Assessing Irish Merger Control: How a Small National Competition Authority Can Make a Big Impact

Richard BUNWORTH*

Ireland is an increasingly interesting and prominent jurisdiction in merger control, both from a European and international perspective. Due to the level of multinational corporate investment into the country (particularly in digital and pharmaceutical industries), Ireland has a somewhat disproportionate level of importance when compared to other jurisdictions of a similar size in the EU. In addition, the Irish competition authority, the Competition and Consumer Protection Commission ('CCPC'), has recently been granted several additional powers when reviewing mergers. Further, it appears to be adopting a more aggressive and interventionist stance, for example, by taking the previously unusual step of prohibiting a number of transactions and requiring extensive remedies across several cases. Alongside the changes in Irish merger control, the EU Commission is faced with the resurrected challenge of below-threshold mergers as a result of the Court of Justice of the EU's ('CJEU') judgment in Illumina v. Commission. This decision has scuppered its ability to rely on Article 22 of the EU Merger Regulation ('EUMR') to access problematic acquisitions in digital and pharmaceutical markets. As a result, there is a strong possibility that national competition authorities ('NCAs') with the ability to 'call-in' transactions that fall outside the EU's notification thresholds may be required to do so to plug this gap that has re-emerged in European merger control.

In this context, with Ireland positioned as an extremely important corporate hub and the CCPC likely to be faced with an expanding mandate over the coming years, this article offers a timely review of the Irish authority's activities over the past five years as a means of synthesizing trends that can be observed (as well as potential future developments). It does so by tracing through the assessments of mergers systematically over this period (2020–24) from their initiation by way of notification to the CCPC, all the way through to determinations, remedies, and prohibitions. By taking this approach, the article extracts information and points of interest from the various stages as a means of shaping merger parties' expectations of the process, as well as providing key advice for other NCAs in the EU.

Keywords: Merger control, competition law, Article 22 EUMR, merger review, digital markets, pharmaceutical markets, call-in powers, below-threshold mergers, CCPC, Ireland, EU Commission

* The author is an Assistant Prof. at Trinity College, Dublin. He is also serving as a Non-Governmental Advisor to the Irish Competition and Consumer Protection Commission for the period 2024–26. However, the views expressed in this article are solely those of the author and should not be attributed to any institution to which he is affiliated. Email: richard.bunworth@tcd.ie.

Bunworth, Richard. 'Assessing Irish Merger Control: How a Small National Competition Authority Can Make a Big Impact'. *World Competition* 48, no. 4 (2025): 521–552.

1 INTRODUCTION

Ireland is an increasingly interesting and prominent jurisdiction in merger control, both from a European and international perspective. Due to the level of multinational corporate investment into the country (particularly in digital and pharmaceutical industries), Ireland has a somewhat disproportionate level of importance when compared to other jurisdictions of a similar size in the EU. In addition, the Irish competition authority, the Competition and Consumer Protection Commission ('CCPC'), has recently been granted several additional powers when reviewing mergers. Further, it appears to be adopting a more aggressive and interventionist stance, for example, by taking the previously unusual step of prohibiting a number of transactions and requiring extensive remedies across several cases. Alongside the changes in Irish merger control, the EU Commission ('Commission') is faced with the resurrected challenge of below-threshold mergers as a result of the Court of Justice of the EU's ('CJEU') judgment in *Illumina v. Commission*.[1] This decision has scuppered its ability to rely on Article 22 of the EU Merger Regulation ('EUMR') to access problematic acquisitions in digital and pharmaceutical markets. As a result, there is a strong possibility that national competition authorities ('NCAs') with the ability to 'call-in' transactions that fall outside the EU's notification thresholds may be required to do so to plug this gap that has re-emerged in European merger control.

In this context, with Ireland positioned as an extremely important corporate hub and the CCPC likely to be faced with an expanding mandate over the coming years, this article offers a timely review of the Irish authority's activities over the past five years as a means of synthesizing trends that can be observed (as well as potential future developments). It will do so by tracing through the assessments of mergers systematically over this period (2020–24) from their initiation by way of notification to the CCPC, all the way through to determinations, remedies, and prohibitions. By taking this approach, the aim is to extract information and points of interest from the various stages as a means of shaping merger parties' expectations of the process.

The general hypothesis is that the CCPC has become stricter, both in terms of enforcing procedural rules and in its review of transactions (through both its willingness to employ remedies and prohibit transactions to protect consumer interests), and this will be tested against the data. This evaluation will serve to benefit transacting parties in terms of their expectations of the merger control procedure in Ireland. Further, by conducting an in-depth review of the trends across notifications and transactions in Ireland, the article aims to provide valuable

1 Joined Cases C-611/22 and C-625/22 *Illumina v. Commission*, ECLI:EU:C:2024:677.

insight to the CCPC to inform its operation in the upcoming years, which is likely to represent the authority's most crucial and impactful period in its history. Finally, this assessment of the CCPC's role will provide insight for other smaller NCAs within the European Competition Network (ECN) in terms of the rigour with which it operates and how to address the competitive power of multinational undertakings.

2 THE IMPORTANCE OF IRELAND AS A JURISDICTION FOR MERGER CONTROL

Ireland is recognized as a thriving corporate environment, with (primarily US) multinational companies supplementing domestic entities.[2] These companies avail of the many business-friendly policies of the Irish government, such as a low corporation tax rate of 12.5% and tax credits to support research and development. In addition, Ireland is the only remaining English-speaking jurisdiction in the EU (with the Union representing an essential consumer-base for most exporting companies) which encourages undertakings to establish offices or factories in the country. Ireland also has a highly-educated workforce that has been significantly enhanced by inward migration with workers seeking to avail of opportunities in companies that house their European operations in Dublin in particular (such as Google which has over 9,000 workers and Meta with around 2,000).[3] This ecosystem is bolstered by the work of Enterprise Ireland which supports and invests in Irish-owned businesses, as well as pioneering initiatives such as those directed at encouraging female entrepreneurship and fostering entrepreneurial education,[4] all of which has created a very active start-up environment. There are more than 2,200 indigenous tech start-up and scale-up companies, as well as six unicorn companies (including Intercom and Stripe).[5] As a result, Ireland is

[2] There are almost 1,000 US companies based in Ireland, directly employing over 200,000 people in the country. *Facts & Figures*, American Chamber of Commerce (2025), https://www.amcham.ie/facts-figures (accessed 21 Jul. 2025).

[3] Ciara O'Brien, *Google in Ireland: From Small Beginnings to One of State's Biggest Private Employers* (The Irish Times 20 Jan. 2023), https://www.irishtimes.com/technology/2023/01/20/google-in-ireland-from-small-beginnings-to-one-of-the-countrys-biggest-private-employers (accessed 21 Jul. 2025); Ciara O'Brien & Riley Griffin, *Irish Fears as Meta to Cut 5% of Staff Globally* (The Irish Times 14 Jan. 2025), https://www.irishtimes.com/business/2025/01/14/meta-to-cut-5-of-staff-with-eye-on-lowest-performers (accessed 21 Jul. 2025.)

[4] *Entrepreneurship* (Government of Ireland 4 Dec. 2023), https://www.gov.ie/en/department-of-enterprise-tourism-and-employment/policy-information/entrepreneurship (accessed 21 Jul. 2025).

[5] Ludo Fourrage, *Inside Ireland's Thriving Tech Hub: Startups and Success Stories* (NuCamp 24 Dec. 2024), https://www.nucamp.co/blog/coding-bootcamp-ireland-irl-inside-irelands-thriving-tech-hub-startups-and-success-stories (accessed 21 Jul. 2025); John Kennedy, *Ireland's Rising Regional Tech Players to Watch* (Think Business 3 Apr. 2024), https://www.thinkbusiness.ie/articles/rising-irish-regional-tech-businesses (accessed 21 Jul. 2025).

recognized as a tech and digital centre, which is supplemented strongly by multinational activity that is often focused in digital and pharmaceutical industries. For example, it is estimated that over 90,000 professionals work in information and communications technology companies in the country (with the area in Dublin where a number of these companies are based often referred to as 'Silicon Docks' due to its canal-adjacent location).[6]

The omnipresence of multinational technology and pharmaceutical companies (operating in industries where acquiring competitors is a prominent business growth strategy) and hundreds of promising start-up companies mean that the importance of Irish merger control is likely to expand. The CCPC's already significant standing amongst enforcers and from the perspective of multinational corporations is evidenced by the American Bar Association Antitrust Law Section's extensive response to the CCPC's recent consultation on the Irish Merger Guidelines.[7] The thrust of the ABA's input was for greater transparency on the CCPC's working theories of harm and more examples to be used in the guidelines, the former of which can be seen as a means of facilitating a frictionless process for undertakings. However, a key conclusion to be drawn from the ABA's involvement is the recognition by US dealmakers of the continued and future importance of Irish merger control given its crucial strategic position as a European base for hundreds of undertakings. Further, the prominence of private equity financing in the Irish market is also set to continue (twenty-nine of the eighty-two merger notifications to the CCPC in 2024 involved private equity buyers),[8] the result of which may be an increase in notifiable transactions. Finally, following the decision of the CJEU in *Illumina v. Commission* (which concurred with the Opinion of AG Emiliou in overturning the General Court's findings),[9] it is clear that European competition agencies will no longer be permitted to refer transactions to the Commission for review where they do not fall within the referring authority's jurisdiction (namely, satisfying national turnover thresholds). Thus, the proposed solution of utilizing Article 22 EUMR to bring potential killer acquisitions or otherwise non-notifiable transactions within the Commission's jurisdiction is no longer available.[10] The net result of the CJEU's decision is that this stopgap

---

6 Fourrage, *supra* n. 5.

7 American Bar Association Antitrust Law Section, *Comments of the American Bar Association Antitrust Law Section and International Law Section Review of Ireland's CCPC's Guidelines for Mergers* (American Bar 7 Nov. 2024), https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2024/joint-comment-ireland-guidelines-merger-analysis.pdf (accessed 21 Jul. 2025).

