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LAW FIRM

2018 Merger Control Update

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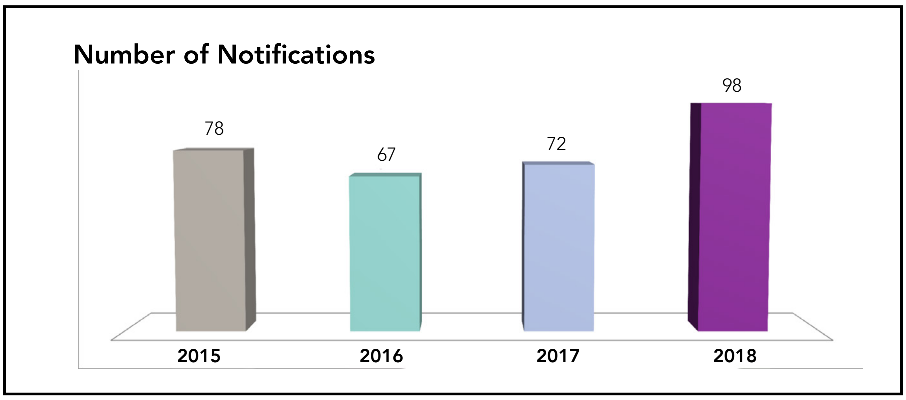
Notifications rise by 36% in 2018

The end of 2018 brings to a close one of the busiest four year periods in the history of Irish merger control. This is largely due to significant economic growth and the lower notification thresholds which applied since 2014. The number of mergers notified from 2015-2018 is, in the history of the Competition Act 2002 as amended, second only to the notifications from 2004-2007. The 98 mergers notified in 2018 was also an increase of 36% on 2017.

This high level of notifications is unlikely to continue in 2019. The increase in the notification thresholds from €3 million to €10 million turnover in the ROI will reduce number of notified mergers by approximately 40%, as we reported here. The reduction will relate to those mergers where annual turnover in the State is between €3 and €10 million. This is a welcome development for businesses active in sectors such as motor fuel retail, pharmacies, and hotels, which have found themselves significantly affected by Irish merger control in recent years.

There has been four times the number of Phase 2 reviews in 2018 compared with 2017 which may be indicative of a desire to focus more on cases where substantive issues arise. While none of these have been prohibited, there has also been an increase in the number of remedies, particularly behavioural remedies, being adopted. It remains to be seen whether the increased powers and potentially resourcing required by the implementation ECN+ Directive will increase the frequency of substantive review and decision making by The Competition and Consumer Protection Commission (the "CCPC").

The developments and statistics reviewed below suggest that the CCPC continues to evolve. An awareness that business bears the burden of merger control is emphasised by the recent consultation on the adoption of a simplified procedure for no-issues mergers. If introduced, such a procedure should reduce the quantity of information required and shorten clearance times for such transactions which would be welcomed by practitioners and business alike.



2018 Trends - What was notified?

Industry Sector	Number of notifications	% Increase/Decrease on 2017
Agriculture / Food Production	5	-17%
Betting & Gaming	3	+50%
Business and IT Services	3	+50%
Consumer Goods – retail and distribution	2	-50%
Data and Software	3	+50%
Energy	4	0%
Financial Services	6	+50%
Grocery – retail and distribution	6	+100%
Healthcare	3	+200%
Hotel / Hospitality	5	+25%
Insurance	3	+50%
Manufacturing	7	+250%
Media / Advertising	3	-63%
Motor fuel wholesale and retail	4	-69%
Other	7	+250%
Real Estate	7	+75%
Retail Pharmacy	5	+400%
Telecommunications	6	+200%
Transport / Logistics	5	+67%
Vehicle Sales	8	+700%
Waste	3	+50%

