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LAW FIRM

2017 Merger Control Update

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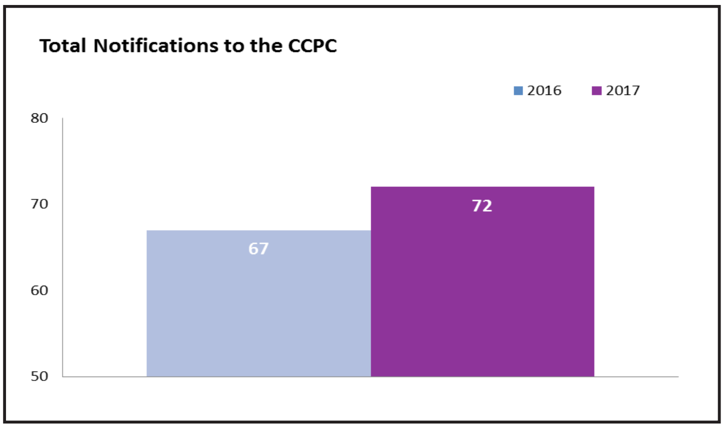
Notifications rise by 7.5% in 2017

The number of transactions notified to the Competition and Consumer Protection Commission ("CCPC") continues to rise following the implementation of the Competition and Consumer Protection Act 2014 (the "2014 Act"). In 2017, a total of 72 notifications were observed, highlighting a 7.5% increase from 2016 (per graph below). According to the CCPC annual report, these mergers and acquisitions concerned businesses which generated an estimated aggregate turnover of €56 billion within the State.

No proposed transactions were prohibited by the CCPC in 2017 however four Phase 1 determinations were subject to formal commitments prior to clearance. No transactions required a Phase 2 analysis.

This bulletin examines the latest developments in the Irish merger control regime, highlighting the trends observed across a variety of economic sectors, noting significant changes such as those in the motor fuel service station and IT, Communication and Advertising sectors.

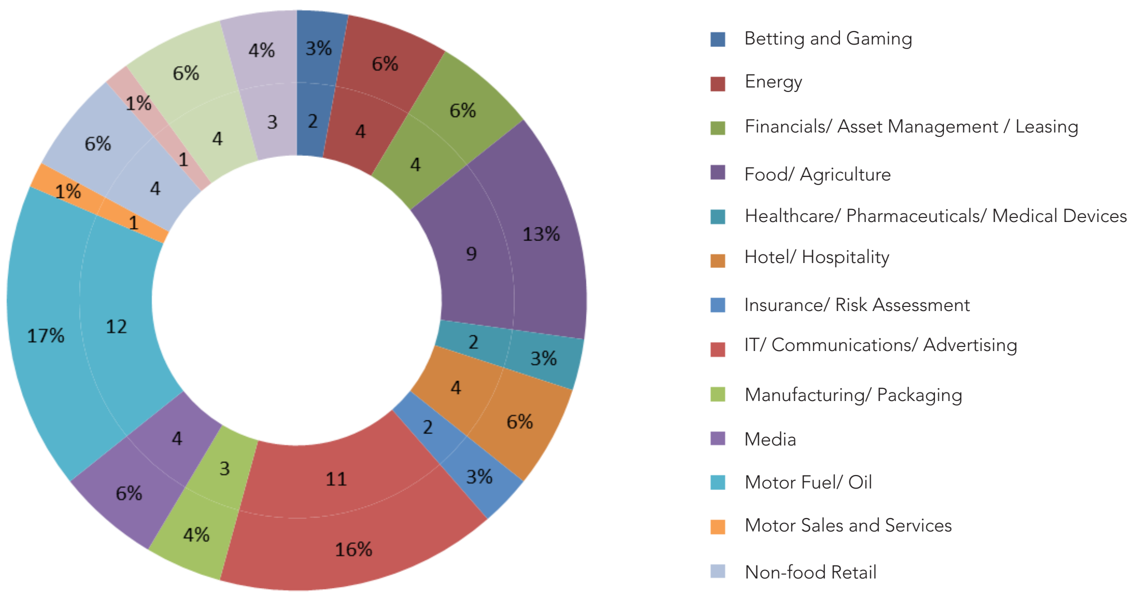
On 29 September 2017, the Department of Business, Enterprise and Innovation ("DBEI") launched a public consultation, requesting opinion with regard to (i) whether the financial thresholds for mandatory notification of mergers should be raised; and (ii) whether the time periods for review of notified mergers are appropriate. Although the results of this consultation are yet to be published, the increase in notified mergers, when combined with the consistently low number of merger require substantive analysis, suggests that a reformulation of the merger thresholds is desirable.



