Merger Control in Ireland: Too Many Unnecessary Merger Notifications?

Paul K Gorecki*

Abstract: The market for corporate control plays an important role in ensuring that assets are deployed in an efficient and effective manner. However, on occasion, mergers might lead to a reduction in competition and a consequent rise in prices and/or other anticompetitive effects. The Competition Act 2002 provides that all mergers that meet certain financial thresholds must be notified to the Competition Authority in order that they are subject to a competitive effects assessment. However, there are concerns that the notification thresholds result in many mergers with little or no nexus to Ireland being notified. While it is the case that the vast majority of merger notifications do not raise competition concerns, Ireland is not out of line with other jurisdictions which have mandatory notification thresholds such as the EU and the US. Nevertheless, that should not lead to complacency. The paper quantifies the impact of reforms made in 2006 and 2007 by the Competition Authority and the Minister of Enterprise, Trade and Employment to the merger notification thresholds. The evidence suggests that these tighter better specified thresholds led to a reduction of at least 40-50 per cent in the number of merger notifications. However, more could be done, albeit probably to a lesser extent than the earlier reforms. Applying the International Competition Network's Recommended Practices for Merger Notification Procedures, a series of proposals are made in the paper for revising the merger notification thresholds to better select mergers with a nexus to Ireland. Such moves should facilitate a more effective and efficient market for merger control by reducing transaction costs involved in the merger process as well as allowing Competition Authority resources to be deployed elsewhere, a not inconsiderable advantage in a period of austerity.

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*Research Professor, Economic and Social Research Institute, Dublin and Department of Economics, Trinity College, Dublin. Prior to joining the ESRI, the author was a Member of the Irish Competition Authority between 2000 and 2008. Helpful comments and suggestions were received from Noreen Mackey and Francis O'Toole. The usual disclaimer applies. Contact email: paul.gorecki@esri.ie.

I. INTRODUCTION

All policies should be reviewed from time to time to ensure that they are being administered in an efficient and effective manner, that they are still relevant, and that they take into account best practice internationally. Merger control is no exception. It performs an important function by discouraging and, if necessary, prohibiting mergers that breach a competition test, such as substantial lessening of competition (SLC), while at the same time encouraging and facilitating pro-competitive mergers. Merger control increases the transaction costs involved in a merger: lawyers advise and economists provide expert reports; competition authorities request information, data and documentation from the merging parties; senior management participate in the process, through, for example, attending meetings with the competition authority.[1] Merger control should only deal with those mergers where competition problems are likely to arise while the quality of the analysis of the competition authority should be sufficient that the distinction between pro- and anti-competitive mergers is successfully drawn. Failure to do so will have adverse effects not only on the market for merger control, by raising transaction costs and creating uncertainty, but also on consumer welfare, since pro-competitive mergers may be discouraged or even prohibited and anti-competitive mergers encouraged or even approved.

Patrick Massey's review of the Irish merger experience is therefore timely.[2] Merger control was radically overhauled in Ireland effective 1 January 2003.[3] Prior to that date merger control was an opaque ministerial decision-making process based on broad public interest criteria with no published, reasoned decisions or any published merger guidelines.[4] Under the Competition Act 2002 merger control switched to the Competition Authority, all merger determinations were published, a competition test, SLC, was employed to judge mergers, and merger guidelines were issued. Close to 500 merger determinations were published between 2003 and 2010; with only three merger prohibition determinations, one of which was appealed and is currently before the Courts.[5] However, Massey's review is also timely because the Competition Act 2002 is being reviewed and hence if there are ways in which the legislative framework can be improved they can be considered by the legislators.

Massey argues merger control in Ireland exhibits very important shortcomings: too many unnecessary notifications and the inadequate quality of merger analysis:

> "A striking feature of the Irish merger regime is the *large volume of apparently unnecessary notifications* involving mergers, which had no competition nexus with Ireland. There is some evidence that the decision to modify its [the

[1] There are of course the administrative costs of the competition authority and third parties might make representations to the competition authority on the merits or otherwise of the merger.

[2] Patrick Massey, *Taking Politics Out of Mergers: A Review of Irish Experience*. 6(4), Journal of Competition Law and Economics, 853-878, (2010).

[3] Massey, *supra* note 2, at 854-856, discusses the background and the changes introduced in the Competition Act 2002 in greater detail.