8 Vincent Power et al., *Irish Merger Control. 2024 Lessons and 2025 Trends* (A&L Goodbody 4 Feb. 2025).

9 *Illumina v. Commission, supra* n. 1; Opinion of Advocate General Emiliou, ECLI:EU:C:2024:264.

10 The Commission had recently issued Guidance to facilitate the usage of Art. 22 EUMR by European national competition authorities where no single authority, nor the Commission, had jurisdiction to review a proposed transaction. This was in response to mergers such as *Facebook/WhatsApp* and *Facebook/Instragram* that were not

solution for below threshold mergers has been rendered redundant, meaning that an increasing responsibility is likely to fall on European NCAs with the power to 'call-in' mergers that do not come within their national thresholds for merger review. Due to Ireland's recent adoption of 'call-in' powers,[11] and the fact that it is a home for a number of multinational companies with active acquisition policies, there is a significant possibility it will be required to review some prominent transactions before the Commission finds an alternative to the failed Article 22 EUMR solution.

3 MERGER CONTROL PROCEDURE IN IRELAND

The Irish merger control regime has been in place since 1 January 2003. It was established by the Competition Act 2002 which has been amended multiple times since its inception, most recently by the Competition (Amendment) Act 2022 which introduced several important changes (the Competition Act 2002 as amended is hereinafter referred to as the '2002 Act').

Under the existing regime, notifiable mergers, acquisitions and joint ventures are subject to review of their compatibility with the 2002 Act.[12] The CCPC has sole responsibility for assessing such transactions (save for media mergers which must also be notified to the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media).[13] Pursuant to Part 3 of the 2002 Act, transactions must be notified to the CCPC if they meet certain financial thresholds (thereby mirroring the Commission's method for ascribing jurisdiction). Thus, it is mandatory to notify a transaction where in the most recent financial year (1) the combined turnover in Ireland of all the undertakings involved is at least EUR sixty million; and (2) the turnover in Ireland of each of two or more of the undertakings involved is at least EUR ten million.[14] These thresholds were raised (from EUR fifty million and EUR three million respectively) in 2019 in response to concerns that the CCPC

subject to review by the Commission because they did not satisfy the sole factor deciding jurisdiction, namely, the turnover thresholds (because the target companies were virtually not revenue-generating). In essence, such companies are being acquired for their potential and pre-empt future competition, thereby having the possibility to radically distort competition in favour of the acquirer in future if the potential is realized. For commentary on killer acquisitions, *see* Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions,* 129 J. Pol. Econ. 649 (2021), doi: 10.1086/712506.

[11] Competition Act 2002 (as amended), s. 18A.

[12] *Ibid.*, s. 16.

[13] The procedure relating to media mergers is set to be amended by the Media Regulation Bill which will implement the European Media Freedom Act (EMFA) in Ireland. The EMFA creates new rules aimed at protecting media pluralism and independence. A key aspect of this will be the transfer of responsibility for review of media mergers from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media to Coimisiún na Meán. However, the CCPC's role in reviewing media mergers will remain unchanged. At present, media mergers are notified pursuant to s. 18(2) of the 2002 Act.

[14] Competition Act 2002 (as amended), s. 18(a).

was becoming over-burdened reviewing mergers that were unlikely to pose any competition concerns due to the relatively small financial value.

In addition to mandatory notification, undertakings have the option to voluntarily notify transactions to the CCPC. Indeed, the most recent prohibition of a transaction, *DAA plc/Certain Assets of Mr Gerard Gannon*, was voluntarily notified.[15] In total, there were five voluntary notifications from 2020–24.[16] Parties were incentivized to do this previously because the CCPC can still take action against below-threshold deals under its general competition law powers such as sections 5 and 6 of the 2002 Act (which mirror Articles 101 and 102 TFEU). However, this incentive has been enhanced significantly in this author's opinion by the introduction of 'call-in' powers under the Competition (Amendment) Act 2022.

Finally, when assessing transactions the CCPC operates the 'substantial lessening of competition' test, namely, asking whether the merger or acquisition is likely to lead to a substantial lessening of competition on any relevant market in Ireland that it has defined as potentially affected.[17] This mirrors the 'substantial lessening of competition' test operated by the UK Competition Markets Authority,[18] and in reality, has very little difference in terms of its practical application when compared to the Commission's metric of a 'significant impediment to effective competition' in reviewing mergers.[19]

4 RECENT CHANGES UNDER THE COMPETITION (AMENDMENT) ACT 2022

The Competition (Amendment) Act 2022, based on the ECN+ Directive, has introduced fundamental changes to Irish merger control. Many of the amendments are about ensuring that the CCPC has the power to review transactions that may otherwise have been implemented without an investigation due to the binary nature of the turnover thresholds. The changes that have been brought about will thus add some nuance to the jurisdiction of the CCPC in Irish merger control and enable it to challenge problematic transactions in the state effectively, regardless of whether the target is revenue-generating or only in the research and

15 M/23/011 – *DAA plc / Certain Assets of Mr Gerard Gannon*.

16 2023: M/23/011 – *DAA plc / Certain Assets of Mr Gerard Gannon*; 2022: M/22/041 – *Foresight Group/ Etag Fixings*; 2021: M/21/011 – *Easycash/Bank of Ireland ATMs* and M/21/009 – *CityLink/GoBus*; 2020: M/20/012 – *Eason/Dubray Books*.

17 Competition Act 2002 (as amended), s. 20(1)(c).

18 UK Enterprise Act 2002, s. 22(1).

19 Council Regulation (EC) No 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings [2004] OJ L24, Art. 2 (EU Merger Regulation).

development stage (but with the potential to become an important competitive force).

The most significant change is the introduction of the 'call-in' power for the CCPC. As a result of this change, the CCPC has been empowered to require notification of below-threshold transactions both before they are implemented and retrospectively after a merger has been consummated in certain circumstances.[20] While this power has not been used yet, the CCPC acknowledged that it considered several below-threshold transactions in 2024 with a view to potentially to calling them in.[21] This power is likely to become even more significant over the next five years due to the developments relating to Article 22 EUMR (discussed below in section 6), meaning the CCPC could play an increasingly prominent role in a European context. In tandem with this, merger parties have been granted the ability to retrospectively notify transactions that have been put into effect but were not notifiable.[22] The transacting parties may be motivated to do so for business certainty or to pre-empt a potential 'call-in'. In the case of both 'call-in' and retrospective voluntary notifications, the CCPC has been empowered to impose interim measures on the parties.[23] It may do so where it considers it appropriate due to the risk that the merger or acquisition may have an effect on competition on any markets in the state.[24] Finally, the CCPC may also bring summary proceedings against merger parties for gun-jumping in situations where they take steps to implement a transaction after notifying it but prior to its approval.[25]

5 IRISH MERGER CONTROL 2020–24

5.1 NOTIFICATIONS

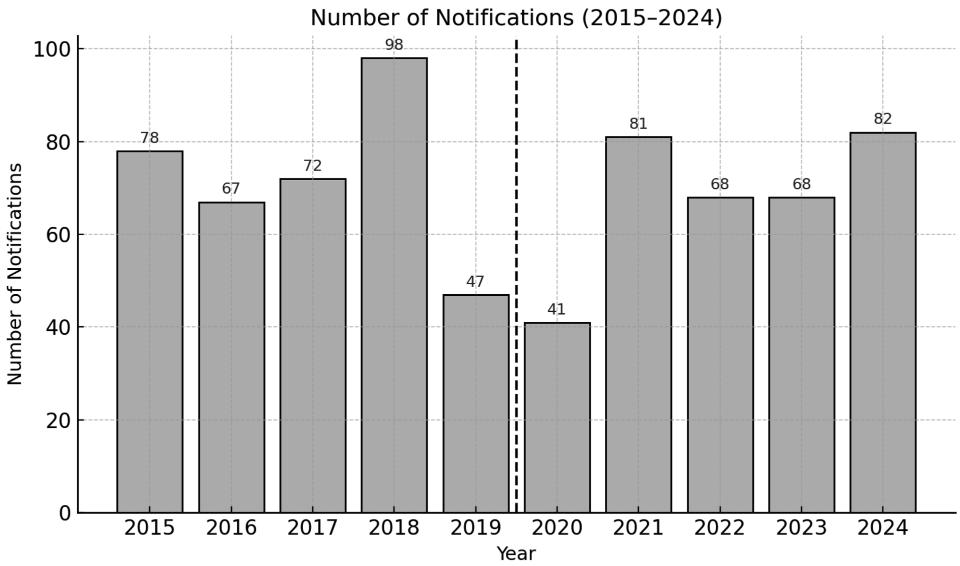
As mentioned in the previous section, the financial thresholds for the mandatory notification of mergers and acquisitions were increased from 1 January 2019 as a means of reducing the number of transactions being

[20] The CCPC may only 'call-in' a merger within sixty working days of the earliest of; (1) the date that a public bid is publicly announced or made but not yet accepted; (2) the date the CCPC becomes aware of signing of the transaction; or (3) the date of closing of a transaction.
[21] CCPC Mergers and Acquisitions Report 2024, at 3.
[22] Competition Act 2002 (as amended), s. 18(3A).
[23] *Ibid.*, s. 18B.
[24] *Ibid.*, s. 18B(1)(b).
[25] *Ibid.*, s. 19(10).

reviewed by the CCPC (the combined turnover figure was raised by 20% while the individual undertaking turnover levels more than tripled). This was in response to the perception that the low monetary value of the thresholds had inflated the number of notifications put before the CCPC. The high point of this occurred in 2018 when the CCPC received a record ninety-eight notifications. However, despite the relatively substantial increase in the thresholds in 2019, when one compares the levels of notifications in recent years they are strikingly similar. Over the past five years, the average number of notifications per year is sixty-eight (and this includes the Covid-affected year when only forty-one notifications were submitted due to dealmakers' uncertainty over the longer-term impact of the pandemic). In comparison, in the five years before this (2015–19) there were an average of 72.4 notifications per year, which represents a mere 4.4 transactions more per annum (Figure 1).