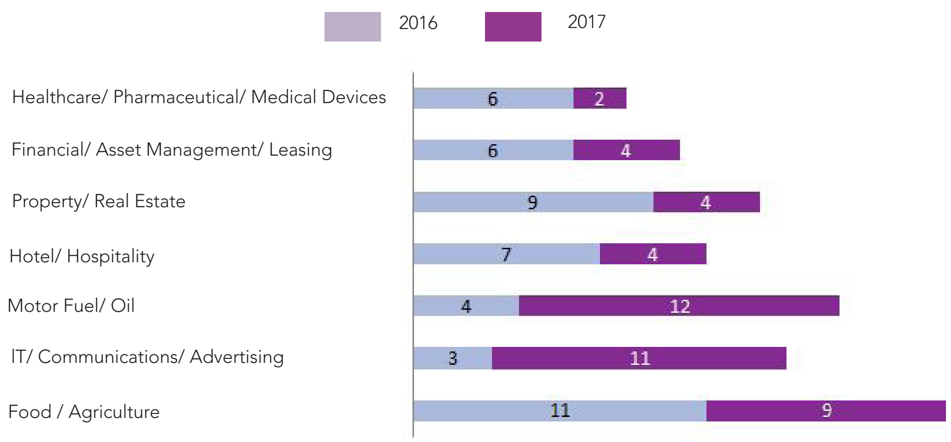
What gets notified?

The break-down of notifications by economic sector in 2016 and 2017 is outlined by the graphs below.