[4] In a small number of important cases it is true that the Minister referred a merger to the Competition Authority to prepare a report on the competitive impact of the merger, which was published. However, the final decision remained with the Minister.

[5] This is the *Kerry* case referred to below.

> Competition Authority's] interpretation of the legislation has reduced the number of such notifications. Nevertheless, some reform of the notification criteria may be required to further reduce unnecessary notifications."[6]
>
> "*Serious questions* arise regarding the *quality of the [Competition] Authority's analysis* in a number of … cases that raised significant competition concerns. … The appeal hearing in *Kerry* revealed serious shortcomings in the Authority's analysis of efficiencies. … The *Kerry* case also raised questions about the Authority's analysis in respect of countervailing buyer power, entry, and brand repositioning. … The low prohibition rate limits the number of potential false-positive decisions. Three of the five cases considered here … raise the question of possible false negatives."[7]

Although Massey made no proposals for reducing unnecessary notifications, he does make a number of suggestions for improving the quality of the Competition Authority's analysis and for reducing the probability of false positive merger determinations.

The purpose of this and an accompanying forthcoming paper is to carefully consider the serious criticisms made by Massey of the Competition Authority's stewardship of merger control and the accompanying set of proposals to rectify the situation. This paper concentrates on the issue of the volume of merger notifications; the next on the quality of merger analysis. In each case the evidence presented by Massey is examined and in some cases new evidence is introduced and/or Massey's analysis extended.

The paper is organised as follows. Section II addresses the issue of whether too many mergers with little nexus to Ireland are notified to the Competition Authority, taking into account the 2006 and 2007 reforms. If too many mergers are notified transaction costs of mergers are raised needlessly and the public resources of the Competition Authority could be usefully employed elsewhere. Section III proposes a number of additional reforms to the notification criteria so as to better, albeit probably to a lesser extent than the earlier reforms, ensure that mergers which are unlikely to raise competition issues are not notified. Section IV presents some conclusions.

II. TOO MANY UNNECESSARY MERGER NOTIFICATIONS?

Massey argues that a "striking feature" of Irish merger control is the "large number of apparently unnecessary notifications involving mergers, which had no competition nexus with Ireland."[8] It is further stated that this is "not out of line with international experience,"[9] which is explored further in Sections II.A and II.B below. However, Massey does

[6] Massey *supra* note 2, at 877. Emphasis supplied.
[7] Massey *supra* note 2, at 877-888. Emphasis supplied.
[8] Massey, *supra* note 2, at 877. Mergers that meet certain thresholds are required to be notified under the Competition Act 2002. These are discussed further in Sections II.C and II.D below and set out in full on the Competition Authority's website: http://www.tca.ie/EN/Mergers--Acquisitions/When-to-Notify.aspx. Accessed 14 February 2011.
[9] Massey *supra* note 2 at 857. Massey relies on pre-2001 data (at 855, note 3), while in this paper much more recent data is used.

acknowledge that the Competition Authority has taken steps to reduce the scale of the problem, although he does not assess their impact. Sections II.C and II.D below quantify these reforms.

Massey's conclusion appears to be based on the fact that a very small number of merger notifications proceed to Phase II.[10] While Massey is correct that the vast majority of merger notifications are classified as Phase I rather than Phase II (Table 1), the inference that this is a striking feature nevertheless needs to be tested, qualified and explored in order to gain a better appreciation of why it might be a problem and how it can be resolved.

Table 1

Merger Notifications, by Phase I & Phase II, Ireland, 2003-2010.

Year	Phase I (Number)	Phase II (Number)	Total (Number)	Phase I /Total (%)
2003	42	3	45	93.3
2004	78	3	81	96.3
2005	82	1	83	98.8
2006	93	4	97	95.9
2007	67	3	70	95.7
2008	36	2	38	94.7
2009	26	1	27	96.3
2010	44	2	46	95.6

Note: Mergers are dated by the year the notification was made to the Competition Authority. Total excludes the six notifications that were withdrawn or referred to the EU between 2003 and 2009.

Source: Massey, *supra* note 2, Table 1 at 856 and Competition Authority, *Annual Report*, various years.