Given the purpose of increasing the thresholds was to reduce the number of mergers being reviewed by the CCPC, the intervention does not appear to have been particularly successful. This is especially the case when one considers that the eighty-two notifications in 2024 was the second highest number in ten years, and significantly more than any year other than 2021 (where the eighty-one notifications are widely considered an aberration due to pipeline deals that were delayed by Covid-19). This is an important point for the Irish legislature to note, as well as the Irish Government when deciding upon the budget for competition enforcement and merger control. For a competition regulator to work effectively it requires sufficient resources to both investigate potential breaches of competition rules on markets (anti-competitive agreements and abuse of dominance) and review mergers. However, due to the legislative timelines imposed on merger control, the CCPC must ensure these deadlines are strictly met which risks skewing priorities towards the immediate needs of responding to merger notifications and away from important investigative and enforcement activities. With the levels of notifications remaining stagnant (or potentially rising based on 2024), this represents a concern that was possibly assumed would be corrected by the increased turnover thresholds, and which is being exacerbated by the number of Phase Two investigations (discussed below) that require extensive resources to be conducted properly. The CCPC is not alone in this regard and the balance between merger control and competition enforcement is a difficult one for smaller NCAs to strike, but the burden on the Irish authority due to the level of notifications is certainly notable.

Figure 1 Number of Merger Notifications Per Year 2015–24



5.2 Simplified merger notification procedure

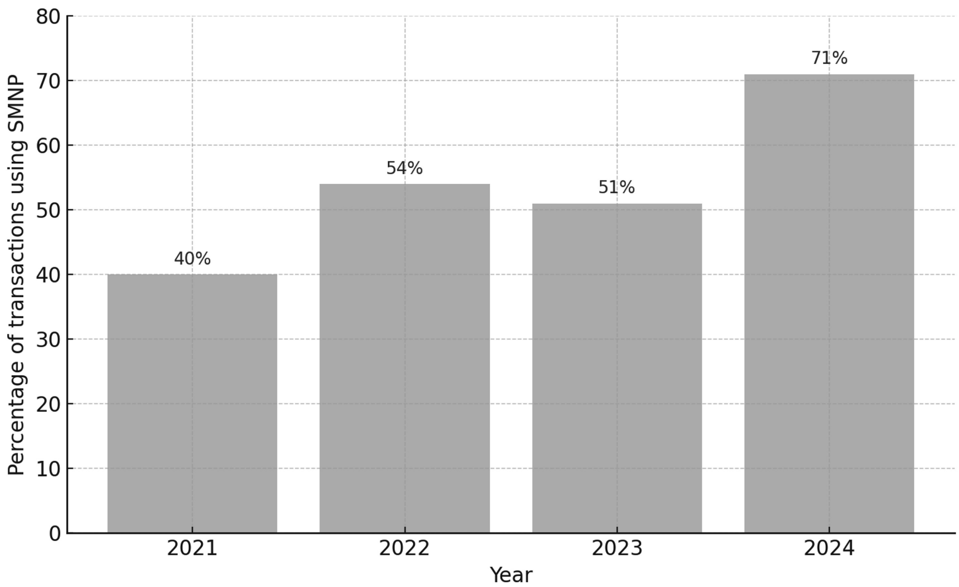
The Simplified Merger Notification Procedure ('SMNP') has been in operation for five years, having been commenced on 1 July 2020 pursuant to the publication of the SMNP Guidelines. It was introduced following two separate public consultations in 2018 and 2019, and as a response to frustration among undertakings at the time lag involved in the review of mergers where there was little or no crossover between the parties.

The SMNP is available (1) where there is no overlap between the undertakings involved, or (2) where there is an overlap, that their combined market share on the same product market is less than 15% or the market share of each undertaking is less than 25% where they are active on upstream or downstream markets to each other. The Notification Form to be completed is the same as that for ordinary notifiable transactions, with the difference being that parties to a simplified merger need not complete all sections.

In terms of the timing for the SMNP process, the CCPC endeavours to 'make a determination as soon as practically possible' following the expiration of the ten-working day period for third party submissions from the date of notification. In general, this has resulted in an informal expectation of simplified mergers being cleared within fifteen working days, with the average from 2020–24 being 13.3 working days. In comparison, the deadline for the CCPC to review ordinary mergers under the Phase One procedure is thirty working days from notification.

The SMNP has been an enormously successful innovation, both in terms of reducing the resources needed by the regulator in reviewing unproblematic mergers and in reducing the timeline for approval of transactions for the parties involved. The success is evidenced by the statistics, where at least 40% of notifications annually are done pursuant to the SMNP since its first full year in operation. Indeed, the highest percentage of simplified transactions occurred in the 2024, where 71% of notifications (fifty-eight in total) were under the SMNP (Figure 2). There are likely two causes for the recent increase in this author's opinion. Firstly, there are a greater number of transactions involving acquisitions by international private equity companies each year where there is no overlap with the acquired Irish target. Secondly, there is greater understanding and awareness of the SMNP, particularly among general corporate counsel (as opposed to specialized competition lawyers) who only rarely interact with merger control. Therefore, advisors are more likely to utilize the SMNP due to this heightened understanding of its significant benefits. Reflecting on the ease with which the SMNP was assimilated into Irish merger control and its significant usage since adoption, the procedure has very clear merit and would likely benefit almost all other NCAs of a similar size within the EU. From the agency's perspective, it creates challenges in terms of the tight timelines, but it also reduces the resources required in reviewing each individual transaction that uses the SMNP.

Figure 2 Percentage of Merger Notifications Utilizing the SMNP 2021–24



5.3 Requirements for further information and extended Phase One transactions

The CCPC has increasingly utilized its power to issue Requirements for Further Information ('RFIs') to merger parties. RFIs are generally requested to obtain relevant information not incorporated in the original Notification Form; expand on information provided; or clarify points made by the notifying parties. In 2024, thirty-five RFIs were issued across all cases.[26] Similarly, there were 28 and 30 issued in 2023 and 2022 respectively.[27] (Figure 3) While this includes multiple RFIs in relation to the same transaction in many cases, this is still quite a significant number. The effect of the issuance is to 'stop the clock' in the calculation of the thirty working days (from notification) in which the CCPC must issue a determination. Under the SMNP procedure, the CCPC issuing a RFI converts the notification to a Standard Merger (thereby removing the benefits of the simplified expedited deadline).

Tied to the increased usage of RFIs, a number of merger investigations have been subjected to an extended Phase One (in other words, the clock was stopped and the thirty working days from the original notification date did not apply, as the clock is only 'restarted' when the RFI is successfully complied with). On average, 14.2 mergers per year were subject to an extended Phase One investigation over the period 2020–24. The impact of this is very significant for notifying parties as it can cause delays in receiving clearance for a transaction. For example, the average timeframe for a standard Phase One determination in 2024 was 28.5 working days, whereas for an extended Phase One case the average was seventy-eight working days.[28] (Figure 3) The number of cases subjected to extended Phase One investigations depend on a number of factors such as the complexity of the transaction involved; the clarity of the Notification Form provided; the relevant market and whether it is clearly defined; and the parties' responses to RFIs. Therefore, there is an element of responsibility on notifying parties and their advisors to anticipate the authority's possible queries and to be proactive and forthcoming in addressing these in the Notification Form. A failure to do so clearly risks delaying the clearance of transactions. Given the strict rules against gun-jumping, this is a significant consequence for parties and should be considered thoroughly (including by engaging in pre-notification discussions with the CCPC), as the CCPC appears increasingly inclined to issue RFIs and engage in extended Phase One investigations to ensure the transaction does not threaten competition.