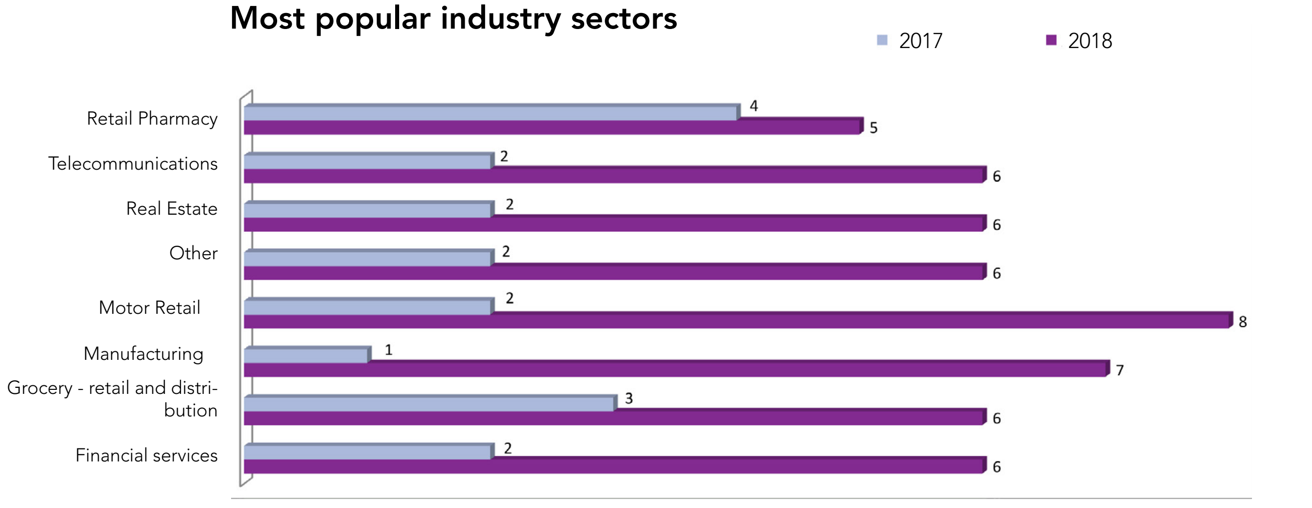
The number of **Private Equity** and property investment transactions doubled in 2018, and accounted for approximately one-quarter of all notifications, involving entities such as Brookfield, Kennedy Wilson, Oaktree, Exponent, Eurozeo, EQT and Carlyle. Meanwhile, foreign-to-foreign deals accounted for approximately one fifth of Irish notifications in 2018.

As shown in the table above, in terms of **agriculture and food production**, there was a slight reduction in Irish merger activity in 2018, compared to 2017. This may be partially attributable to uncertainty around Brexit.

Motor vehicle sales emerged as a significant sector in 2018, with a seven-fold increase from 2017. Of particular note this year in this sector was the notification of *M/18/020 Armalou-Spirit Ford/Lillis O'Donnell*, a merger which was implemented in 2015, but was not notified to the CCPC at that time. Ultimately, the transaction was notified and cleared by the CCPC, which also launched a criminal investigation into the parties responsible.

In the **grocery distribution and retail market**, a sensitive market in competition law terms, a significant market share is held by each of the Musgrave Group (owner of the Centra, Mace and Daybreak brands in Ireland) and BWG Foods (owner of the Spar, Londis and XL brands in Ireland). Both have consolidated their positions in recent years, with 4 transactions notified by Musgrave in the past three years, and three notifications by BWG in 2018 alone.