A. Irish Exceptionalism?

Although it is the case that in Ireland virtually all mergers are resolved at Phase I, is this, in some sense, exceptional? Do other jurisdictions that have mandatory merger notification systems, such as the European Union (EU) or the United States (US), record similar results? If this is the case this does not mean, of course, that efforts should not be made to design better notification criteria so that only mergers that are likely to raise competition concerns are notified. However, it does mean that Ireland is not out of line with other competition authorities.

[10] In general Phase I mergers are those that have to be dealt with in a short time frame (e.g. less than 30 days) that does not in general permit extensive fact finding and economic analysis. A merger requiring such in-depth fact finding and analysis can take an additional 90 days and is referred to as a Phase II investigation.

Table 2

Merger Notifications, Phase I Notifications As A Percentage of Total Merger Notifications, Ireland, European Union and the US, 2003-2010.

Year	Ireland (%)	European Union (%)	United States (%)
2003	93.3	96.0	96.4
2004	96.3	96.7	97.4
2005	98.8	96.7	96.9
2006	95.9	96.3	97.4
2007	95.7	96.2	97.0
2008	94.7	97.0	97.5
2009	96.3	97.9	95.5
2010	95.6	98.5	95.9
Average	95.8	96.9	96.7

Note: For the EU Phase I mergers are recorded as 'First Phase Decision', while Phase II are recorded as 'Phase II Proceedings Initiated' in the data source; for the US total merger notifications are recorded as 'Adjusted Transactions In Which A Second Request Could Have Been Issued', while Phase II mergers are recorded as 'Investigations in Which Second Requests Were Issued'. Total refers to Phase I plus Phase II merger notifications.

Source: Table 1 above for Ireland, European Competition website for EU (http://ec.europa.eu/competition/mergers/statistics.pdf) and, Federal Trade Commission & Department of Justice, Antitrust Division, *Hart-Scott-Rodino Annual Report Fiscal Year 2010* (FTC&DoJ, 2010), Appendix A.

In order to address this issue Table 2 presents for Ireland, the EU and the US, the ratio of Phase 1 mergers to the total of Phase I and Phase II mergers annually for 2003 to 2010. Ireland is not out of line with either the EU or the US in terms of the importance of Phase I mergers, in both of the latter jurisdictions mandatory notification leads to large numbers of mergers being notified that are unlikely to raise competition concerns. On average over the 2003-2009 period Phase I mergers accounted for 96 per cent of all notified mergers in Ireland, and 97 per cent in the EU and the US. In sum, at least in terms of overall proportions, Ireland is not exceptional.

B. Phase I Mergers: No Competition Concerns?

The implicit assumption in the discussion to date is that Phase I mergers are unlikely to raise competition concerns. However, this is not always the case. Phase I mergers are sometimes cleared with binding commitments resulting from proposals made by the parties and/or a substantial competition analysis is undertaken. Clearing a merger subject to commitments at Phase I suggests the merger raises serious competition issues and merits notification; equally mergers, that are cleared at Phase I without commitments, but only after some analysis, merit notification. In this section we explore the extent to which Phase 1 mergers fall into these categories.

In Table 3 Phase I mergers that are either cleared with proposals or cleared after substantial competition analysis but without conditions is presented for Ireland, but in the case of the latter category the estimates by their nature are subjective and almost inevitably err on the low side. In any event, the results suggest that even after netting out Phase I mergers that merit notification using the above two criteria, the vast majority of merger notifications do not appear to raise competition issues.

Table 3

Merger Notifications, by Phase I Mergers That Raised Competition Concerns, Ireland, 2003-2006.

Col (1) Year	Col (2) Phase I Total (Number)	Col (3) Phase I Cleared with Commitments (Number)	Col (4) Phase 1 Raised Competition Concerns but Cleared w/o Proposals (Number)	Col. (5) Total (Phase I + Phase II) (Number)	Col (6) Phase I Less Columns (3+4) /Total (%)
2003	42	1	1	45	88.9
2004	78	1	0	81	95.1
2005	82	5	1	83	91.6
2006	93	0	2	97	93.8

Note: Mergers are dated by the year the notification was made to the Competition Authority. Total excludes the four notifications that were withdrawn or referred to the EU between 2003 and 2006.

Source: Massey, *supra* note 2, Table 1 at 856, Competition Authority, *Annual Report*, various years, and P. K. Gorecki, C. Keating, & B. O'Connor, *The Role of Economic Evidence in Merger Control in Ireland: Current and Future Practice*, 3(2) European Competition Journal, Appendix at 370-372, 2007.