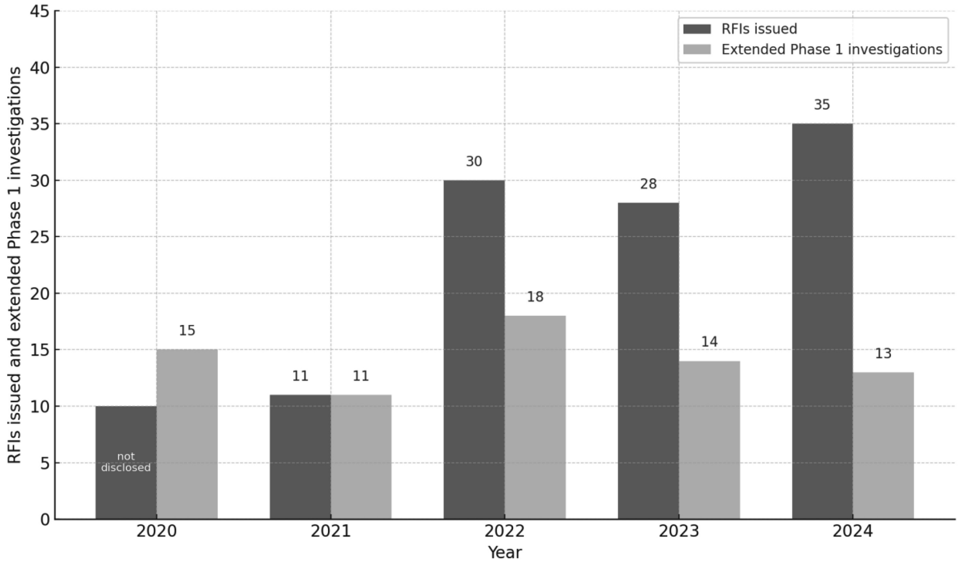
---

26 CCPC Mergers and Acquisitions Report 2024.

27 *Ibid.*

28 CCPC Mergers and Acquisitions Report 2024, para. 1.15.

Figure 3 Number of RFIs and Extended Phase One Investigations Per Year 2020–24



5.4 PHASE TWO INVESTIGATIONS

In addition to the CCPC's increased tendency to engage in extended Phase One investigations, the last five years of merger control in Ireland demonstrate a very clear willingness on the part of the regulator to take the significant step of commencing Phase Two investigations. Phase Two investigations are considered far more intensive than Phase One cases in both EU and domestic competition law. This is primarily because the deadline to issue a determination is extended to 120 working days (or 135 working days if the notifying parties submit remedy proposals). A Phase One investigation transitions to a Phase Two investigation (or a 'full investigation' as per the 2002 Act)[29] where the CCPC is not satisfied by the notifying parties that the transaction does not pose a threat to competition on a market in the state.

It is more difficult to analyse Phase Two investigations than notifications because they often fall over two calendar years. However, once broken down, the data is extremely illuminating. In 2020 and 2021 the CCPC opened two and three Phase Two investigations respectively. The figures increased in the most

[29] Competition Act 2002 (as amended), s. 22.

recent three years, where the CCPC commenced four Phase Two investigations in 2023 and five in each of 2022 and 2024. This represents a very significant shift, showing the relative strength of the Irish authority in challenging potentially problematic transactions. Assessed from a different perspective, the CCPC issued six Phase Two determinations in 2022, surpassing the previous record of four (which occurred over fifteen years ago, in 2003 and 2006).[30] This number is swollen somewhat by the exit of two key banks from the Irish market during this period, namely, Ulster Bank and KBC.[31] These cases raised very novel questions regarding the counterfactual given the two banks' contemporaneous decisions to leave the market, leading to an inevitable requirement for a full investigation. Further, there was another financial markets case related to the creation of a new payments system involving a joint venture between the three largest remaining domestic banks in the state, which also required a Phase Two examination. Yet the continuation of this trend with four Phase Two determinations in both 2023 and 2024 indicates the much greater likelihood of full investigations in Irish merger control in the last five years.

There are a number of important consequences of this shift in approach. Firstly, Phase Two investigations are exceptionally resource-intensive for smaller NCAs. Thus, they increase the workload involved without necessarily being reflected in a statistical rise in the number of notifications. The CCPC's rigorous and determined focus is extremely commendable, but it is argued that this should be accompanied by an expanded budget and increase in the number of employees involved in merger control. Further, if this trend continues, the CCPC should consider creating a dedicated Phase Two division comprising senior investigators experienced with complex competition issues. Secondly, the CCPC is clearly unafraid of progressing to Phase Two where notifying parties are unable to satisfy it that a transaction is not potentially harmful to competition. This boldness in approach is something that other NCAs of a similar size should seek to imitate, as it can create a culture of compliance with competition rules.

5.5 Assessments

Assessments in Irish merger control equate to Statements of Objection given by the Commission in EU merger cases. They represent an important procedural step signifying the CCPC's concern around the potentially significant competitive effects of a proposed transaction. The Assessment is used to set out, in writing,

30 CCPC Mergers and Acquisitions Report 2024, at 1.

31 M/21/004 – *AIB/BoI/PTSB – Synch Payments*; M/21/021 – *Bank of Ireland/Certain Assets of KBC* and M/21/040 – *AIB/Certain Assets of Ulster Bank*.

the CCPC's preliminary concerns and the evidence supporting those views. The purpose is to facilitate the parties' full comprehension of issues so that they can disprove them through economic evidence or offer proposals to remedy the anti-competitive effects. Following the Assessment, the parties can exercise a right to respond to the CCPC's concerns in writing and orally; access the evidence in the CCPC's file; submit further evidence; and make proposals to address the preliminary concerns.[32]

Assessments are only issued during a Phase Two investigation, yet most mergers that go to a full investigation are approved without the requirement to issue one (as the competitive concerns are clear and have been flushed out through RFIs and discussions between the CCPC and notifying parties). Thus, Assessments were traditionally rare in Irish merger control (with the CCPC generally satisfied to issue a determination without one), but there has been a notable increase in their usage in recent years. For example, there were four Assessments issued in 2022 which represents a significant increase from previous practice.[33] While this figure may be somewhat inflated by the banking transactions discussed above, the recent prominence of Assessments is evident across other years too. For example, there were two Assessments issued in 2023,[34] while there was one each in 2024, 2021 and 2020.[35] As with the trend towards more cases progressing to Phase Two, the increasing issuance of Assessments has significant resource-implications for any authority, particularly in relation to the right of parties to respond orally, thereby requiring the CCPC to prepare and host (often adversarial) oral hearings. Further, while not a final determination, the written Assessment is inevitably a detailed and complex document that requires extensive drafting and input from economic and legal experts. Thus, the rigorous challenging of potentially problematic mergers in this manner places a significant strain on the resources of any small NCA, and the CCPC should be commended for persisting with Assessments despite this. As above, an organizational shift whereby the CCPC delineates a specific Phase Two division may be beneficial in achieving efficiencies in this regard.

5.6 Remedies

Remedies are commitments given by parties to carry out certain acts or behave according to certain parameters in future to prevent against potential competitive harm from the transaction. The rationale that the CCPC employs is that the remedies

[32] CCPC Mergers and Acquisitions Report 2024, para. 1.13.
[33] CCPC Mergers and Acquisitions Report 2022, at 2.
[34] *DAA/Certain Assets of Mr Gerard Gannon, supra* n. 15 and M/22/040 – *Q-Park/Tazbell*.
[35] CCPC Mergers and Acquisitions Report 2024, para. 1.14; CCPC Mergers and Acquisitions Report 2023, para. 1.15.

must satisfy the following to be accepted; (1) be comprehensive and effective; (2) be capable of effective implementation within a short time period; and (3) eliminate the competition concerns entirely.[36]

There is a general delineation between structural remedies and behavioural remedies. Structural remedies have traditionally been favoured by competition authorities due to the fact that their implementation does not require continued oversight or monitoring. They will often require the merged entity to divest a business, physical assets, or other rights to a competitor to ensure competition in that market is maintained.[37] For example, in *Uniphar/LXV Remedies (Sam Cauley)* the acquirer, Uniphar, was required to divest three pharmacies to competitors in areas where both the acquirer and target pharmacies were active.[38] Behavioural remedies, on the other hand, are designed to constrain the future conduct of the merging firms. The most common behavioural remedies accepted by the CCPC tend to involve 'ring-fencing' commitments to prevent the flow of competitively sensitive information held by the target about its competitors in the post-merger management of the merged firm or a joint venture.[39] For example, such ring-fencing requirements were a crucial part of the remedy package in *Synch.* The case involved a joint venture between the three biggest retail banks in Ireland which created obvious risks in information leakage.[40] Interestingly, the CCPC also required a commitment by the parties to ensure interoperability for any new participants that wished to join the payment services platform and an independent governance structure. This author argues that behavioural remedies are likely to become increasingly prominent due to the expansion of platform-style businesses across various digitized markets and the need to prevent the usage of data in an abusive manner by the merged entity post-transaction. Finally, hybrid commitments involve a blend of structural and behavioural remedies. For example, in *BWG/McCarrick Brothers Wholesale*, BWG committed not to acquire certain aspects of the vendor's business and to prevent the sharing of commercially sensitive information relating to the vendor's business (in other words, ring-fencing).[41]

There is a very notable increased reliance by the CCPC on remedies in merger cases. This arguably commenced in the three years prior to 2020, however, the trend has continued strongly in the past five years and it appears that commitments will only grow in terms of their importance in Irish merger control. As evidence of this, there were four cases in which the CCPC insisted upon remedies

36 CCPC Mergers and Acquisitions Report 2022, at 2.
37 CCPC Mergers and Acquisitions Report 2020, para. 3.4.
38 M/22/049 – *Uniphar/LXV Remedies (Sam McCauley).*
39 CCPC Mergers and Acquisitions Report 2020, para. 3.5. Ring-fencing is the most common method, making up 50% of behavioural remedies in 2020.
40 *Synch Payments, supra* n. 31.
41 M/22/047 – *BWG/McCarrick Brothers Wholesale.*

in 2022 and 2023. Further, over the course of 2020–24, there were fourteen cases in which remedies were required. In contrast, in the period of 2003–19, there were only thirty-two cases requiring remedies. Thus, in the past five years the total number of cases requiring remedies is almost half the number of the previous seventeen years. Similarly, the percentage of mergers requiring commitments by the CCPC from 2003–19 was 3.21%, compared to 5.6% in EU cases decided by the Commission in the same period. In the most recent five years, this has risen to 4.12% of cases in Ireland. These figures relating to remedies demonstrate very clearly the shift that is occurring in terms of how the CCPC views commitments from parties as potentially applicable across a range of cases, as opposed to being confined to a rare case or two per year. This change evidences the CCPC's unwillingness to accept parties' simple assertions that a transaction is not problematic.

