

EU Merger Control: Key Features

The A&L Goodbody EU, Competition and Procurement Group is widely recognised as the leader in its field in Ireland and has been ranked among the top 100 competition law practices worldwide. Our Group is at the forefront of competition law practice in Ireland and has been involved in numerous merger notifications to the European Commission.

What types of transactions must be notified to the European Commission (Commission) under the EU Merger Regulation (EUMR)?

Any concentration that has an “EU dimension” must be notified to the Commission. A concentration is: (i) a merger; (ii) the acquisition of direct or indirect control of the whole or part of an undertaking; or (iii) a full function joint venture. Control of an undertaking is defined under the EUMR as “the possibility of exercising decisive influence on an undertaking”, and it can be held solely or jointly.

When does a concentration have an “EU dimension”?

Turnover tests are applied to establish whether a concentration has an EU dimension. See the flowcharts over the page for the turnover tests. Generally, if a proposed transaction has an EU dimension, it must be notified to the Commission only and not to national EU Member State competition authorities.

A concentration that does not have an EU dimension may nonetheless be notifiable in individual Member States under national merger control regimes, for example to the Irish Competition Authority or the Office of Fair Trading in the UK.

When and by whom must a proposed transaction be notified under the EUMR and what are the consequences of implementing the transaction before clearance?

Concentrations must be notified following conclusion of the relevant agreement, announcement of the public bid or acquisition of the controlling interest. A notification must be made prior to implementation of the proposed transaction. Generally the notification is made by the party or parties that will acquire control following the proposed transaction. Implementing a concentration that has an EU dimension without clearance by the Commission can lead to significant fines.

What decisions do the Commission make on a notified merger?

There can be two phases of analysis by the Commission. The majority of concentrations notified are cleared after Phase I. During Phase I, the Commission investigates the proposed transaction and decides either to clear it (possibly on the basis of commitments) or refer it to a more in-depth Phase II assessment. After Phase II, the Commission may clear the proposed transaction, clear it with conditions imposed or prohibit it.

What kind of commitments might be offered to or required by the Commission in order for a transaction to be cleared?

If the Commission has concerns about the effect a proposed transaction may have on competition, it may nonetheless approve the transaction provided the parties undertake to take steps to minimise the risk of impeding competition. Conditions imposed on clearance may include the divestment of certain businesses following completion, the ring-fencing or restructure of certain parts of the business or other commitments regarding future conduct.

What substantive test is applied by the Commission in assessing a notified merger?

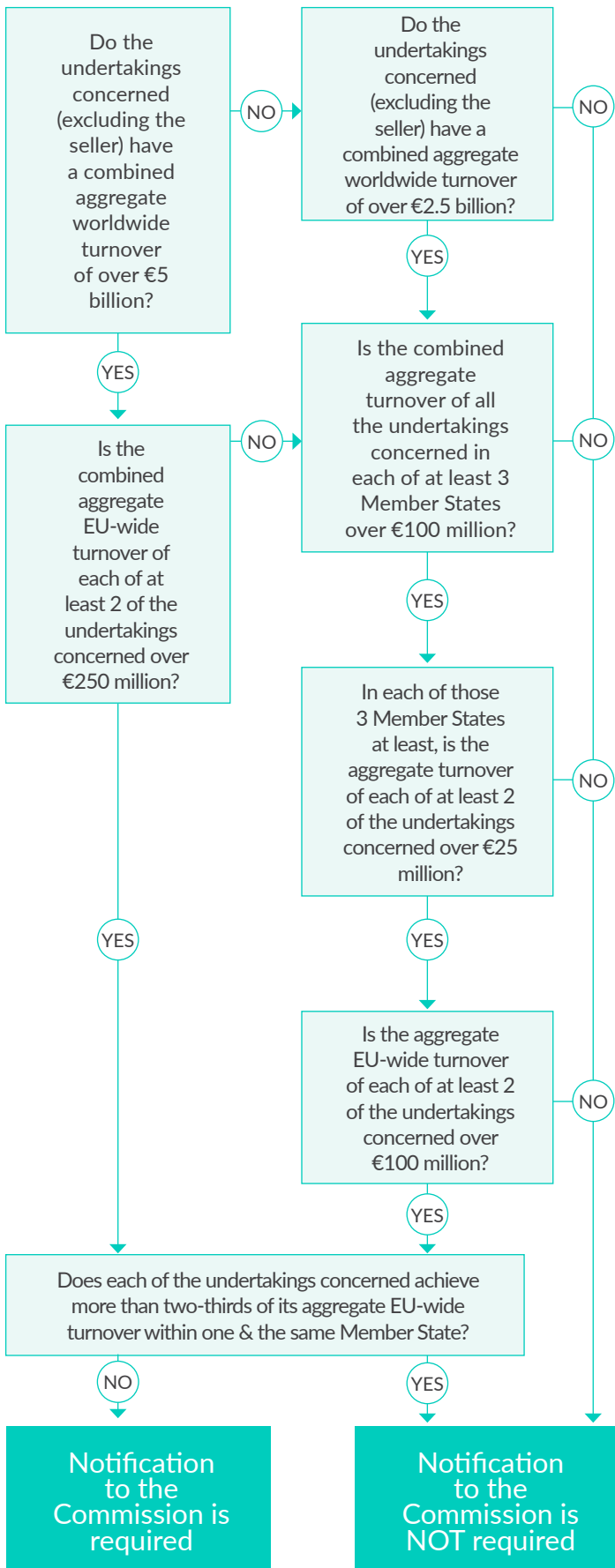
The Commission will assess the proposed transaction to determine whether it would substantially impede effective competition in the internal market or in a substantial part of it.

