

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Ireland****27 November 2018**

This document reproduces a written contribution from Ireland submitted for Item 5 of the 130<sup>th</sup> OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

[www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm](http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm)

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**JT03439251**

## *Ireland*

### **1. Introduction**

1. This submission has been prepared by the Irish Competition and Consumer Protection Commission (“the CCPC”) for consideration at the OECD Competition Committee Roundtable on 27-28 November 2018, with reference to the questions annexed to the Chairman’s letter of 11 July 2018 and the Background Note by the Secretariat of 4 October 2018.
2. Section 2 below contains a discussion of the current legislation in the Irish State, i.e., the relevant sections of the Competition Act, 2002, as amended;
3. Section 3 below provides an overview of the experience of the CCPC’s predecessor, the Competition Authority, of gun-jumping, pre-amendments brought about by the Competition and Consumer Protection Act 2014; and
4. Section 4 below deals with the CCPC’s experience of gun-jumping post the 2014 amendments, mentioned above.

### **2. Gun Jumping – An Irish Perspective**

#### **2.1. Competition Act 2002**

5. Part 3 of the Competition Act 2002, as amended (“the 2002 Act”), which was amended by, inter alia, the Competition and Consumer Protection Act 2014 (“the 2014 Act”), deals specifically with mergers and acquisitions and requires undertakings to notify certain mergers or acquisitions (i.e., those that meet specified financial thresholds in the Irish State and media mergers) to the CCPC.
6. The amendments to Part 3 of the 2002 Act, which were introduced by the 2014 Act, as mentioned above, came into operation on 31 October 2014 pursuant to Competition and Consumer Protection Act 2014 (Commencement) Order 2014 (S.I. No. 366 of 2014). In particular, the financial thresholds specified in section 18(1) of the 2002 Act, pursuant to which the undertakings involved in a proposed merger or acquisition are obliged to notify the CCPC of the proposal to put the merger or acquisition into effect, were amended by the 2014 Act.<sup>1</sup>
7. Section 16 of the 2002 Act sets out what constitutes a merger and/or acquisition. Section 18(1) of the 2002 Act imposes an obligation on the undertakings involved in such a proposed merger or acquisition to notify the CCPC of the proposal to put such merger or acquisition into effect. Pursuant to section 18(1A) of the 2002 Act, such notification shall be made before the proposed merger or acquisition is put into effect and pursuant to section

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<sup>1</sup> The CCPC was established on 31 October 2014 after the National Consumer Agency and the Competition Authority were dissolved and amalgamated pursuant to sections 38 and 39 of the 2014 Act. By virtue of section 39 of the 2014 Act, references to the Competition Authority in any Act of the Oireachtas (Irish Parliament) passed before the establishment day of the CCPC, namely 31 October 2014, shall, on and after that day, be construed as references to the CCPC.

18(9) of the 2002 Act, it is a criminal offence for an undertaking or person in control of an undertaking to contravene section 18(1) of the 2002 Act. Section 18(10) of the 2002 Act provides for separate offences for each day the contravention of section 18(1) of the 2002 Act continues. Section 19 of the 2002 Act provides that where a proposed merger or acquisition is put into effect before the CCPC has issued a clearance determination (or before the statutory period for the CCPC to issue a determination has lapsed) the merger is void. Annex A of this report contains further information on the relevant legislative provisions.

8. The offences set out in sections 18(9) and 18(10) of the 2002 Act are often referred to as “gun-jumping”, which is a term commonly used to refer to either:

1. the failure by the undertakings involved in a proposed merger or acquisition to notify to a competition authority such merger or acquisition, which is required under law to be notified, before putting it into effect, or
2. where such undertakings notify a proposed merger or acquisition to the relevant competition authority but begin to put it into effect before clearance has been issued by the relevant competition authority.

## 2.2. Legislative Provisions

### 2.2.1. The Obligation to Notify the CCPC

9. Under Part 3 of the 2002 Act, proposed mergers and acquisitions exceeding a specified financial threshold must be notified to the CCPC for review prior to being put into effect.