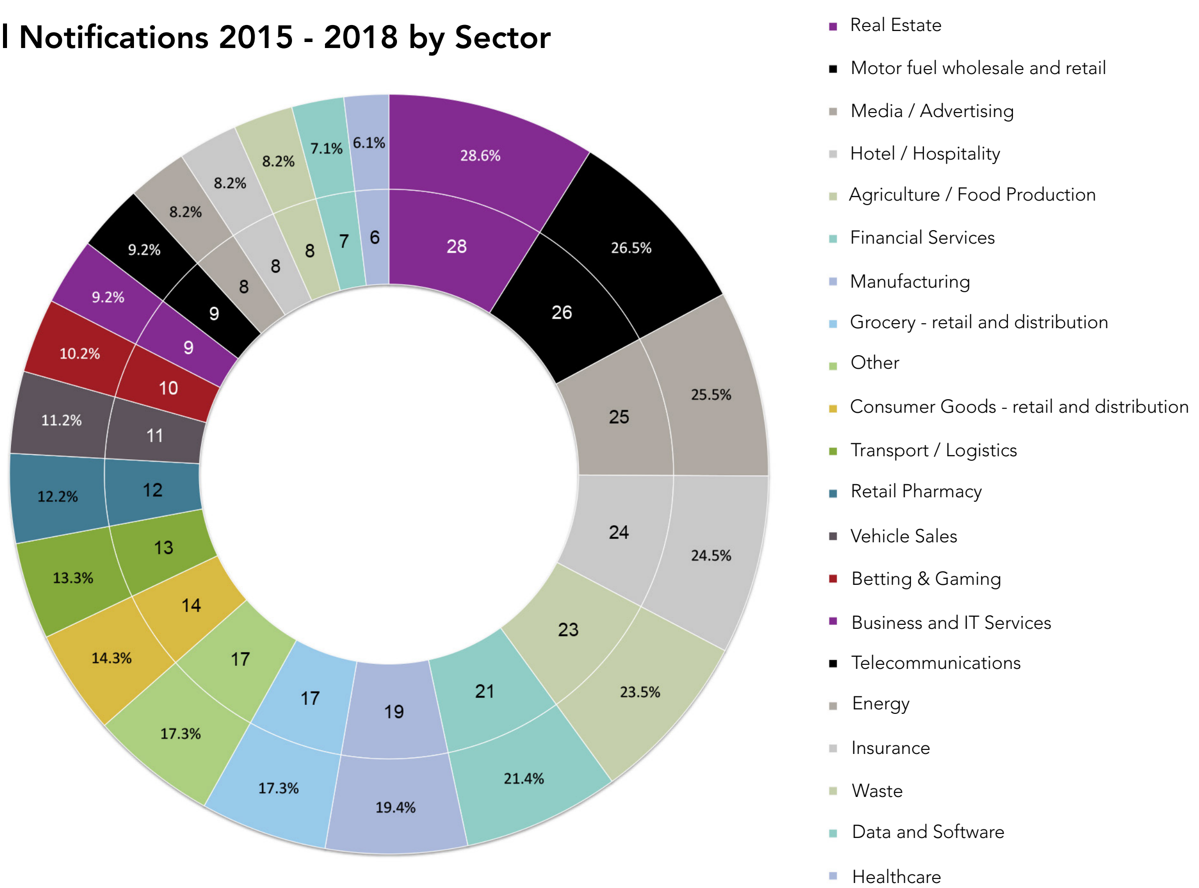
Most popular industry sectors



The **newspaper sector** has also seen consolidation and indeed two of the four Phase 2 investigations cleared in 2018 involved media mergers in this sector. The acquisition of the Irish Examiner by the Irish Times was cleared by the CCPC in 89 days, and a transaction involving the acquisition of a 50% stake in the Irish Daily Star (*Trinity Mirror / Northern & Shell*) lasted 153 working days and resulted in significant remedy commitments.

Commentators observe that Phase 2 investigations in media mergers are particularly onerous for business, as the transaction must be referred to the Minister for Communications for a media plurality analysis after the CCPC has completed its review. Independent News and Media ("INM") has been involved in three significant notifications in the past three years, and ultimately withdrew one of those citing the excessive length of the review. In an interesting development elsewhere, German competition law has recently relaxed the applicability of certain competition laws to the newspaper industry, and allows for "crisis cartels" in the sector in light of the growth of online news sources.