What is the timing for the assessment of notified mergers? (See flowchart overleaf)

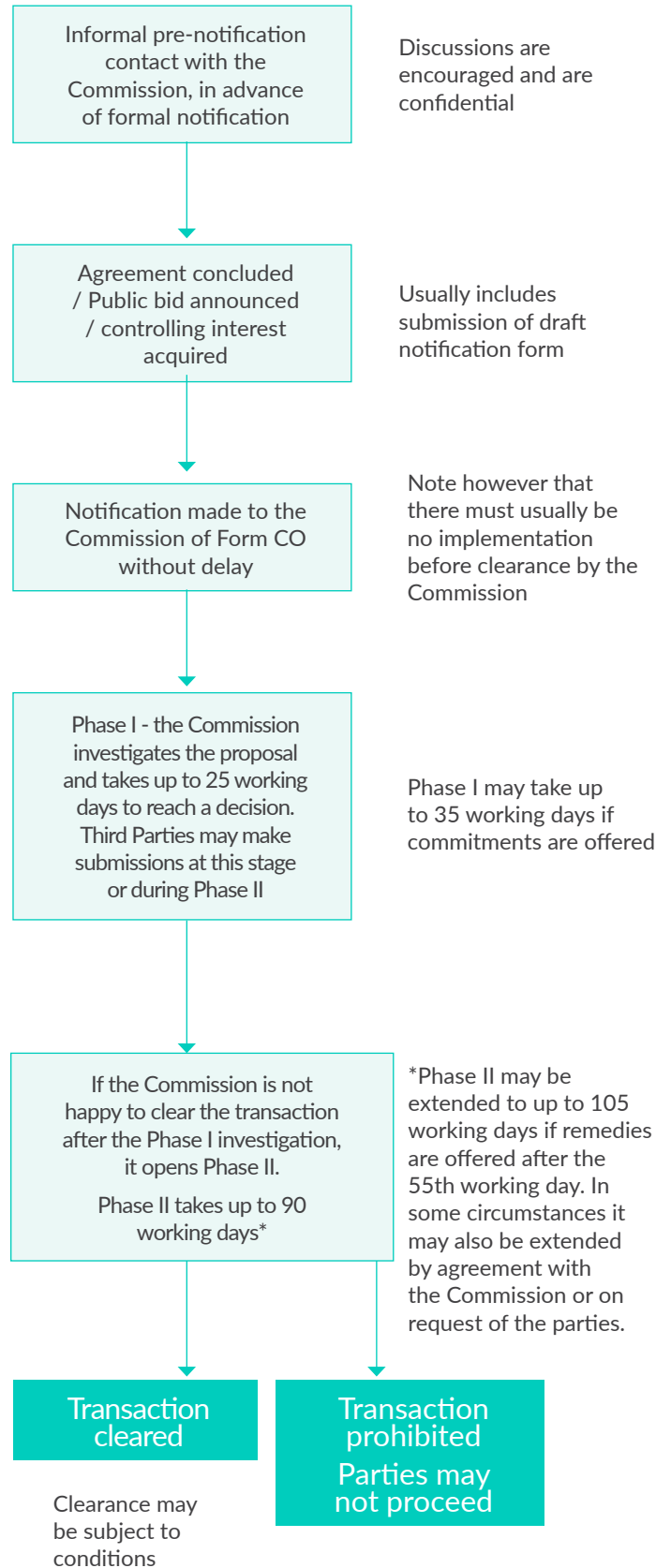
Phase I takes 25 working days (or 35 working days where commitments are offered to the Commission). Phase II takes up to 90 working days (which can be extended to 105 working days if remedies are offered to the Commission after the 55th working day).

Is a notification to the European Commission required?

If there is a proposed (i) merger, (ii) acquisition of direct/indirect control of whole or part of an undertaking or (iii) full function joint venture, the following tests are applied to establish whether it has an EU dimension.