#### 2.2.1.1 Definition of a merger or acquisition

10. Section 16(1) of the 2002 Act provides that:

*“a merger or acquisition occurs if—*

- (a) two or more undertakings, previously independent of one another, merge, or*
- (b) one or more individuals who already control one or more undertakings, or one or more undertakings, acquire direct or indirect control of the whole or part of one or more other undertakings, [...]*”

11. Sections 16(2) and 16(3) of the 2002 Act set out what amounts to ‘control’ of an undertaking.

#### 2.2.1.2 The financial thresholds

12. Section 18(1) of the 2002 Act provides that:

*“Where –*

- (a) In relation to a proposed merger or acquisition, in the most recent financial year –*
  - (i) the aggregate turnover in the State of the undertakings involved is not less than €50,000,000, and*
  - (ii) the turnover in the State of each of 2 or more of the undertakings involved is not less than €3,000,000, or*

*(b) a proposed merger or acquisition falls within a class of merger or acquisition specified in an order under subsection (5),*

*each of the undertakings involved in the merger or acquisition shall notify the Commission in writing, and provide full details, of the proposal to put the merger or acquisition into effect.”*

### 2.2.1.3 When a merger or acquisition is required to be notified

13. Section 18(1A) of the 2002 Act states:

*“A notification under subsection (1) –*

*(a) shall be made before the proposed merger or acquisition is put into effect, and*

*(b) may be made after any of the following applicable events occurs [...]*

*(ii) the undertakings involved demonstrate to the Commission a good faith intention to conclude an agreement or a merger or acquisition is agreed [...]*”

### 2.2.1.4 Who is required to notify

14. Section 18(1) of the 2002 Act requires each of the undertakings involved in a proposed merger or acquisition to notify the CCPC in writing and provide full details of the proposal to put the merger or acquisition into effect.

15. Section 3(1) of the 2002 Act provides that:

*“‘undertaking’ means a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits, shall include an association of undertakings.”*

16. The terms “*undertakings involved*” and “*undertakings involved in a merger or acquisition*”, used in Part 3 of the 2002 Act, are not defined in the 2002 Act. The CCPC has set out its interpretation of these terms in guidance documents published on the CCPC’s public website.

17. The CCPC’s Merger Notification Form (dated 31 October 2014), which is published on the CCPC’s public website<sup>2</sup>, states:

*“In accordance with section 18(1) of the 2002 Act, each of the undertakings involved in a proposed merger or acquisition must notify the Commission in writing of the proposal to put into effect a merger or acquisition that satisfies the conditions set out in section 18(1)(a) or section 18(1)(b) of the 2002 Act. The Act does not define what are the “undertakings involved”. However, the Commission’s Notice in respect of certain terms used in Part 3 of the Competition Act 2002 sets out the Commission’s understanding of this term for the purposes of section 18(1).”*

18. The Notice referred to in the CCPC’s Merger Notification Form is the *Notice in respect of certain terms used in Part 3 of the Competition Act 2002, as amended* (dated 31 October 2014), which is also published on the CCPC’s public website

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<sup>2</sup> For further information, please see: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/CCPC-Merger-Notification-Form.pdf>

(<https://www.ccpc.ie/>).<sup>3</sup> The CCPC’s Notice is based on similar notices previously published by the CCPC’s predecessor, the Competition Authority. Article 2(2) of the CCPC’s Notice outlines the CCPC’s understanding that the terms “*undertakings involved*” and “*undertakings involved in the merger or acquisition*”, as used in section 18(1) of the 2002 Act, means: “*the entire group of undertakings to which an undertaking party to a proposed transaction belongs*”. Article 2(3) of the CCPC Notice clarifies that, in the case of the acquisition of part (i.e., the target) of an undertaking: “*the turnover only of the target (whether or not it is constituted as a separate legal entity) shall be taken into account on the vendor’s side of the transaction for the purposes of section 18(1)(a)*”.