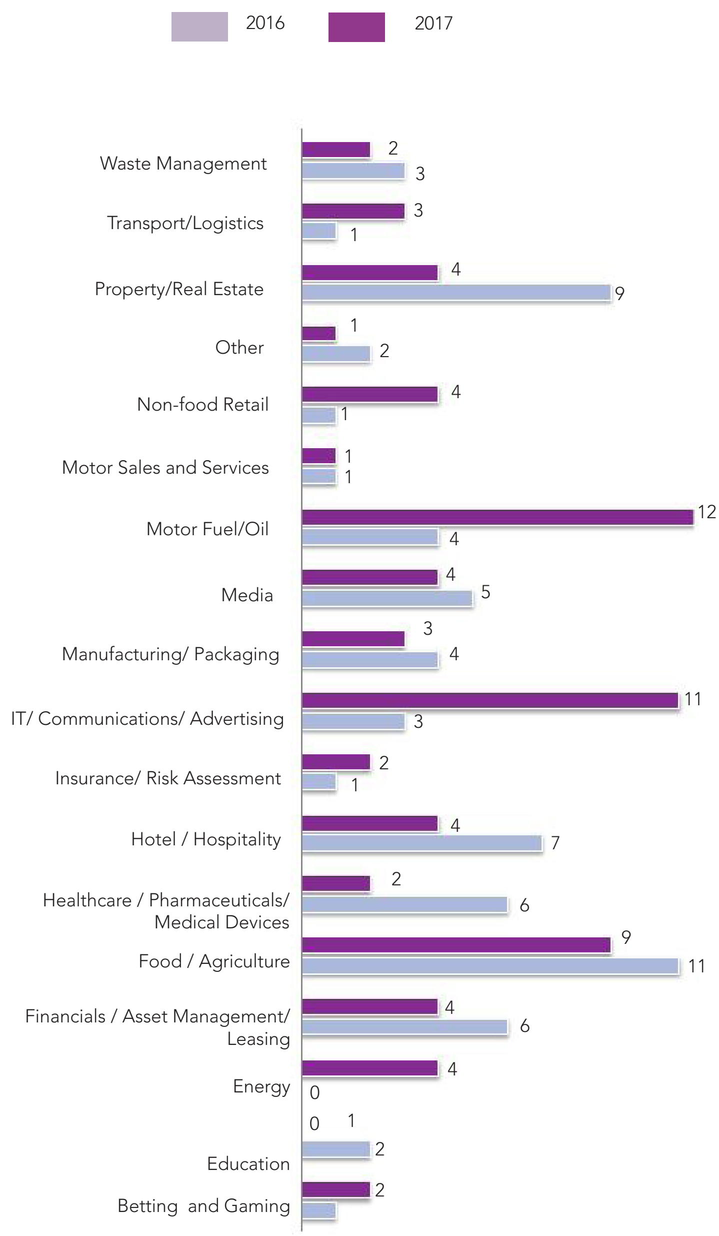
2017 Notifications by Sector



Most Significant Changes by Sector from 2016-2017



Notifications by Primary Sector Involved



Food and agriculture transactions continue to constitute a significant proportion of notified transactions - approximately 13%. This may be attributed to the intention of businesses in this sector to consolidate in response to Brexit concerns. With the UK accounting for over 50% of Irish beef exports, the devaluation of sterling resulted in a loss of €150 million to the beef industry alone in the last six months of 2016. Despite the overall increase in the international value of Irish food and drink exports in 2017, a large proportion of these exports (35%) continue to be directed to the UK market. It is unsurprising, therefore, that two-thirds of notifications in this sector involved the beef and dairy industry.

+300% increase in IT, Communications and Advertising Sector

Notably, 2017 witnessed a surge in activity in the IT, communications and advertising sector, consisting of 16% of notified transactions. This increase of nearly 300% from 2016 is reflective of the continued growth of this sector in Ireland, the second largest exporter of computer and IT services in the world.

+200% increase in Motor Fuel and Oil Sector

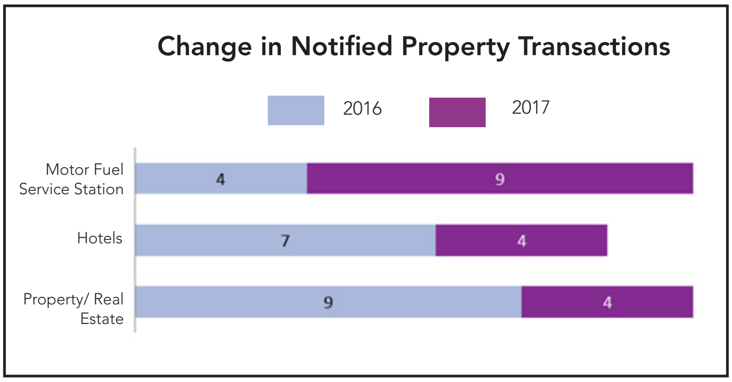
Similar increases were observed in the transport, insurance and risk assessment, and betting and gaming sectors. There were four notifications in the energy sector in 2017, compared to none in 2016.

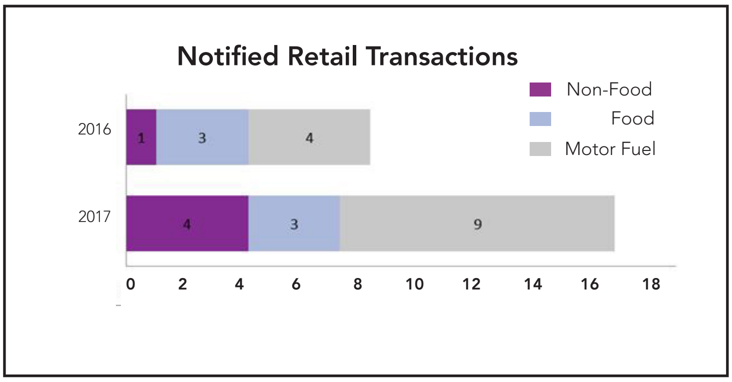
Retail mergers and acquisitions had a significant impact in 2017, increasing by 100% from the previous year, and constituted over 20% of cleared transactions. This was driven largely by a significant rise in the number of motor fuel and associated forecourt acquisitions, discussed below. Statistics for 2017 demonstrate a 200% increase in the number of motor fuel/oil transactions notified.

Property transactions

Business turnover associated with property assets, including rental income, must be included when assessing turnover thresholds in a merger scenario. It is important for businesses involved in property transactions to consider whether a notification to the CCPC is required, and thus whether completion may be delayed as a result. In circumstances where completion of transactions is urgent, the purchaser or acquirer who is not subject to merger control clearance may be a more attractive option for sellers.