An alternative approach is to compare Ireland with the EU excluding Phase I mergers that receive conditional clearance from Phase 1 mergers.[11] In the case of Ireland and the EU it is Phase 1 mergers less those cleared with commitments. In both cases the result is expressed as a percentage of total merger notifications. In some years for Ireland (i.e. 2006, 2008, and 2009), but not for the EU no mergers receive conditional clearance at Phase I (Table 4). In any event the conclusions drawn above do not change in any material way. The vast majority of mergers do not appear to merit notification on competition grounds in either the EU or Ireland.

Table 4

Merger Notifications, by Phase I & Phase II, Ireland, 2003-2010.

Year	Phase I/Total Ireland (%)	Phase I less Phase I Cleared with Commitments/ Total Ireland (%)	Phase I/Total EU (%)	Phase I less Phase I cleared with Commitments/ Total EU (%)
2003	93.3	91.1	96.0	91.0
2004	96.3	95.1	96.7	91.7
2005	98.8	92.8	96.7	91.7
2006	95.9	95.9	96.3	92.5
2007	95.7	92.8	96.2	91.8
2008	94.7	94.7	97.0	91.4
2009	96.3	96.3	97.9	92.6
2010	95.6	93.5	98.5	93.4
Average	95.8	94.0	96.9	92.0

Note: Mergers are dated by the year the notification was made to the Competition Authority. Total excludes the six notifications that were withdrawn or referred to the EU between 2003 and 2009. For the EU Phase I mergers are recorded as 'First Phase Decision', while Phase II are recorded as 'Phase II Proceedings Initiated' in the data source; Total refers to Phase I plus Phase II merger notifications. Conditional clearances in Ireland and the EU are Phase I mergers cleared with commitments.

Source: Table 1 above for Ireland, and European Competition website for EU (http://ec.europa.eu/competition/mergers/statistics.pdf.

It should be noted, however, that the Competition Authority, like other competition authorities, strives to reduce the costs imposed on the notifying parties in mergers that raise

Comparable data do not appear to be readily available for the US.

[11]This is the same approach as used by Massey supra note 2 at 857.

little or no competition concerns. In a pre-merger notification meeting with the Competition Authority, for example, the merging parties might request that certain parts of the notification form need not be completed given the characteristics of the merging parties and the markets in which they operate. Indeed, the Competition Authority signals this possibility in its published pre-merger guidance.[12]

C. Reducing the Number of Unnecessary Notifications: Raising the Threshold

The Competition Authority, as Massey notes, has moved to reduce the number of notified mergers that are unlikely to raise competition concerns and therefore do not merit notification. However, Massey does not explore the change or estimate the likely impact of the change. This is important since it may provide an indication of how to revise the notification criteria in order to further reduce the number of mergers that are unlikely to raise competition concerns.

Under Section 18(1)(a) of the Competition Act 2002 mandatory notification applies to all mergers that meet the following criteria:[13] if, in the most recent financial year,

> (a) the world-wide turnover of each of 2 or more of the undertakings involved in the merger or acquisition is not less than €40,000,000,
>
> (b) each of 2 or more of the undertakings involved in the merger or acquisition carries on business in any part of the island of Ireland, and
>
> (c) the turnover in the State of any one of the undertakings involved in the merger or acquisition is not less than €40,000,000.

While the thresholds in (a) and (b) are defined in the Competition Act 2002, the term "carries on business in any part of the island of Ireland" is not defined in the legislation. The Competition Authority thus issued a notice in 2003 setting out its interpretation of the term: to "include undertakings which have sales into the island of Ireland without having a physical presence within the island of Ireland."[14] Thus if an undertaking with sales of in excess of €40 million in Ireland (conditions a, b and c), acquired an undertaking that had sales into the island of Ireland of (say) €40,000 or even €400 (condition b as interpreted by the Competition Authority), but had a worldwide turnover of €50 million (condition a), then the mandatory

[12] On the Competition Authority's website under 'Pre-notification discussions', the Competition Authority states that, "[T]he Authority may also waive completion of parts of the Merger Notification Form. Parties who do not wish to complete parts of the Merger Notification Form should contact the Authority." For details see: http://www.tca.ie/images/uploaded/documents/Pre-notification%20discussions.pdf. Accessed 14 February 2011.