19. The CCPC’s approach to interpreting the concept of the undertakings involved in a merger or acquisition is consistent with the EU merger control rules, which use the term “*undertakings concerned*”, and the decisional practice of the European Commission and the jurisprudence of the EU courts in this regard.<sup>4</sup>

## 2.2.2. Sanctions

### 2.2.2.1 The Criminal Offence and Penalties

20. Section 18(9) of the 2002 Act provides<sup>5</sup>:

*“Where there is a contravention of subsection (1) or section 20(2) an undertaking, or the person in control of an undertaking, which has failed to notify the Authority within the specified period or failed to supply the information required within the period specified by the Authority, as the case may be, shall be guilty of an offence and shall, subject to subsection (10), be liable—*

*(a) on summary conviction, to a fine not exceeding €3,000,*

*(b) on conviction on indictment, to a fine not exceeding €250,000. “*

### 2.2.2.2 Continued Contravention and Penalties

21. Section 18(10) of the 2002 Act provides:

*“Subsection (9) operates so that if the contravention concerned continues one or more days after the date of its first occurrence, the undertaking or person referred to in that subsection is guilty of a separate offence under that subsection for each day that the contravention occurs; but in respect of the second or subsequent*

<sup>3</sup> For further information, please see: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/CCPC-Mergers-Notice-in-respect-of-certain-terms-used-in-Part-3-1.pdf>

<sup>4</sup> In accordance with the provisions of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and the guidance set out in the European Commission’s Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, at paragraphs 129 to 153.

<sup>5</sup> Prior to Part 3 of the 2014 Act coming into operation on 31 October 2014, section 18(9) of the 2002 Act provided that a person in control of an undertaking who had contravened section 18(1) of the 2002 Act was guilty of an offence, i.e., the undertaking itself was not guilty of an offence. The 2014 Act amended section 18(9) of the 2002 Act such that an undertaking which contravenes section 18(1) of the 2002 Act is guilty of an offence.

*offence of which he or she is guilty by reason of that continued contravention, subsection (9) shall have effect as if—*

- (a) in paragraph (a), ‘€300’ were substituted for ‘€3,000’,*
- (b) in paragraph (b), ‘€25,000’ were substituted for ‘€250,000’.*”

### **2.2.2.3 Criminal Liability of Individuals**

22. Section 18(11) of the 2002 Act provides a definition of the term “*person in control of an undertaking*” for the purposes of section 18(9) of the 2002 Act. Section 18(11) of the 2002 Act provides that:

*“For the purposes of subsection (9), the person in control of an undertaking is –*  
*(a) in the case of a body corporate, any officer of the body corporate who knowingly and wilfully authorises or permits the contravention, [...].”*

### **2.2.2.4 Voidness of a merger or acquisition**

23. Where a proposed merger or acquisition is required to be notified to the CCPC pursuant to section 18(1) of the 2002 Act, the notification must be made before the proposed merger or acquisition is put into effect, as required by section 18(1A) of the 2002 Act.

24. Pursuant to section 19(1) of the 2002 Act, any such proposed merger or acquisition shall not be put into effect until the CCPC issues a determination to clear the merger or acquisition either unconditionally or subject to conditions (or until the statutory period for the CCPC to reach a determination has elapsed). If a proposed merger or acquisition is put into effect in contravention of section 19(1) of the 2002 Act, such proposed merger or acquisition is void pursuant to section 19(2) of the 2002 Act.

## **2.2.3. Investigation and Prosecution**

### **2.2.3.1 CCPC Investigation**

25. Section 10(1) of the 2014 Act provides:

*“The Commission shall have, in addition to the functions assigned to it by any other provision of this Act, or of any other enactment, the following functions:*

- (a) to promote competition;*
- (b) to promote and protect the interests and welfare of consumers;*
- (c) to carry out an investigation, either on its own initiative or in response to a complaint made to it by any person, into a suspected breach of-*
  - (i) the relevant statutory provisions, that may be occurring or has occurred [...]*”<sup>6</sup>

26. Section 18(1)(d) of the 2014 Act provides that:

*“18.(1) The Commission may, to enable it to perform its functions under this Act, do all or any of the following things: [...]*

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<sup>6</sup> Note that the term “relevant statutory provisions” is defined in section 2 of the 2014 Act and, pursuant to paragraph (b) of that definition, includes the 2002 Act.