The individual turnover threshold of €3 million means that certain asset acquisitions such as motor fuel forecourts and retail pharmacies often require notification even though such transactions are generally not likely to lead to a Significant Lessening of Competition, even in localised markets. A total of nine motor fuel and forecourt acquisitions were notified in 2017, compared to just four in 2016. However, the number of acquisitions in the hotel and property/ real estate sector both decreased by over 50% as illustrated opposite.

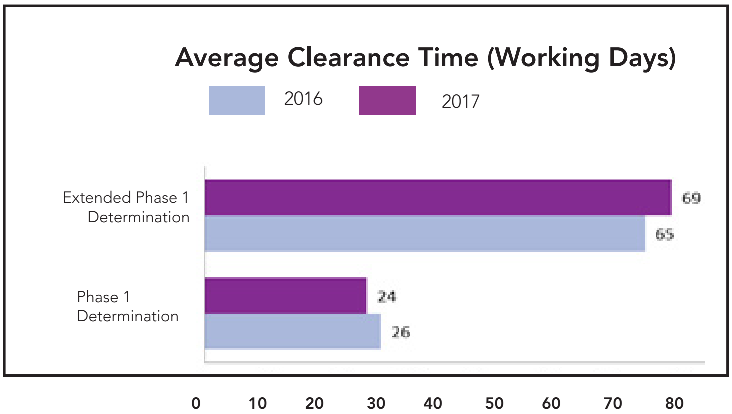


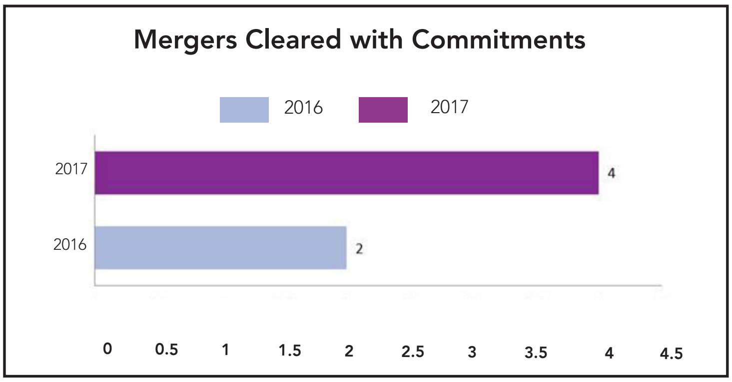


Determination time

The average number of working days to issue a Phase 1 determination reduced by two working days in 2017. Nine notifications were subject to an extended Phase 1 investigation and seven determinations issued, compared to just four in 2016. The average duration for an extended Phase 1 determination increased from 65 to 69 working days in 2017. The shortest time for a Phase 1 determination was 12 working days, involving a joint acquisition of a Scandinavian energy supplier by an investment group. There were no Phase 2 investigations in 2017, in comparison to one in 2016; the acquisition of Greenstar by Panda.

The CCPC did not prohibit any mergers in 2017 although four transactions (approximately 6%) were subject to commitments, double that of 2016. Commitments identified by the CCPC and the relevant parties to alleviate competition concerns included the divestment of fixed assets, the release of contracted customers, removal of anti-competitive clauses in asset purchasing agreements, and voluntary notification of transactions undertaken on behalf of a third party that would otherwise be notifiable.





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Conclusion

By way of reminder, the 2014 Act states that transactions require notification to the CCPC where, in the most recent financial year:

i) the aggregate turnover in the State of all of the undertakings involved is at least €50 million; and
ii) turnover in the State of each of two or more undertakings involved is at least €3 million.

The above thresholds apply regardless of where the legal entities are based, and transactions cannot come into effect prior to clearance by the CCPC, otherwise known as 'gun-jumping'.

Whilst the number of transactions notifiable to the CCPC since the introduction of the 2014 Act continues to rise, the proportionality of the current thresholds to the associated time and cost to businesses remains to be considered. This is particularly the case where the CCPC has the existing power to request a notification to be made under the 'voluntary' procedure where competition concerns are raised by market participants, as in the case of the Kantar Media and Newsaccess merger (M/17/12).

With no mergers prohibited or indeed progressing to Phase 2, it is apparent that in the majority of cases few substantive competition concerns arise. It will be interesting to see if the outcome of the DBEI public consultation results in the reform of the current Irish merger regime. A balance must be struck between competition law compliance and reducing the regulatory burden to improve business efficiency.

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