[13] Under Section 18(1)(b) if "the merger or acquisition falls within a class of merger or acquisition specified in an order under *subsection (5)"* then it also has to be notified. This is discussed further in the Section II.D below on media mergers.

[14] Competition Authority, *Notice in Respect of Certain Terms Used in Section 18(1) of the Competition Act 2002 (As amended 18 February 2003)*, Decision No. N/02/003. (Competition Authority, 2003).

notification thresholds were met, even though the acquired firm had little if any nexus to Ireland – a few euro internet sales were sufficient.[15]

When the Competition Authority set out its interpretation of the term carries on business in 2003 it cast the net widely in order to ensure that all mergers that were likely to raise competition concerns were captured. However, as experience with that interpretation grew it became apparent to the Competition Authority that many mergers were being notified with little or no nexus to Ireland. As a result on 12 December 2006 the Competition Authority, after consultation, revised its interpretation of the term "carries on business" 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.[16]

The purpose was to ensure that mergers notified to the Competition Authority had a nexus or connection with Ireland.

Although there was a decline in the number of merger notifications subsequent to the change in the Competition Authority's interpretation of "carries on business" (Table 1), the decline cannot be attributed solely to this change, since as Massey notes[17] there were other factors that likely explained the decline, such as the global recession, the credit crunch and the seizing up of capital markets. A simple comparison of merger notifications before and after the 12 December 2006 is thus of limited usefulness.

In order to predict the level of merger notifications that would have occurred without the Competition Authority's change in the interpretation of "carries on business", the EU and the US are used as benchmarks. It is assumed that the Ireland/EU and Ireland/US ratio of merger notifications would have remained unchanged, but for the change in interpretation by the Competition Authority. In other words, the assumption is made that the determinants of merger notifications are broadly similar across these jurisdictions; all that differs is the scale. There is some evidence to support this in that many of the mergers notified under the Competition Act 2002 involve parties with activities located mainly outside of Ireland.[18]

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[15] In one case the "value of the sales of one of the undertakings involved into the country was less than the fee for notifying the merger." N. Mackey, *Improving Merger Control in Ireland: Proposed Legislative Reforms Four Years On*. Paper presented at Competition Authority sponsored conference on Merger Control in Ireland: Prospect and Retrospect, Croke Park Conference Centre, Dublin, 11 April 2007. This paper may be accessed at: http://www.tca.ie/images/uploaded/documents/Improving%20Merger%20Control%20-%20Noreen%20Mackey.pdf. Accessed 16 February 2011.

[16] Competition Authority, *Notice in Respect of Certain Terms Used in Section 18(1) of the Competition Act 2002 (As amended 12 December 2006)*, Decision No. N/02/003. (Competition Authority, 2006).

[17] Massey, *supra* note 2, at 857.

[18] For details see: (a) I. Bah & L. NiChualladh, *The Curious Tale of Pigs, Papers and Peru: Media Mergers in Ireland*, Figure 1 at 12, in reference to media mergers. Paper presented at Competition Authority sponsored conference on Merger Control in Ireland: Prospect and Retrospect, Croke Park Conference Centre, Dublin, 11

Table 5

Merger Notifications, Actual and Predicted, Based on EU and US Benchmarks, Ireland, 2003-2010.

Year	Ireland/ EU (Ratio of the Number of Mergers Notified)	Ireland/ US (Ratio of the Number of Mergers Notified)
2003	45/223 = 0.2018	45/968 = 0.0465
2004	81/240 = 0.3375	81/1377 = 0.0588
2005	83/301 = 0.2757	83/1610 = 0.0515
2006	97/349 = 0.2779	97/1746 = 0.0555
Average	0.2732	0.0531
	Ireland Mergers Notified (Number) **Actual Predicted** **(EU Benchmark)**	**Ireland Mergers Notified (Number)** **Actual Predicted** **(US Benchmark)**
2007	70 109	70 112
2008	38 92	38 88
2009	27 66	27 36
2010	46 75	46 60

Note: The number of mergers notified is the total of all Phase I and Phase II mergers. See notes to Tables 1 and 2 above. The number of mergers notified in the EU for 2007 to 2010 was 401, 336, 243, and 271; for the US the corresponding numbers were 2108, 1656, 684 and 1128 respectively. The predicted number of mergers for 2007 to 2010 is defined as the average Ireland/EU and Ireland/US ratio of number of mergers notified for 2003 and 2006, multiplied by the number of mergers notified in the EU and the US, respectively.