*(d) by notice in writing, require any person or undertaking to provide it with such written information as the Commission considers necessary to enable it to carry out its functions.”*

### 2.2.3.2 Power to prosecute

27. The Director of Public Prosecutions can prosecute offences (whether on a summary basis or on indictment) under section 18(9) of the 2002 Act. Section 18 of the 2002 Act does not directly confer on the CCPC a power to bring a summary prosecution in respect of offences under section 18(9) of the 2002 Act. Nonetheless, the CCPC will work with the DDP to prosecute offences under section 18(9) of the 2002 Act.

### 2.2.3.3 Limitation period

28. An offence under section 18(9) of the 2002 Act is known as a “hybrid offence” as it can be tried summarily or on indictment. There is no limitation period for the initiation of proceedings in relation to an offence under section 18(9) of the 2002 Act by virtue section 177 of the Criminal Justice Act 2006.

## 3. Pre-2014 – The Competition Authority

### 3.1. Previous Legislative Provisions

29. Prior to the amendments to the 2002 Act (at the end of October 2014), the legislation provided for:

1. a proposed merger or acquisition had to be notified to the Competition Authority when, in the most recent financial year:
  - i. each of two or more of the undertakings involved had a worldwide turnover of €40 million;
  - ii. each of two or more of the undertakings involved carries on business in any part of the island of Ireland<sup>7</sup>; and,
  - iii. at least one of the undertakings involved generated not less than €40 million turnover within the Irish State.
2. a notification to the Competition Authority had to be submitted within 1 month after the conclusion of an agreement in respect of a merger or acquisition or after the making of a public bid; and

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<sup>7</sup> With respect the ‘carries on business’ test, an interpretation of this phrase was given by the Competition Authority in Notice in respect of certain terms used in Part 3 of the Competition Act 2002 (N/02/003): “The Competition Authority understands this phrase to include undertakings that either -

(a) have a physical presence on the island of Ireland (including a registered office, subsidiary, branch, representative office or agency) AND make sales and/or supply services to customers on the island of Ireland, OR,

(b) have made sales into the island of Ireland of at least €2 million in the most recent financial year.

3. only a person in control of an undertaking who had contravened the mandatory notification requirement (section 18(1)) was guilty of an offence, i.e., the undertaking itself was not guilty of an offence.

### 3.2. The Competition Authority's experience of gun-jumping (pre-2014)

30. As set out in paragraph 2.1 above, the term 'gun-jumping' may be used to cover a variety of scenarios, including where the undertakings involved in a merger or acquisition which is required to be notified to a competition authority:

- do not submit a notification to the relevant competition authority and proceed to put the merger or acquisition into effect;
- take steps towards putting the merger or acquisition into effect (either fully or partially) and then submit a notification to the relevant competition authority; or
- submit a notification to the relevant competition authority but proceed to put the merger or acquisition into effect (either fully or partially) before receiving the competition authority's decision approving or clearing the merger or acquisition.

31. The Competition Authority, had never investigated suspected gun-jumping whereby the undertakings involved in a merger or acquisition proceeded to put such merger or acquisition into effect without submitting a notification to the Competition Authority (i.e., scenario (a) outlined above). However, on some occasions, the Competition Authority, during the course of its merger review, had become aware that the undertakings involved in a merger or acquisition notified to the Competition Authority had proceeded to put such merger or acquisition into effect (or partially into effect) either: (i) before the merger notification was submitted to the Competition Authority (i.e., scenario (b) outlined above), or (ii) after the merger notification was submitted to the Competition Authority but before the Competition Authority had issued its determination clearing the merger or acquisition (i.e. scenario (c) outlined above).

