMEFRAMES IN MERGER PROCESS



*The Competition Authority must notify the Minister within 5 days of notification of a media merger.

**Where, the Competition Authority has approved or conditionally approved a media merger, the Authority must notify the Minister immediately. In Phase One, the Minister may mandate that a Phase Two investigation be opened. In Phase Two, the Minister may overrule the Authority's determination and approve subject to different conditions or prohibit the merger.

deadline. A further appeal on a point of law may be made to the Supreme Court.

11 PENALTIES FOR NON-COMPLIANCE

Failure to notify the Competition Authority or to supply information required within the specified periods is a criminal offence. The person in control of an undertaking who is found guilty of such an offence is liable:

- To a fine up to €3,000 on summary conviction; or
- To a fine up to €250,000 on conviction on indictment.

Where a contravention continues one or more days after first occurring, an additional fine of €300 (on summary conviction) or €25,000 (on conviction on indictment) will be imposed for each day of continuing contravention.

A notification is not valid where any information provided or statement made is false or misleading in a material respect. Further, any decision made on the basis of such a notification will be void.

Failure to comply with a voluntary commitment or other obligation is a criminal offence. The person in control of an undertaking which is found to be guilty of such an offence is liable:

- To a fine up to €3,000 and/or up to six months' imprisonment on summary conviction; or
- To a fine up to €10,000 and/or up to two years imprisonment on conviction on indictment.

Where a contravention continues one or more days after first occurring, an additional fine of €300 (on summary conviction) or €1,000 (on conviction on indictment) may be imposed for each day.

12 PRACTICAL ISSUES

MERGER NOTIFICATION FORM AND GUIDANCE NOTES

The Competition Authority has issued merger notification forms and guidance notes for notifying parties. The notification forms require the submission of a considerable amount of information particularly for multinational companies. Detailed information must be provided on all of the principal businesses of each notifying party, as well as of their respective affiliates. The notification must also include all documents specifically prepared for the purpose of evaluating the proposed transaction with respect to the markets affected. The Competition Authority has adopted a "short form" for notification of mergers which do not give rise to significant competition issues.

FILING FEE

The filing fee is currently €8,000

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Matheson Ormsby Prentice is one of Ireland's largest corporate law firms with over 200 lawyers. The firm is based in Dublin, Ireland and has additional offices in London, England and Palo Alto, California. The firm provides a full range of legal services to its global client base, which includes governments, government agencies, supranational organisations and many of the world's leading corporations and financial institutions.

The firm's EC, Competition and Regulatory Group comprises of specialist lawyers with experience ranging from private practice in London and Brussels to the EC institutions in Brussels and Luxembourg. The group advises on all aspects of EC, Competition and Regulatory matters including merger control, cartel and dominance cases, public procurement law, competition law audits and sectoral regulation.

For further information, or for professional advice on Irish merger control or other competition or EC law matters, please contact Helen Kelly, Karen Gibbons or Bonnie Costelloe at our Dublin office. Contact details are set out out below.

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The information contained in this booklet provides a general guide to Irish merger control rules. This booklet does not, however, purport to give legal advice or to be an exhaustive interpretative of the law in Ireland in relation to merger control and is not a substitute for detailed and specific professional advice for which you should contact Helen Kelly, Karen Gibbons or Bonnie Costelloe of our EC, Competition and Regulatory Group.

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