Total Notifications 2015 - 2018 by Sector

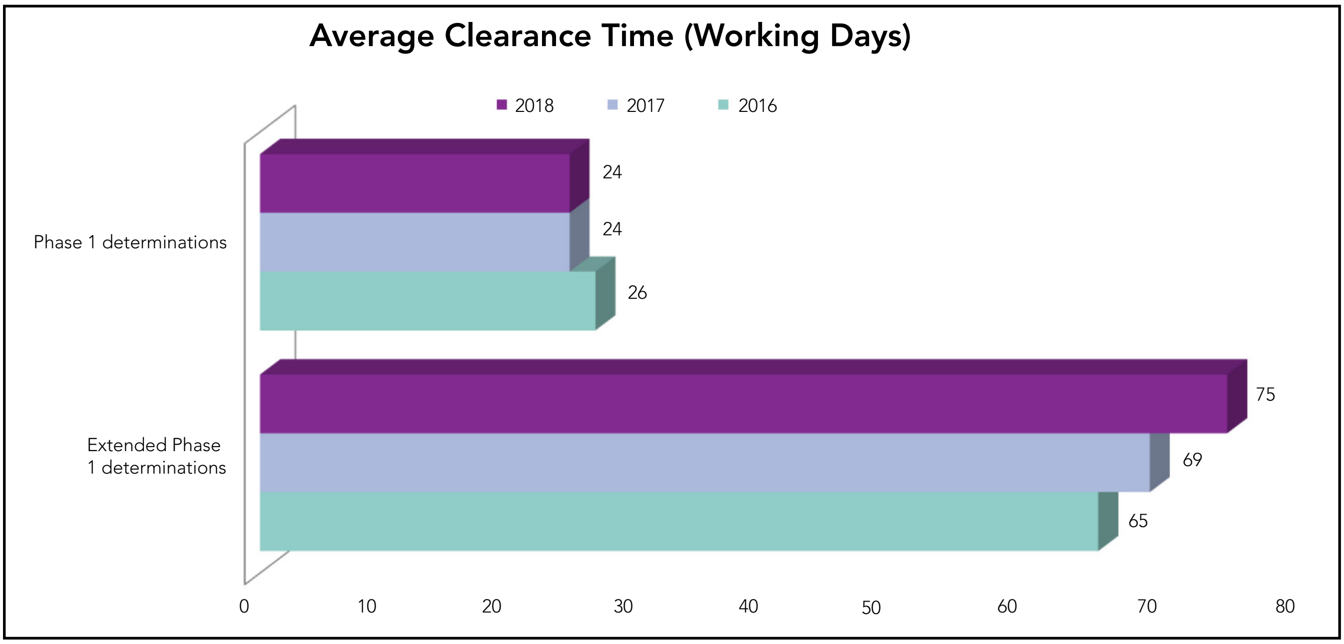


SECTORS LIKELY TO BE AFFECTED IN 2019

The pre-2019 individual turnover threshold of €3 million meant that certain asset-only acquisitions such as of individual motor fuel forecourts, hotels and retail pharmacies often required notification, despite their usually negligible impact on competition, even on localised markets. This created a perception among the business community that notifications amounted to a "tax" on transactions due to the cost, resources and uncertainty involved in notifying.

Notifications in the most affected sectors peaked in 2017, and fell slightly in 2018 - mergers in the **motor fuel retail** sector slowed in 2018 (down by 68%), despite significant activity in recent years. Given that many of the deals in these sectors are unlikely to be caught by the new thresholds, this reduction could partly be a result of purchasers holding off on completing acquisitions until the new rules came into effect on 1 January 2019.