32. Examples of such merger reviews conducted by the Competition Authority are:

- M/04/003 *Radio 2000/Newstalk 106*<sup>8</sup>, in which a rights issue bringing Radio Two Thousand Limited's shareholding in News 106 Limited to 53.12% closed on 1 October 2003. The transaction was notified to the Competition Authority on 13 January 2004<sup>9</sup>;

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<sup>8</sup> M/04/003 – Acquisition by Radio Two Thousand Limited (t/a 98 FM) of sole control of News 106 Limited (t/a NewsTalk 106 FM), determination of the Competition Authority dated 5 March 2004. A copy of the determination is available at the following link:

[https://www.cpc.ie/business/wp-content/uploads/sites/3/2017/05/m\\_04\\_003\\_p1d.pdf](https://www.cpc.ie/business/wp-content/uploads/sites/3/2017/05/m_04_003_p1d.pdf)

<sup>9</sup> In M/04/003, the Competition Authority indicated that the parties had failed to notify the transaction within the time period set out in section 18(1) of the Competition Act 2002 (the rights issue closed on 1 October 2003 and the transaction was notified more than 1 month later on 13 January 2004).

- M/10/043 *Stena/DFDS*<sup>10</sup>, in which the transaction was completed on 1 December 2010 and was notified to the Competition Authority on 17 December 2010;
- M/11/012 *Jabil/F-I Holding Company*<sup>11</sup>, in which the transaction was completed on 21 February 2011 and was notified to the Competition Authority on 4 April 2011<sup>12</sup>; and
- M/12/031 *Top Snacks/KP Snacks*<sup>13</sup>, in which the transaction was notified on 18 December 2012 and was completed on 25 January 2013 (while the Competition Authority's merger review was ongoing).

33. In two of the aforementioned merger reviews (M/04/003 and M/11/012)<sup>14</sup>, the Competition Authority's determination concluded that there was insufficient evidence to seek a prosecution for an offence under section 18(9) of the 2002 Act, on the basis that the breach of section 18(1) in each case did not appear to have been done knowingly and willfully.<sup>15</sup> However, it is important to note that each of these merger determinations were issued prior to the introduction of the 2014 Act, where only a person in control of an undertaking who had contravened section 18(1) could be prosecuted for an offence, i.e., the undertaking itself could not be prosecuted for an offence. Pursuant to section 18(11) of the 2002 Act, a "*person in control of an undertaking*" is a person who knowingly and wilfully authorises or permits the contravention of section 18(1) of the 2002 Act. Accordingly, in each of the two merger reviews referred to above, the Competition

<sup>10</sup> M/10/043 – Proposed acquisition by Stena AB, through its subsidiary Stena Line (UK) Limited, of certain assets of DFDS A/S, determination of the Competition Authority dated 7 April 2011. A copy of the determination is available at the following link:

<https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M-10-043-Stena-DFDS-Public.pdf>

<sup>11</sup> M/11/012 – Proposed acquisition by Jabil Circuit Netherlands B.V. of sole control of F-I Holding Company, determination of the Competition Authority dated 19 April 2011. A copy of the determination is available at the following link: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M-11-012-Jabil-F-I-Holding-Determination.pdf>

<sup>12</sup> In its determination, the Competition Authority also noted that the parties had failed to notify the Competition Authority within one month after the conclusion of the agreement in which the notified transaction was given effect.

<sup>13</sup> M/12/031 – Proposed acquisition by Top Snacks Limited of the KP Snacks business from United Biscuits (UK) Limited, determination of the Competition Authority dated 22 April 2013. A copy of the determination is available at the following link: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M-12-031-Top-Snacks-KP-Snacks-Public.pdf>

<sup>14</sup> The Competition Authority's determinations in the other two merger reviews referred to (i.e. M/10/043 and M/12/031) do not make any conclusions as to whether the implementation of those transactions gave rise to a potential breach of section 18(1) of the Competition Act 2002.