The CCPC's approach to the form of commitments required from parties has evolved from being primarily structural to one that blends behavioural and hybrid remedies where appropriate. This reflects the practice of the Commission in EU cases. Previously, there was a perception that behavioural remedies were less effective than structural remedies, that they generated uncertainty, and that the need for monitoring was problematic.[42] However, while maintaining a preference for divestures,[43] the Commission has demonstrated an increasing willingness to adopt other forms of remedies (particularly in decisions on digital mergers).[44] Similarly, the CCPC's approach appears to indicate a slight preference for structural commitments where feasible, but an even greater willingness to explore behavioural commitments than the Commission. Of the fourteen cases in which remedies were accepted from 2020–24, six cases involved structural commitments,[45] six cases contained behavioural commitments,[46] and two cases relied on hybrid commitments.[47] It should be noted that the CCPC does not

[42] Massimo Motta, Michele Polo & Helder Vasconcelos, *Merger Remedies in the EU: An Overview,* 52 Antitrust Bull. 603, 605 (2007), doi: 10.1177/0003603x0705200310; Ariel Ezrachi, *Behavioural Remedies in EC Merger Control – Scope and Limitations*, 29 World Competition 459, 461 (2006), doi: 10.54648/woco2006032.

[43] Christopher Cook, Vladimir Novak & Sven Frisch, *Recent Developments in EU Merger Remedies*, 9 J. Eur. Competition L. & Prac. 403 (2018), doi: 10.1093/jeclap/lpy036.

[44] Claire Turgot, *Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime*, 5 Eur. Competition & Reg. L. Rev. 112, 120 (2021), doi: 10.36862/eiz-672. *See* e.g., Case M.8306 – *Qualcomm/NXP*, C(2018) 167 final (2018), Case M.8314 – *Broadcom/Brocade*, C(2017) 3370 final (2017) and Case M.8124 – *Microsoft/LinkedIn*, C(2016) 8404 final (2016).

[45] M/24/011 – *Lloyds Pharmacy/McCabes Pharmacy*; M/23/065 – *Phey Topco/Trasmore; Uniphar/LXV Remedies (Sam McCauley), supra* n. 38; M/22/067 – *Thorntons Recycling/Carducci Holdings (The City Bin Co.)*; M/21/071 – *Tesco Ireland/Joyce's Supermarkets* and M/21/016 – *Pandagreen/Exomex*.

[46] M/23/010 – *BWG/Tuffy Wholesale; Synch Payments, supra* n. 31; *Bank of Ireland/Certain Assets of KBC, supra* n. 31; M/20/005 – *ESB/Coillte (JV)*; M/21/024 – *Orpea/FirstCare* and M/19/034 – *CVC Funds/Celtic Rugby DAC*.

[47] *Q-Park/Tazbell Services, supra* n. 34 and *BWG/McCarrick Brothers Wholesale, supra* n. 41.

generally classify whether the remedies are structural, behavioural, or a hybrid, and the distinction between each can be a fine one in certain cases. For example, *Orpea/FirstCare* and *CVC Funds/Celtic Rugby DAC* required the parties to notify future transactions to the CCPC which is strictly a behavioural requirement but is motivated by structural concerns. As an aside, this author would argue that this commitment to notify acquisitions voluntarily in future is extremely useful and should be applied much more frequently to prevent against creeping acquisitions and as an effective means to bring non-notifiable transactions to the authority's attention (while also bolstering its new 'call-in' powers).

As referenced, there is still a slight preference towards structural remedies given their immediacy and the lack of any monitoring attached to them, hence their application in both cases requiring remedies in 2024. Similarly, structural remedies are the clearly preferred mode of commitments in waste disposal markets.[48] Further, the reliance on behavioural remedies may be marginally inflated in the five year period by the financial market transactions which relied on commitments such as ensuring interoperability for other competitors, preventing the exchange of commercially sensitive information, as well as the very novel commitment by Bank of Ireland to make EUR one billion in total funding available to certain non-bank lenders through the purchasing of securities issued by them in order to increase their funding capacity and reduce their cost of funding.[49] In addition, Bank of Ireland agreed to make EUR one million in funding available for distribution to companies involved in developing innovations relevant to the market for the provision of mortgages in the state. These cases were notably complex and the CCPC's ability to develop original, implementable commitments in tandem with the parties is an excellent example of how smaller NCAs can operate effectively and strive for strong remedies on markets that ultimately protect consumers' interests. The CCPC's ability to extract extensive structural and behavioural remedies is also testament to an intensive and rigorous review of transactions that has become established practice, and which again provides a useful illustration of the potential for NCAs outside of the traditionally more powerful agencies in the UK, Germany, and France.

One final important point to note is the possible difference in clearance time when parties put forward commitments during Phase One. For example, this approach was taken in *Lloyds Pharmacy/McCabes Pharmacy* and *Uniphar/LXV Remedies (Sam McCauley)*, where both transactions were cleared after extended Phase One investigations. In contrast, *Q-Park/Tazbell Services* took a full year to

[48] *Thorntons Recycling/Carducci Holdings (The City Bin Co.), supra* n. 45 and *Tesco Ireland/Joyce's Supermarkets, supra* n. 45 and M/21/016 – *Pandagreen/Exomex, supra* n. 45.

[49] *Synch Payments, supra* n. 31 and *Bank of Ireland/Certain Assets of KBC, supra* n. 31.

receive clearance. The lesson for notifying parties would seem to be that they, and their advisors, will be rewarded when being forthcoming and taking a proactive approach in identifying potential competition issues and proposing workable solutions. In contrast, seeking to deny the existence of issues or resisting the need for remedies risks causing significant delays that may have unwanted commercial consequences.

5.7 Prohibitions and withdrawn transactions

Prohibitions of notified transactions are extremely rare in Irish merger control, with only five in total since 2003.[50] However, two of those prohibitions (or 40%) have occurred in the period 2020–24 (and more particularly, since 2022, with an unprecedented two prohibitions in three years). To put this in a wider context, the *Uniphar/NaviCorp* prohibition was the first since the CCPC was established in 2014 (having replaced its predecessor, the Competition Authority), with the most recent to this being in 2008.[51] Therefore, two of the five ever prohibitions occurring during the past three years represents an extremely significant shift, demonstrating a more aggressive and interventionist approach by the CCPC. This contrasts with a more reluctant stance amongst comparatively sized NCAs in the EU to adopt this most radical step, but also shows the potential for smaller agencies to interfere to prevent the conclusion of problematic transactions when their procedures are meticulously followed, the remedies offered by parties are insufficient, and the economic analysis being relied on by the authority is comprehensive.

The most recent prohibition related to the Dublin Airport Authority's proposed acquisition of a car park site next to Dublin airport.[52] This case was more straightforward (relatively speaking) because the CCPC found that the DAA would have controlled over 90% of car parking in the vicinity of Dublin airport had the acquisition been approved, and it was of the view that other operators could open the disused site quickly and easily. In contrast, *Uniphar/NaviCorp* represented an interesting and somewhat unexpected decision, as it was the first time a transaction had been prohibited in Ireland where remedies had been offered.[53] The transaction related to the proposed acquisition by Uniphar of

[50] M04/032 – *IBM/SBCS*; M/06/039 – *Kingspan/Xtratherm*; M/08/009 – *Kerry/Breeo*; M/21/079 – *Uniphar/NaviCorp; DAA/Certain Assets of Mr Gerard Gannon, supra* n. 15.

[51] *Kerry/Breeo, supra* n. 50. The Kerry/Breeo prohibition was later overturned by the High Court in *Rye Investments Ltd v. Competition Authority* [2009] IEHC 140.

[52] *DAA/Certain Assets of Mr Gerard Gannon, supra* n. 15.

[53] Paul K. Gorecki, *Merger Control in Ireland After Uniphar/NaviCorp Merger: Improved Procedures, Better Outcomes?*, 44 Eur. Competition L. Rev. 471, 471 (2023).