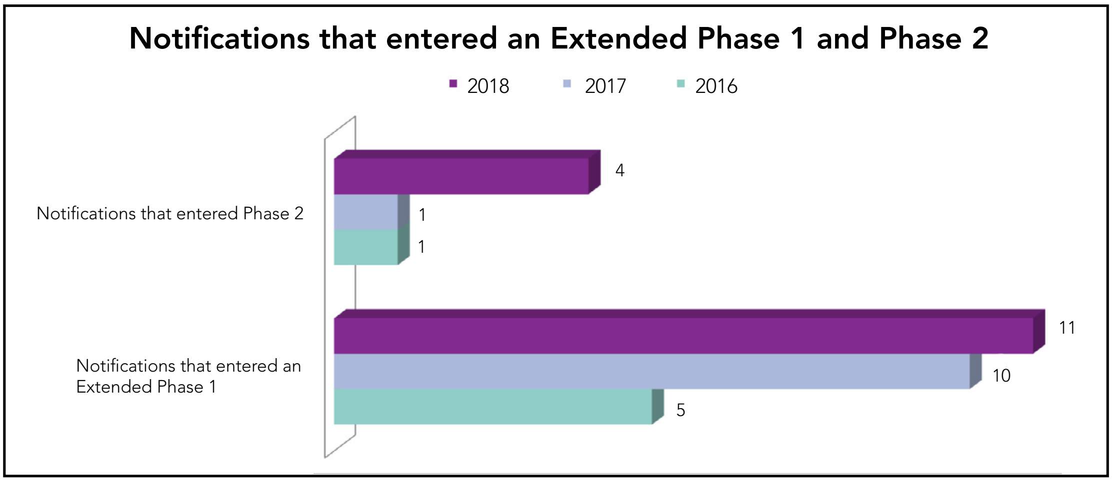
CLEARANCE TIMES

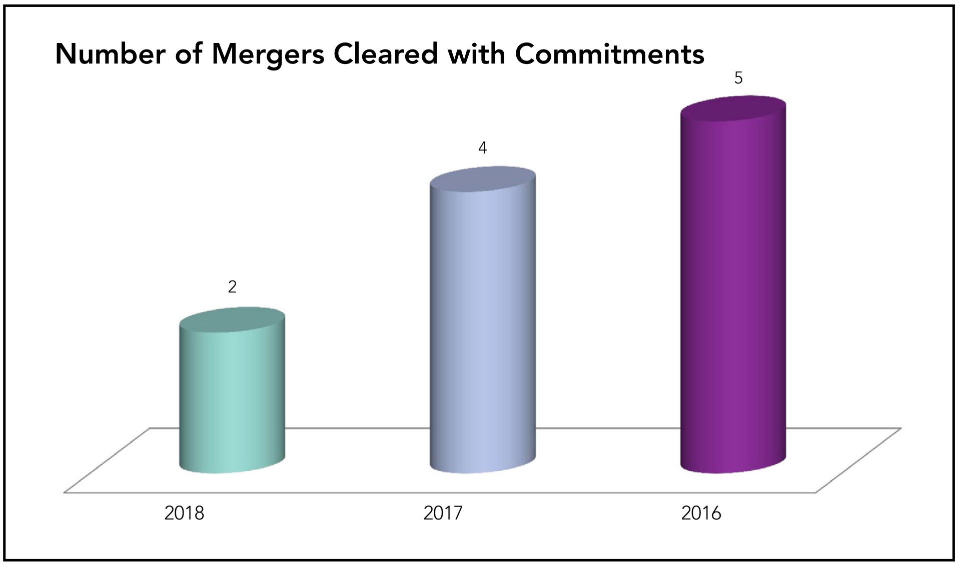


As illustrated in the graph above, the shortest time for a Phase 1 clearance determination in 2018 was just 7 working days (compared to a minimum of 12 in 2017).

THE CCPC'S REVIEW

The chart overleaf suggests that the CCPC is scrutinising transactions more closely. In total, five mergers were subject to remedy commitments. In particular, the CCPC expressed concern around the access to third party commercially sensitive information post-transaction in a number of cases and imposed remedies to address such concerns.





Certain sectors were more likely to be the subject of behavioural remedies. In the **convenience grocery retail** sector, one of the mergers involving BWG was cleared by the CCPC subject to commitments to ensure BWG has no access to competitively sensitive information in the Vendor's (4 Aces) group under circumstances where 4 Aces remains a member of the Gala buyer group, a significant competitor of BWG, following completion.

In terms of **retail pharmacies**, the August determination in the *Uniphar/SISK* Healthcare merger included the imposition of firewall and confidentiality commitments to be entered into by Uniphar, in order to prevent the exchange of competitively sensitive information post-transaction between its pre-wholesale/logistics arm and SISK Healthcare's wholesale business.

Meanwhile in the **hazardous waste** sector, the *Enva/ Rilta* transaction was approved by the CCPC subject to both a structural and behavioural remedy following an extensive Phase 2 investigation, lasting a total of 7.5 months. Ultimately, the purchaser was required to divest a treatment facility for an oily water tank, interceptor waste and hazardous waste lubricant oil; and also accept certain hazardous waste from third parties.

As with all recent years, no proposed transactions were prohibited by the CCPC in 2018.

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