<sup>15</sup> In M/04/003, the Competition Authority states (at paragraph 5) that: "The Authority... found insufficient evidence to seek a criminal penalty, as it was not apparent that any officer of NewsTalk, Radio 2000 or Communicorp knowingly and wilfully authorised or permitted the contravention, pursuant to section 18(11) of the Act." In M/11/012, the Competition Authority states (at paragraph 4) that: "The notifying parties have explained to the Authority that certain unusual and difficult circumstances gave rise to the failure to notify within the prescribed time limits. The Authority accepts the parties' explanation, and also accepts that whilst there has been a contravention of section 18(1) of the Act, it was not done knowingly or wilfully. Accordingly, no criminal offence has been committed."

Authority had not found sufficient evidence that any person in control of an undertaking had knowingly and wilfully authorised or permitted a contravention of section 18(1) of the 2002 Act.

## 4. Post-2014 – The CCPC

### 4.1. CCPC’s View on Gun-Jumping

34. The CCPC considers that putting a merger or acquisition into effect without notifying the CCPC, in breach of section 18(1) of the 2002 Act, is a very serious contravention as it undermines the effective functioning of the merger regime in the Irish State. The CCPC’s view is that the impact of the voidness provided for in section 19(2) of the 2002 Act does not have a sufficiently strong deterrent effect in itself. If section 19(2) of the 2002 Act were to be relied upon as a reason not to bring a criminal prosecution, the incentives for undertakings involved to comply with the requirements of the merger regime in the first place would be reduced. Not only could this result in potential negative effects on the competitive structure of the market if fewer problematic mergers and acquisitions were to be notified to the CCPC, but it would also have a significant impact on the work and resources of the CCPC arising from a need to increase its activity in the monitoring, detection, investigation and enforcement of suspected breaches of section 18(1) of the 2002 Act. In comparison, the possibility of being convicted of criminal offences under sections 18(9) and 18(10) of the 2002 Act carries a much more significant reputational risk to both the undertakings involved and persons in control of those undertakings and therefore, in the CCPC’s view, has a much stronger deterrent effect.

35. In addition, the CCPC considers that the clear intention of the Oireachtas (Irish Parliament) was that the voidness of a merger or acquisition pursuant to section 19(2) of the 2002 Act is a consequence of a breach of section 18(1) of the 2002 Act which is separate and, potentially, additional to criminal sanctions which may be imposed pursuant to sections 18(9) and 18(10) of the 2002 Act.

36. For these reasons, the CCPC considers that the risk of criminal sanctions being imposed for a breach of section 18(1) of the 2002 Act is an important part of the competition enforcement toolkit and ensures that the Irish merger regime continues to function effectively and efficiently and is complied with.

### 4.2. Approach of CCPC to ‘Gun-Jumping’ Transactions post 2014

#### 4.2.1. Legislative Framework

37. Section 18(12A) of the 2002 Act provides that the CCPC may accept notification of a merger or acquisition to which section 18(1) of the 2002 Act applies but which was purported to have been put into effect without having been notified to the CCPC. Under section 18(12A) the CCPC “*may*” accept a notification in those circumstances, i.e., it is not obliged to do so.

38. Section 18(12A) provides that the CCPC may accept such a notification “*notwithstanding section 19(2)*” of the 2002 Act. The CCPC considers that such wording means that, irrespective of the fact that the merger or acquisition in question is rendered void by virtue of section 19(2) of the 2002 Act, the CCPC may nevertheless accept a notification of such merger or acquisition.

39. Sections 21 and 22 of the 2002 Act oblige the CCPC, in respect of a notification received by it, to make a determination as to whether the merger or acquisition will substantially lessen competition in markets for goods or services in the State. Under section 21(2), the CCPC “*shall*” inform the undertaking from whom the notification was received of its determination at the end of its Phase 1 review of a merger or acquisition, i.e., it is obliged to do so. Similar language appears in sections 22(2) and 22(3) of the 2002 Act with respect to a Phase 2 investigation.

40. Both section 21 and section 22 of the 2002 Act provide that the CCPC shall make a determination “*in respect of a notification received by it*”. These provisions are not restricted to notifications made under section 18(1) of the 2002 Act (i.e., notifications of a proposal to put a merger or acquisition into effect). Equally, these provisions do not exempt the CCPC from making a determination in respect of notifications accepted by the CCPC pursuant to section 18(12A) of the 2002 Act or in respect of mergers or acquisitions which are void pursuant to section 19(2) of the 2002 Act.