NaviCorp Limited and its wholly-owned subsidiaries. The CCPC found that it would lead to a substantial lessening of competition in each of the markets for; (1) the provision of buying group services in the state (which would impact choice and prices for retail pharmacies)[54]; and (2) the provision of common management and branding services in the state (where providers would be reduced from 4 to 3 in the market, raising concerns about unilateral effects and harm to retail pharmacies).[55] The decision has faced criticism because the CCPC deemed that the third set of remedy proposals were delivered with insufficient time to be market-tested, and as a result, were not taken into account in its determination.[56] In total, it took one year for a determination to be reached following notification. As with the discussion of remedies in the previous section, the lesson for parties and advisors seems to be that they should approach the CCPC as early as possible with solutions to competition issues that are evident. For example, an Assessment was issued by the CCPC on 21 September 2022, and then several sets of proposals were submitted by the parties from 8 November to 14 December 2022. In contrast, parties' remedies could have been proposed in Phase One or early in Phase Two which would have obliged the CCPC to consider these in the context of the Assessment (thereby providing more detailed guidelines to the parties as to what would likely be acceptable in terms of commitments, rather than commencing these discussions at a late stage in the process). Further, it is submitted that the prohibition decision sent a clear message that the CCPC is unwilling to be dictated to by advisors in terms of reviewing material. Former Chief Economist to the Commission, Tommaso Valletti, has written about the 'unbalanced tug of war' between competition authorities and large companies able to employ extensive teams of lawyers and economists.[57] The CCPC's resources are limited, and its refusal to consider the final set of proposals demonstrates a strong stance against the possibility of parties using delaying tactics to force the regulator into accepting unsatisfactory remedies due to having insufficient time to analyse them. This is a very positive development and one which other NCAs in the EU should seek to replicate as the levels of resources between agencies and corporate entities becomes increasingly tilted towards the latter.

In addition to an increase in the CCPC's propensity to prohibit transactions, there has also been an observable trend of parties withdrawing transactions.

[54] Buying groups negotiate discounts and supply terms with suppliers of pharmaceutical products on behalf of their member pharmacies.

[55] Common management and branding services are provided by pharmacy symbol/franchise groups and include services such as branding, store design, and business intelligence and reporting.

[56] *Uniphar/NaviCorp, supra* n. 50, para. 9.71.

[57] Tommaso Valletti, *How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews* (ProMarket 28 Jun. 2021) www.promarket.org/2021/06/28/tech-block-merger-review-enforcement-regulators (accessed 29 Nov. 202).

Withdrawals often indicate that parties believe the CCPC is likely to prohibit a transaction in its determination and want to avoid the negative publicity associated with this. Therefore, the statistics on prohibitions may be deflated somewhat by this tendency. In total, there were four fully withdrawn transactions that were not re-notified.[58] Two of these cases were withdrawn during the Phase One investigation,[59] while the other two were withdrawn at a much later point during full investigations.[60] The *Link Group/Pepper* proposed transaction involved two leading providers of loan servicing in the state. The CCPC undertook extensive examinations at Phases One and Two, issuing substantial RFIs to the merging parties. It communicated its preliminary competition concerns during Phase Two and engaged in discussions with the parties, after which they announced that the notification was being withdrawn. In *East Cork Oil/Misty Lane*, the CCPC had issued an Assessment setting out its preliminary conclusion that the proposed acquisition would likely result in a substantial lessening of competition in regional markets around particular depots for; (1) the supply of kerosene (home heating oil); (2) the supply of Sulphur Free Gas Oil (agricultural or 'green' diesel); and (3) the supply of road diesel, all of which was to small customers. While East Cork Oil informed the CCPC that it did not agree with its preliminary conclusions, it subsequently withdrew the notification. As mentioned, the latter two cases in particular have the hallmarks of transactions that were ultimately likely to be prohibited, and the parties pre-empted this through withdrawals. Interestingly, East Cork Oil had acquired Tara Oil and Rimbrook successfully in 2015 and 2019 respectively, with both being cleared in less than six weeks. The Assessment of the Misty Lane acquisition exemplifies the CCPC's stricter approach that is evident over the last five years.

Combined with the withdrawal of transactions, the CCPC has also required several notifying parties to re-notify transactions due to procedural errors.[61] The CCPC observed that 2022, in particular, was notable for the number of transactions withdrawn following expressions of concern by the CCPC that information provided by parties in the notification, or in response to an RFI, was false or misleading in a material respect; that full details were not provided in the notification; or that all of the information required was not provided in response to an RFI.[62] Pursuant to section 18(12) of the 2002 Act, the CCPC has the power to

[58] M/22/063 – *Windsor Motors / certain assets of Green Cars (t/a Agnelli Motor Park)*; M/22/015 – *East Cork Oil/Misty Lane*; M/22/025 – *The Agricultural Trust/Irish Garden* and M/20/003 – *Link Group/Pepper.*

[59] *Windsor Motors/certain assets of Green Cars (t/a Agnelli Motor Park)*, *supra* n. 58 and *The Agricultural Trust/Irish Garden, supra* n. 58.

[60] *East Cork Oil/Misty Lane, supra* n. 58 and *Link Group/Pepper, supra* n. 58.

[61] M/23/056 – *Lloyds Pharmacy/McCabes Pharmacy; Synch Payments, supra* n. 31; M/22/017 – *Linnaeus Veterinary / Blackhall Facilities* and M/22/037 – *Thorntons Recycling/Carducci Holdings (The City Bin Co.).*

[62] CCPC Mergers and Acquisitions Report 2020, para. 3.4.

deem a notification invalid if it is of the opinion that the full details required have not been provided.[63] Hence, parties choose to withdraw and re-submit transactions which restarts the merger review process.[64] The fact that the CCPC is increasingly vigilant in terms of addressing procedural errors or refusing to accept unsatisfactory responses to RFIs is an important development in its own right and a further example of the more interventionist approach being adopted. As it points out, incomplete, inaccurate or misleading information impinges on its ability to make a sound determination, therefore, the CCPC is understandably rigorous (particularly regarding RFIs, where it has specifically requested information it deems relevant, such as in *Lloyds Pharmacy/McCabes Pharmacy* which required a re-notification due to non-compliance with an RFI).[65] As the CCPC notes, it welcomes pre-notification discussions with parties and these represent a clear means of avoiding the need to re-notify.[66] However, while this openness by the CCPC is to be welcomed, it risks creating an even greater burden on the regulator and an expectation of hand-holding through the merger review process.

5.8 Sectors

There is no particularly discernible pattern that has emerged in terms of the markets in which transactions have been taking place over the last five years, with a considerable level of variance annually. However, it is notable that professional services was the most active market in each of the last three years, accounting for 13–15% of notifications in each of 2022–24. This is unsurprising given Ireland's nature as a services-based economy, as well as the digital and financial hubs in the capital that are served by undertakings in various professional service markets. Similarly, there were a number of transactions in the information and communications sector in the years 2020 and 2023 (with nine and six notifications respectively), reflecting the prominence of digital businesses in Ireland. Further, the financial and insurance services sector was represented strongly across the five year period, and particularly from 2021–23 where there were twenty-four transactions in total (representing 15% of the total notifications in 2021). This figure is particularly high as a result of the withdrawal of Ulster Bank and KBC from the Irish market which led to four separate notifications.[67] These cases required very

63 Competition Act 2002 (as amended), s. 18(12).
64 CCPC Mergers and Acquisitions Report 2020, para. 3.1.
65 *Ibid.*, para. 3.4.
66 *Ibid.*, para. 3.6.
67 *AIB/Certain Assets of Ulster Bank, supra* n. 31; M/21/076 – *PTSB/Certain Assets of Ulster Bank*; M/22/044 – *AIB/Certain Mortgage (Tracker) Assets of Ulster Bank* and *Bank of Ireland/Certain Assets of KBC, supra* n. 31.

extensive resources for the CCPC to address them comprehensively. However, the cases represent excellent case studies for other NCAs in the ECN given the importance of the exiting banks to the domestic market and the financial services sector generally. Further, they raised interesting questions in terms of how to deal with counterfactuals when two undertakings indicate their intention to exit the market simultaneously. The determinations reflect the CCPC's studied awareness of the limitations of the role of a competition authority in these situations, which is not to prevent unwanted exits from the market, but rather, to prevent a substantial lessening of competition arising from the acquisition of the undertakings' assets. In addition, there was the interesting joint venture between Bank of Ireland, Allied Irish Banks, plc and Permanent TSB which provides a helpful precedent for other NCAs in terms of crafting novel and effective remedies in markets that are being digitized.[68] Finally, there were 3–5 media mergers each year from 2020–24 (with twenty-two in total, or 6.5% of all notifications). They were generally cleared during Phase One, with the exceptions of *Formpress Publishing/D&D Media* (which was cleared after a Phase Two investigation) and *The Agricultural Trust/Irish Garden* (which was withdrawn).

6 ARTICLE 22 EUMR AND THE ROLE OF NCAs

As referenced, the CJEU's ruling in *Illumina* in September 2024 has changed the landscape considerably.[69] The CJEU overruled the General Court's judgment and found that the Commission's interpretation of Article 22 EUMR exceeded its intended scope and interfered unduly with undertakings' right to business certainty. Thus, NCAs are no longer permitted to refer transactions that they themselves do not have jurisdiction to review pursuant to national merger rules.

The ruling has placed the CCPC in an interesting position, particularly as a result of its new 'call-in' powers. As a European agency that appears to have been generally supportive of the expansive use of Article 22 EUMR, the question arises whether it will aid in plugging the 'gap' that has re-emerged. In light of Ireland's position as a digital and pharmaceutical hub, and the fact that numerous multinational companies have a European presence in the country, it would seem to be situated favourably to adopt a more active role in such cases. Further, its 'call-in' powers mean that it is one of the few jurisdictions with an effective tool to gain jurisdiction over sub-threshold transactions. This new power does not require the CCPC to demonstrate any turnover or presence of the target in the state, but rather, that the transaction *may* impact competition at the national level. Given the

68 *Synch Payments, supra* n. 31.
69 *Illumina v. Commission, supra* n. 1.

global nature of the digital and pharmaceutical sectors, this is unlikely to be a difficult barrier to overcome.