How does a notification to the European Commission operate?



Selected Irish-related merger cases assessed by the European Commission

- **Centrica / Bord Gáis Energy** (2014) – The acquisition by Centrica, a UK energy company, of Bord Gáis Energy, the supply and thermal generation business in Ireland of Bord Gáis Éireann, an Irish commercial majority State-owned undertaking, was approved by the Commission.
- **Hutchison 3G UK / Telefónica Ireland** (2014) – Following a Phase II investigation, the acquisition of Telefónica Ireland by Hutchison 3G was approved by the Commission, conditional upon a commitments package aimed at ensuring the short-term entry of two mobile virtual network operators (MVNOs) and Eircom remaining a competitive mobile network operator in Ireland.
- **Kendrick / Topaz / RPIF** (2014) – The Commission approved the acquisition by Kendrick Investments Limited, controlled by Denis O'Brien, of Topaz Energy Group Limited and Resource Property Investment Fund plc.
- **Apollo / Ulster Bank / Arnotts** (2014) – The acquisition of joint control by affiliates of Apollo and Ulster Bank Ireland of Arnotts was approved by the Commission.
- **Canada Life / Irish Life** (2013) – The Commission approved the acquisition by Canada Life, ultimately controlled by Power Corporation of Canada, of Irish Life from the Minister for Finance of Ireland.
- **Ryanair / Aer Lingus** (2013) – The Commission, following a Phase II investigation, prohibited Ryanair's proposed takeover of Aer Lingus. The Commission concluded that the takeover would have harmed consumers by creating a monopoly or a dominant position on over forty routes where the two companies currently compete vigorously. This followed a previous prohibition by the Commission of a proposed takeover by Ryanair of Aer Lingus in 2007.
- **Eaton Corporation / Cooper Industries** (2012) – The Commission approved the acquisition of Irish electrical company Cooper Industries by rival Eaton.
- **SCA / Georgia-Pacific Europe** (2012) – The Commission approved, with conditions, the acquisition of Georgia-Pacific's European tissue business by Swedish competitor SCA. Conditions imposed by the Commission included the disposal of certain business activities in Ireland and elsewhere.
- **Liberty Mutual Group / The Irish General Business of Quinn Insurance Limited** (2011) – The Commission approved the acquisition by Liberty Mutual of the Republic of Ireland general insurance business of Quinn Insurance.
- **News Corp / BskyB** (2010) – The Commission approved the acquisition of British and Irish pay TV operator BSkyB by News Corporation, a US headquartered global media and communications company.
- **Topaz / Shell Aviation Ireland** (2010) – The Commission approved the acquisition by Irish oil company Topaz of a controlling stake in Shell Aviation Ireland.
- **Anglo Irish Bank and RBS / Arnotts** (2010) – The Commission approved the acquisition of joint control of Arnotts by Anglo Irish Bank and RBS.
- **Heineken / Scottish & Newcastle** (2008) – The Commission referred the part of the acquisition relating to Irish assets (Beamish & Crawford) back to the Irish Competition Authority, which subsequently cleared it. This has been the only reference back to the Irish Competition Authority under the EUMR.
- **Total Produce / Haluco** (2008) – The Commission cleared the acquisition of joint control by the Irish Total Produce plc and Haluco Beheer BV over TP Haluco, a Dutch fruit and vegetable importer and wholesaler.
- **First Data Corporation / AIB** (2008) – The Commission cleared a joint venture for payment card services between First Data Corporation and AIB.
- **TUI/First Choice** (2007) – The Commission approved the acquisition of First Choice, a UK travel services company, by TUI, parent of the German TUI group, active in tourism and shipping services. The Commission's decision was conditional on TUI disposing its Irish business, operating under the 'Budget Travel' brand.
- **Aviva / Ark Life** (2006) – The acquisition by Aviva of sole control of Ark Life was approved by the Commission.
- **Telefónica / O2** (2006) – The Commission cleared Telefónica's acquisition of O2, subject to certain conditions.
- **Reckitt Benckiser/ Boots Healthcare International** (2006) – The Commission approved the acquisition of BHI by Reckitt Benckiser. The Commission noted that the transaction would lead to overlaps in Ireland but strong competition from Pfizer and Glaxo-Klein was seen to mitigate this risk.
- **AIB / Bank of Ireland** (2002) – Notification of a proposed joint venture between the two Irish banks to establish a joint IT infrastructure service provider was made but later withdrawn as the parties decided not to proceed.
- **Volvo / Scania** (2000) – The Commission prohibited Volvo's acquisition of Scania, in part because of the risk that it would create dominant positions in the markets for heavy trucks in Sweden, Norway, Finland and Ireland.

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