41. Therefore: (i) where the CCPC decides to accept notification of a merger or acquisition under section 18(12A) of the 2002 Act, the CCPC considers that it has the power to review such merger or acquisition under Part 3 of the 2002 Act; and (ii) having accepted such a notification, the CCPC would be obliged to reach a determination in relation to such merger or acquisition at the end of its Phase 1 review (either to clear the merger or acquisition in question or to open a Phase 2 investigation) pursuant to section 21(2) of the 2002 Act.

42. On this basis, the CCPC’s view is that it has the power to accept notification of a ‘gun-jumping’ transaction by virtue of section 18(12A) of the 2002 Act and, further, has the power to review a ‘gun-jumping’ transaction under Part 3 of the 2002 Act.

### 4.3. CCPC’s experience with Gun-Jumping

43. Since the introduction of the 2014 Act, the CCPC has issued two determinations relating to a merger or acquisition where the undertakings involved had put such merger or acquisition into effect prior to submitting a notification to the CCPC.

1. **No investigation and no prosecution:** M/16/013 *News & Media/certain assets of Greer Publications*<sup>16</sup>, in which the undertakings involved completed the acquisition on 24 February 2016 and notified the acquisition to the CCPC on 8 March 2016. The CCPC noted in its determination that: “*The Commission accepts that (i) the completion of the transaction was the result of an oversight by the parties, and (ii) upon realising their obligation to notify the proposed transaction the parties contacted the Commission shortly thereafter.*”<sup>17</sup> The CCPC did not open a formal investigation into suspected gun-jumping with respect to that acquisition for the following reasons:

- the undertakings involved contacted the CCPC as soon as they realised that they were obliged to notify the acquisition in question to the CCPC;

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<sup>16</sup> M/16/013 – Proposed acquisition by Independent News & Media Limited of certain assets of Greer Publications, determination of the CCPC dated 8 April 2016. A copy of the determination is available at the following link: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/M-16-013-INM-Greer.pdf>

<sup>17</sup> Ibid, at paragraph 5.

- the gap between the completion of the acquisition in question and the notification to the CCPC was 13 calendar days; and
- the undertakings involved gave commitments to the CCPC and took steps to ensure that the acquired business was not integrated into the acquiring business. The undertakings involved held separate the acquired assets pending the CCPC's review of the acquisition.

2. **Investigation and Prosecution: M/18/020 *Armalou-Spirit Ford/Lillis O'Donnell***, in which the CCPC, on 9 February 2018, received a notification of the acquisition by Armalou Holdings, through Spirit Ford, of Lillis-O'Donnell Motor Company. The notification indicated that, in 2014, the turnover in the State of the undertakings involved in the Transaction exceeded the thresholds specified in section 18(1)(a) of the 2002 Act. The notification also indicated that the Transaction was put into effect on 3 December 2015. The CCPC published an announcement on its website on 16 February 2018 which referred to the notification of the Transaction and stated that the CCPC had accepted the notification and would proceed to review the notification in accordance with the relevant provisions of the 2002 Act.<sup>18</sup>

44. The Transaction was approved by the CCPC on 23 March 2018.<sup>19</sup> In October 2017, the CCPC had commenced an investigation into the suspected breach of the notification requirements under section 18(1) of the 2002 Act, which is an offence under section 18(9) of the 2002 Act. The CCPC considers that its decisions to accept the notification and to approve the transaction did not have the effect of stopping its investigation into alleged gun-jumping. This matter is ongoing and, as such, the CCPC is not in a position to provide further information at this time.

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<sup>18</sup> A copy of the CCPC's announcement is available on its website at the following link: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/02/M.18.020-Merger-Announcement-1.pdf>

<sup>19</sup> A copy of the CCPC's determination in M/18/020 is available on its website at the following link: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2018/02/M.18.020-Public-Determination.pdf>