The sense that Ireland will play an enhanced role in challenging such transactions is reinforced by the European merger cases that the CCPC acknowledges it has observed closely over the last five years. The authority notes that it followed attentively all the cases to which it was a referral party, as well as the *Illumina/GRAIL* case. This demonstrates its keen awareness of the Article 22 EUMR issue and its implications, as well as the challenges of below-threshold mergers. In addition, one also observes the CCPC's clear focus on digital cases recently, such as *Booking Holdings/Etraveli Group, Amazon/iRobot, Adobe/Figma*, and *LSEG/Refinitiv Business*.[70] This perhaps offers an insight into the sectors in which it may use its enhanced powers to review acquisitions, which appears logical given the strong presence of technology companies in the state (thereby granting the CCPC a connection that other European NCAs may not be able to establish). Therefore, the diminishment of the effectiveness of Article 22 EUMR and Ireland's prominent digital and pharmaceutical sectors make it likely that the CCPC will use its 'call-in' powers in these areas over the coming years on transactions that may have previously been suited to a referral to the Commission.

7 INITIATIVES TO AID UNDERTAKINGS AND LINGERING ISSUES

7.1 Initiatives to facilitate more efficient reviews

The CCPC has demonstrated itself as being acutely aware of the need for business certainty and, despite the increasing levels of rigour in examining compliance with procedural matters and potential competition issues over the past five years, does not represent an overly obstructive presence. In this regard, the Irish authority has consistently stressed the need for efficiency in a merger regime and for businesses to have confidence that notifications will be dealt with in a timely manner, particularly where no significant competition issues arise.[71] As the CCPC points out, 'ensuring that mergers which may raise competition concerns are properly scrutinized and effectively dealt with does not preclude the operation of an efficient merger control regime'.[72] This author would argue that a subtle and knowledgeable balance has been struck between efficient facilitation of transactions and the protection of consumers' interests in ensuring competitive markets.

[70] CCPC Mergers and Acquisitions Report 2023, para. 2.3 and CCPC Mergers and Acquisitions Report 2020, para. 2.3.

[71] CCPC Mergers and Acquisitions Report 2020, at 1; CCPC Mergers and Acquisitions Report 2023, at 2.

[72] CCPC Mergers and Acquisitions Report 2022, at 2.

To facilitate the efficient operation of merger control, the CCPC has developed several initiatives, the most significant being the introduction of the SMNP in July 2020. The operation of the SMNP has created significant efficiencies for businesses and is likely to become even more prominent as advisors' awareness and knowledge of the procedure have evolved. Its introduction also evidences the CCPC's clear commitment to developing a coherent and streamlined merger regime.

In addition to the SMNP, the CCPC's recent published support for pre-notification discussions with parties is to be commended.[73] While such discussions may ultimately increase the burden on the CCPC, the authority has recognized the benefits to undertakings in facilitating them. As it states, the CCPC 'strongly encourages parties to engage in pre-notification discussions' in all cases other than those where there is no overlap at all in the parties' activities.[74] Further, it particularly encourages discussions where there are overlaps in the activities or sectors involved as this will ensure a more seamless review process by flushing out potentially relevant matters. Therefore, such discussions enable parties to decide whether they can avail of the SMNP; assist in clarifying the information and supporting evidence the CCPC will require in the Notification Form; inform the parties about preparing the Notification Form; and provide the undertakings with an opportunity to provide a description of the nature of competition on the markets involved.[75] From the CCPC's perspective, it will also facilitate it in becoming aware of proposed transactions that might be suitable for the 'call-in' procedure. The process is relatively simple, whereby undertakings are required to submit a written briefing paper of a maximum five pages about the proposed transaction at least two working days in advance of the meeting, along with any relevant agreement or heads of terms. Thus, it is not an onerous obligation yet offers significant potential benefits to parties.

7.2 Undertakings' complaints about merger review in Ireland

The biggest lingering issues that undertakings and advisors put forward against merger control in Ireland are delays in informing parties about the CCPC's theories of harm and the lack of transparency about the threshold for a transaction to proceed to a Phase Two investigation. Both issues were raised by the American Bar Association in its submission on the proposed new merger guidelines.[76]

73 Guidance Note on Pre-Notification Merger Discussions, 27 Sep. 2023.
74 *Ibid.*, para. 1.6.
75 *Ibid.,* para. 1.7.
76 American Bar Association Antitrust Law Section, *supra* n 7.

These issues were recently addressed by the CCPC in its determination in *Uniphar/NaviCorp* where it noted the wide latitude in assessments granted to it under the 2002 Act. In its view, the authority's statutory mandate gave it a 'wide margin of appreciation' in carrying out its duties of assessing whether there is any SLC and how to remedy it,[77] and that this margin extends to when the CCPC informs parties of its theories of harm. As it pointed out, there is no statutory obligation to provide feedback prior to the issuance of the Written Assessment.[78] This position is supported by Cooke J's judgment in *Rye Investments Ltd. v. Competition Authority*, where he held that the CCPC's specialist expertise means that the Irish courts should not intervene simply because it would have reached a different conclusion.[79]

The CCPC's reluctance to share its immediate competition concerns with parties at an early stage has been criticized, most notably by Paul Gorecki (formerly a Member of the Irish Competition Authority).[80] Gorecki's criticisms are in the context of the *Uniphar/NaviCorp* prohibition where he contends that the parties' may have been able to propose acceptable remedies had they received formal confirmation of the CCPC's working theories of harm prior to its Assessment in September 2022 (three months before the Determination).[81] His contention is that 'if the parties are unaware of the CCPC's competition concerns until the Assessment, how are they to develop remedy proposals at an earlier stage to mitigate the agency's concerns?'.[82]

The author's response to this is threefold. Firstly, as the CCPC pointed out in *Uniphar/NaviCorp*, the parties can enter discussions concerning remedy proposals at any time from the *date of notification*.[83] In doing so, they would gain clearer indications as to the details of the competition concerns. Yet the parties chose not to do so until after the Assessment was issued. What Gorecki fails to acknowledge is that there is an element of tactics involved in this, whereby parties avoid putting forward remedy proposals until as late as possible with the objective of unconditional clearance. Secondly, and tied to this, Gorecki seems to underestimate the level of understanding that one can expect from the teams of advisors (both legal and economic) working on these multi-million euro transactions. In paying for this expertise, parties should expect advisors to be able to anticipate the likely competition concerns without having to be informed of them in granular detail so that they can begin proposing remedies. For example, the *Uniphar/NaviCorp* transaction involved a market concentrating from four

77 *Uniphar/NaviCorp, supra* n. 50, paras 1.62–1.63.
78 *Ibid.,* para. 1.77.
79 *Rye Investments Ltd v. Competition Authority, supra* n. 51, para. 5.21.
80 Gorecki, *supra* n. 53.
81 *Ibid.,* at 473–74.
82 *Ibid.,* at 473.
83 *Uniphar/NaviCorp, supra* n. 50, para. 1.78 (emphasis added).

to three operators, which is an obvious concern across NCAs. While the markets involved were somewhat novel meaning there were no exact precedents to rely on (and therefore, the author agrees to a certain extent that the CCPC could have informed the parties a little earlier of its working theories of harm),[84] the fundamental competition principles were not. Thirdly, theories of harm evolve through the investigation process as competition authorities assess evidence. Therefore, expecting an authority to tie itself to a clear and rigid theory is unreasonable. Further, if the CCPC receives remedy proposals at an earlier stage then it can consider them alongside the evidence, which creates efficiencies. Thus, from this author's perspective, the emphasis should be on parties to be more proactive in proposing remedies at an early stage, rather than holding back perceived bargaining chips until late in the process. After all, its role is to review transactions, not to signpost how the parties can circumvent the process by offering as little in return as possible for clearance of their merger.

While this author believes the CCPC's approach towards disclosing theories of harm is entirely justifiable, Gorecki may be correct when he advocates aligning more closely with the International Competition Network's Recommended Practices for Merger Notification and Review.[85] This could involve more informal meetings, particularly around the time of the decision to proceed to Phase Two, where parties could be given non-binding indications of the initial competition concerns. This may also generate efficiencies in the review process by getting to the crux of issues sooner. However, as set out above, this should be in response to parties' proactive efforts to engage in solution-focused discussions intended to correct potential competitive harms from the transaction or assuage the CCPC's concerns. Where such bona fide efforts are forthcoming (as opposed to fishing expeditions by parties to gauge how meagre the remedies they could get away with would be), then the ICN's approach has merit (while it would also benefit in synchronizing Ireland's procedures with other jurisdictions in the network). However, the author would disagree with Gorecki's other justification for providing feedback earlier in the process, namely, to give parties the option to withdraw their notification.[86] The primary purpose of this appears to be in protecting undertakings' reputations (who could avoid the negative connotations of a prohibited transaction). It is submitted that this is an entirely unjustified consideration for a competition authority, and one which no weight should be placed on. Firstly, there is very little to be gained by the CCPC in terms of resources from parties withdrawing a notification if it has carried out a substantial part of its investigation

84 Gorecki, *supra* n. 53, at 473–74.
85 *Ibid.*, at 474.
86 *Ibid.*, at 475.

already. Secondly, merger review in Ireland benefits from published Determinations, and especially prohibition decisions, as they provide informative precedents for the CCPC, future parties, and other NCAs. Thus, aiding the withdrawal of notifications to protect parties' market reputations is erroneous, and rather, consumers should be made aware of the intention by parties to concentrate markets and the CCPC's role in guarding against this.