Source: Table 1 above for Ireland, European Competition website for EU (http://ec.europa.eu/competition/mergers/statistics.pdf) and, Federal Trade Commission & Department of Justice, Antitrust Division, *Hart-Scott-Rodino Annual Report Fiscal Year 2010* (FTC&DoJ, 2010), Appendix A.

April 2007. This paper may be accessed at: http://www.tca.ie/images/uploaded/documents/Pigs,%20Papers,%20Peru%20-%20Ibrahim%20Bah.pdf. Accessed 16 February 2011; and (b) McCann FitzGerald, *Review of Irish Merger Control 2003-2010* (McCann FitzGerald, 2011) at 5 in reference to all mergers between 2003 and 2010. This may be accessed at: http://www.mccannfitzgerald.ie/McfgFiles/knowledge/4080-Review%20of%20Irish%20Merger%20Control%20Decisions%20of%202003-2010_0.pdf. Accessed 4 March 2011.

The results of applying the above approach are presented in Table 5 above. The Ireland/EU and Ireland/US ratio of the total number of mergers notified is estimated for 2003-2006, based on actual mergers notified. The annual average is then used to predict merger notifications in Ireland for 2007-2010, based on mergers notified in the EU and US over that period. Hence, for example, given that the average ratio of Ireland/EU merger notifications for 2003 to 2006 was 0.2732 and the number of mergers notified in the EU in 2007 was 401, then the predicted number of mergers being notified in Ireland in the absence of the change in the interpretation of the term carries on business would have been 109 (i.e. 0.2732 x 401).

There has been a dramatic decline in the number of notified mergers due to the Competition Authority's change in its interpretation of the terms carries on business – between 40 per cent (using the US as a benchmark) and 50 per cent (using the EU as a benchmark).[19] The predicted number of mergers for Ireland, using either the EU or the US as a benchmark, is very similar for 2007 and 2008 and to a lesser extent in 2010, but for 2009 there is a considerable disparity. It is not clear why the disparity occurred for 2009, since there do not appear to have been any large changes in the merger notification thresholds in either the EU or the US between 2008 and 2009.[20] In any event the evidence suggests that the Competition Authority's revision of its interpretation of the term carries on business led to a substantial decline in the number of merger notifications.

D. Reducing the Number of Unnecessary Notifications: Media Mergers

There was another move to reduce the number of unnecessary merger notifications which related to media mergers only, since these are treated differently under the Competition Act 2002 from mergers in other sectors of the economy. This important development is not referred to in Massey's paper, but nonetheless is relevant in terms of reducing the number of unnecessary notifications and provides a basis for some suggestions as to possible further reforms to reduce the number of notifications with little nexus to Ireland in Section III. Media mergers accounted for 21 per cent of the total number notifications over the period 2003-2010, more than any other sector. [21]

Under Section 18(1)(b) of the Competition Act 2002, mergers or acquisitions that fall within a class of merger or acquisition specified in an order by the Minister for Enterprise, Trade and

[19] Based on the annual average of the ratio of (predicted-actual)/predicted.

[20] The US thresholds in the Hart-Scott-Rodino Antitrust Improvement Act of 1976 are adjusted annually to reflect changes reflecting in gross national product. Hence between 2008 and 2009 the threshold changed from to $63.1 million to $62.5 million. (For details see Federal Trade Commission & Department of Justice, Antitrust Division, *Hart-Scott-Rodino Annual Report Fiscal Year* (FTC&DoJ) various years). The EU merger thresholds remained unchanged during the period 2006 to 2009. However, the increase in the size of the EU - in 2004, when 10 new Member States joined, and 2007 when two new Member States joined, is likely to have resulted in an increase in the number of mergers notified, since one of the notification criteria under EU merger control refers to the number of Member States in which the merging parties are involved subject to certain turnover thresholds.

[21] For details see McCann FitzGerald, *Review of Irish Merger Control 2003-2010*, *supra* note 18, at 5. The economy was divided into the following industries, with the percentage of merger notifications accounted for by the sector in parenthesis: construction/building supply (6 per cent); pharma/healthcare (7 per cent); retail/leisure/travel (8 per cent); food and beverage (9 per cent); other (10 per cent); industrial (including energy) (13 per cent); banking/finance/insurance (13 per cent); IT/telecoms (13 per cent); and, media (21 per cent).