In terms of the threshold for proceeding to Phase Two, the author would disagree with the contention that the bar for this is too low.[87] Under the CCPC's procedures, it does so where it is 'unable on the basis of the information before it to form the view that the result of the merger or acquisition will not be to substantially lessen competition in markets for goods or services in the state'.[88] As stated above, the role of the CCPC is to review transactions and assess whether there are potential competition concerns. Its purpose is not to establish a convincing case in this regard, hence the important margin of appreciation in carrying out its work. Rather, it is for the *parties* to demonstrate that a transaction is benign. Where they fail to do so convincingly, it is reasonable for the CCPC to proceed to Phase Two so that it can be confident it is protecting adequately the interests of consumers. Thus, the burden should remain as it is instead of placing a mistaken obligation on competition authorities to search for reasons and make a strong case for proceeding to Phase Two. This interpretation and approach would appear to be supported by the CJEU's judgment in *CK Telecoms* when it re-asserted the Commission's margin of discretion and annulled the General Court's judgment which would have radically changed the burden of proof in EU competition cases.[89]

8 FUTURE DEVELOPMENTS

Based on the CCPC's activity over the last five years, this author would assert confidently that rigorous Phase Two investigations will remain a feature of Irish merger control. In tandem, the next five years will likely see the issuance of more Assessments in cases following full oral hearings, given the CCPC's emerging experience and expertise in such procedures (such as *East Cork Oil/Misty Lane, Synch* and *Phoenix/Cellnex*). Alongside thorough investigations, extensive remedies

87 *Ibid.*, at 476.
88 CCPC, Mergers and Acquisitions Procedures, 1 Aug. 2023, para. 3.1.
89 Case C-376/20 P – *Commission v. CK Telecoms*, ECLI:EU:C:2023:561. For analysis of the General Court's decision, *see* Richard Bunworth, *CK Telecoms UK Limited v. Commission – a Significant Impediment to Effective Protection,* 52(3) IIC – Int'l Rev. Intellectual Property & Competition L. 283–295 (2021), doi: 10.1007/s40319-021-01031-3. On the CJEU decision, *see* Giorgio Monti, *EU Merger Control After the Grand Chamber's Judgment in Commission v. CK Telecoms Investments*, 47 World Competition 1 (2024), doi: 10.54648/woco2024001.

from parties in transactions that create competition concerns will be evident. Further, it is anticipated that the Irish authority will continue to develop novel remedies in cases, such as those in the *Synch* and *Q-Park* cases discussed above. When sufficient proposals are not put forward to remedy competition issues raised by a transaction, or are not advanced in a timely manner to allow for them to be assessed comprehensively, the CCPC has shown its willingness to prohibit transactions. This reliance on the ultimate sanction will remain evident as the Irish authority has dispelled the myth or apprehension around prohibitions by its recent decisions in *DAA plc/Certain Assets of Mr Gerard Gannon* and *Uniphar/NaviCorp*. Indeed, the withdrawal of *East Cork Oil/Misty Lane* demonstrates a recognition of this by parties.

While transacting parties should begin to anticipate the need for more extensive remedies in future cases (and become more proactive in proposing same), a less apparent development may arise in the nature of theories of harm being relied on. It is notable that two of the EU cases the CCPC acknowledged following closely, *Amazon/iRobot* and *Booking Holdings/Etraveli Group*,[90] involved novel ecosystem theories of harm. It is submitted that this may indicate an expectation of the need to apply an ecosystem theory in an Irish merger case in the next five years.

The other major development that will emerge is likely to be the CCPC's reliance on the new 'call-in' powers. This author would expect that at least one transaction will be 'called-in' each year at a minimum. In addition, the CCPC has indicated that it will release guidance providing greater transparency for parties on how it will use its new 'call-in' powers. The guidance, as well as actual case practice, will be instructive for other NCAs, and the CCPC could look to play a leading role in the ECN on this issue (particularly given the fact that a number of other NCAs are adopting similar powers).[91] Further, as set out in section 6 (*Article 22 EUMR and the role of NCAs*), this author anticipates that the 'call-in' powers will be used in at least one high-profile digital or pharmaceutical case that would have previously been reviewed by the Commission relying on Article 22 EUMR. As a result of the CCPC's ability to 'call-in' mergers (even after they have been consummated), it is suggested that there will likely be an increase in voluntary notifications by transacting parties seeking certainty. In addition, there will be a continued focus on procedural issues relating to the Notification Form and responses to RFIs (evidenced by the increasing number of transactions being re-notified), as well as the CCPC's new powers to address gun-jumping by parties. In relation to gun-jumping, the CCPC may seek to pursue a case in this area to

[90] Case M.10920 – *Amazon/iRobot* and Case M.10615 – *Booking Holdings/Etraveli Group*.

[91] Darach Connolly et al., *Predictably Uncertain: Managing Merger Control Call-in Risk at Local Level in the EU* (Kluwer Competition Law Blog 1 Apr. 2025).

establish a prohibitive precedent that discourages parties from engaging in such behaviour. It is also likely that we will begin to see the use of interim measures in cases of voluntary or 'call-in' notifications.

Finally, the CCPC is likely to publish its new merger guidelines in 2025. As it acknowledges, 'international practice for merger analysis has seen significant change to take account of new markets and developments'.[92] Thus, there could be some notable changes, particularly so in relation to the theories of harm it applies to evolving markets in future, as well as market definition practices.

9 KEY TAKEAWAYS FOR ADVISORS AND NCAS

9.1 CONSIDERATIONS FOR LEGAL AND ECONOMIC ADVISORS

Due to the CCPC's new 'call-in' powers, there is a heightened level of execution risk for parties with Irish activities, meaning they must consider thoroughly whether to voluntarily notify sub-threshold transactions to mitigate the risk of a transaction being 'called-in' by the CCPC. If they choose not to, the transaction documents should clearly account for the allocation of risk if a transaction is 'called-in' and the impact of any delays, as well as for the possibility of the transaction eventually being prohibited.

Further, the CCPC may also bring summary proceedings against merger parties for gun-jumping in situations where they complete a deal after notifying it but prior to its approval. Therefore, it is likely that parties' actions following notification will face increased scrutiny to ensure they do not involve any form of integration between the merging parties.

Overall, Irish merger control is a rigorous procedure. Advisors must adapt to the increasingly interventionist approach of the CCPC by engaging in pre-notification discussions; ensuring the Notification Form is given due attention and RFIs are responded to comprehensively; and being proactive and forthcoming with well-thought out and effective remedy proposals. By engaging at an early stage and in an open manner with the CCPC, demonstrating a willingness to identify competition concerns alongside the regulator and formulate solutions, the review process will be more efficient and likely to lead to preferable outcomes for parties. However, if they resist by avoiding the disclosure of pertinent information, offer only the most limited remedies, and delay engagement in an effort to place timing pressure on the CCPC, then they run the risk of transactions being prohibited. A prudent approach for merging parties to adopt would be to employ their

[92] CCPC Mergers and Acquisitions Report 2024, at 1.

external legal and economic advisors to carry out comprehensive competition and economic analysis of the deal prior to notification to avoid delays later on.

9.2 Considerations for the CCPC and other NCAs

Observing the number of Phase Two investigations conducted over the past five years, this author proposes two courses of action. Firstly, the CCPC should, through the ECN, engage with similarly sized NCAs in discussions on how it manages caseload resources with a view to gaining efficiencies. Secondly, it may benefit from a stricter delineation internally between mergers and other competition enforcement to ensure the latter receives due attention. There are further organizational adjustments that the CCPC could make to reflect when most cases are notified. The evidence over the last five years demonstrates clearly that more cases are notified in the second half of each year (as companies seek to close deals prior to the year-end). Therefore, the CCPC should consider employing additional reviewers in the second half of each year (for example, through an internship programme where interns review only SMNP cases). An initiative along these lines would ease the burden on the CCPC during its busiest periods in ensuring it meets deadlines and conducts its investigations with the thoroughness required. As mentioned, the CCPC has done an exceptional job of adhering to the tight deadlines under the 2002 Act, but given the obvious increase in its caseload over the last five years, it would benefit from additional resources to guarantee its ability to continue carrying out its role at the established high level it has set. Finally, the CCPC should engage in continuous dialogue with other NCAs in the ECN and with the ICN Mergers Working Group regarding how they are addressing below-threshold transactions and utilizing 'call-in' powers. In addition, it should consider strongly imposing commitments on transacting parties to voluntarily notify transactions in future years to retain visibility over below-threshold transactions.

10 CONCLUSION

In the past five years, Irish merger control has become a more exacting and complex process. The CCPC has been tasked with reviewing a consistently high number of transactions annually, but increasingly they are required to conduct lengthy Phase Two investigations. The SMNP has been hugely successful in reducing the timeline for clearance of mergers that do not raise any competition concerns, while the CCPC has demonstrated an ability to review transactions across a range of sectors and of differing values clearly and effectively.

Broadly speaking, Irish undertakings benefit from engaging with an informed competition authority that possesses significant expertise. It has established itself as one of the foremost smaller NCAs within the ECN, addressing competently some enormously complex transactions such as the *Synch* joint venture or the withdrawal of two of the biggest banks from the Irish market. It is likely that it will become an even more prominent enforcer within the ECN when it may become responsible for assessing some high-profile, below-threshold mergers in digital or pharmaceutical markets. Based on the evidence of the past five years, it will do so with competence, precision, and clarity.