Employment (the Minister) must be notified to the Competition Authority. To date only one class has been specified: media mergers.[22] The Minister in a 2002 Order defined the class as "all mergers or acquisitions in which one or more of the undertakings involved carries on a media business in the State regardless of the turnover of the undertakings involved."[23] This led to media mergers notified to the Competition Authority that had little or no nexus to Ireland. Thus if Independent News and Media plc (INM), which carries on a media business in the State, since it is a leading newspaper publisher, were to acquire a sausage factory in Peru, under the 2002 Order the transaction would be notified![24]

Acting on a suggestion by the Competition Authority, the Minister revoked the 2002 Order and issued a new Order in 2007,[25] which specified that undertakings involved in,

(a) mergers or acquisitions in which two or more of the undertakings involved carry on a media business in the State, and
(b) mergers and acquisitions in which one or more of the undertakings involved carries on a media business in the State and one or more of the undertakings involved carries on a media business elsewhere must be notified to the Competition Authority.

In other words, if an undertaking carries on a media business in the State and it acquires another media business either in the State (condition (a) in the 2007 Order) or anywhere else in the world (i.e. condition (b) in the 2007 Order) then in both cases the merger is classified as a media merger and should be notified. The hypothetical INM example above would no longer be notified as a media merger because the pig factory is not a media business,[26] but if INM purchased Lima's *El Comercio* that transaction would have to be notified as a media merger.[27]

The issue arises of the degree to which the move from the 2002 Order to the 2007 Order resulted in a decline in the number of media mergers that were notified to the Competition Authority. While there has been a decline in the number of media mergers notified to the Competition Authority, particularly for 2008 and 2009, before recovering somewhat in 2010 (column 3, Table 6), this is of limited value in evaluating the impact of the 2007 Order since the total number of merger notifications also fell (column 2, Table 6). One way of avoiding

[22] A media merger is defined in Section 23 Competition Act 2002 as "a merger or acquisition in which one or more of the undertakings involved carries on a media business in the State." A media business is also defined in the same section as "(*a*) a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs, (*b*) a business of providing a broadcasting service, or (*c*) a business of providing a broadcasting services platform."
[23] Statutory Instrument No. 622 of 2002 Competition Act 2002 (Section 18(5)) Order 2002.
[24] This hypothetical example is taken from I. Bah & L. NiChualladh, *The Curious Tale of Pigs, Papers and Peru: Media Mergers in Ireland*, *supra* note 18. The authors also provide some actual merger notifications as examples in their paper.
[25] Statutory Instrument No. 122 of 2007 Competition Act 2002 (Section 18(5) and (6)) Order 2007, which became effective on 1 May 2007.
[26] The merger may, however, be subject to the notification criteria set out in Section II.C above.
[27] Of course, the issue arises as to whether in such cases the merger would in fact be notified in Ireland. If an undertaking distributed a few newspapers in Ireland or a broadcaster's programmes were distributed to a night time audience of several 100 via cable, the firm may be unaware that if they made an acquisition outside of Ireland of a media business that under the 2007 Order (and the 2002 Order) that the merger should be notified in Ireland.

this problem is to express media mergers as a percentage of total mergers. This, of course, assumes that the determinants of media and non-media mergers are the same. The 2007 Order would thus cause media mergers that would have been notified to be no longer notified, so that the share of media mergers in relation to total notified mergers should, other things equal, decline. As shown in column 4, Table 6 there appears to be a pronounced decline in the share of media mergers, although for 2007 this is not the case.[28] Media mergers accounted, on average, for 23.6 per cent of total mergers notified between 2003 and 2006 declining to an average of 14.9 per cent between 2007 and 2010.

Table 6

Media Mergers, Merger Notifications, Ireland, 2003-2010.

Col (1) **Year**	**Col (2)** **Total Notifications (Number)**	**Col (3)** **Media Merger Notifications (Number)**	**Col (4)** **Ratio of Media to Total Mergers (%)**	**Col (5)** **Ratio of Media Mergers to Total Mergers (Actual (2003-2006) and Predicted (2007-2009)) (%).**
2003	45	12	26.7	26.7
2004	81	14	17.3	17.3
2005	83	23	27.7	27.7
2006	97	22	22.7	22.7
Average	-	-	23.6	23.6
				Predicted Total **EU US** **Benchmark**
2007 (May-Dec)	55	12	21.8	16.4 15.2
2008	38	5	13.2	5.4 5.7
2009	27	2	7.4	3.0 5.5
2010	46	8	17.4	10.7 13.3

Note: Mergers are dated by the year the notification was made to the Competition Authority. Total excludes the six notifications that were withdrawn or referred to the EU between 2003 and 2009. Predicted total number is presented in Table 4 above. The 2007 Order became effective on 1 May 2007.

[28] In this context it should be noted that media mergers share of all notified mergers for the period 1 January to 1 May 2007 was 33.3 per cent. Details concerning the composition of mergers is taken from Competition Authority, *Annual Report 2007* (Competition Authority, 2008) Appendix B, at 83-86.

Source: Massey, *supra* note 2, Table 1 at 856 and Competition Authority, *Annual Report*, various years, Table 5 above.

A difficulty with this approach is that it assumes that other things remain equal concerning the total merger notifications comparing 2003-2006 with subsequent years. However, from the discussion in Section II.C above we know that this is not the case, since the Competition Authority changed its interpretation of "carries on business" leading to a decline in the total number of merger notifications.[29] Hence in order to correct for this we use the predicted total number of mergers from Table 5 where the EU and the US were used as benchmarks. When this is done the decline in the share of media mergers for 2007 to 2009 is much more dramatic (column 5, Table 6). The share of media mergers falls from 23.6 per cent over 2003 to 2006, to 8.9 per cent (EU benchmark used) or 9.9 per cent (using the US as a benchmark) over 2007-2010.

Nevertheless, there is a further issue that needs to be addressed in examining the results in Table 6. There could be a structural or cyclical decline in the number of media mergers greater than that for non-media mergers, so that some of the decline recorded in Table 6 could be due to the fact that there are simply less media mergers.[30] We use evidence from the US where the composition of mergers notified is presented by industry group. The industry group 'Information' is used to approximate media. It is recognised that this is unlikely to be an exact match, since although Information includes newspapers, periodicals, and broadcasting, it also includes book and software publishers as well as internet service providers which do not appear to be covered by the definition of a media business.[31] Hence the results should be viewed with some caution.

The share of all mergers in the US which are accounted for by Information is presented in Table 7. The data is presented in two ways: first, by the acquirer or buyer; and second, by the acquired entity or target. Ideally of course the data should be related to the share of all mergers in which the buyer and the target were in Information, not just one or the other. In any event Table 7 suggests that there has been a reduction in the importance of Information mergers in the US post 2006, although it is more marked for buyers than sellers, suggesting that non-Information firms are buying Information firms. In terms of the concerns in this paper it probably better therefore to rely on the importance measured in terms of mergers measured by acquiring firm. This annual average share has declined from 13.2 per cent over 2003-2006 to 9.0 per cent over 2007-2010.

[29] The change in interpretation of carries on business applied only to non-media mergers.
[30] For example, there may have been a rationalisation of local newspapers and radio stations that was in the nature of a one-off restructuring.
[31] See footnote 22 *supra* for the definition of a media business.

Table 7

Information Industry Group Merger Notifications As A Percentage of Total Merger Notifications, US, 2003-2010.

Year	By Acquiring Person (%)	By Acquired Entity (%)
2003	12.6	14.4
2004	13.5	11.1
2005	12.4	14.7
2006	14.3	9.1
2007	9.8	13.5
2008	8.3	8.2
2009	8.5	11.3
2010	9.5	11.0

Note: Total merger notifications are recorded as 'Adjusted Transactions In Which A Second Request Could Have Been Issued.' The Information Industry Group is defined at the 2-digit level of the North American Industrial Classification System.

Source: Federal Trade Commission & Department of Justice, Antitrust Division, *Hart-Scott-Rodino Annual Report Fiscal Year* (FTC&DoJ), Tables X and XI, various years.

In sum, the change in the definition of the class of media mergers by the revocation of the 2002 Order and its replacement by the 2007 Order has led to a substantial decline in the number of media mergers, but a portion of this is probably due to decline in the importance of media mergers, independent of the change in the definition of a media merger.

III. PROPOSALS FOR REDUCING UNNECESSARY MERGER NOTIFICATIONS

Any merger control regime has to strike a balance between casting the notification net too wide to ensure that all possible anticompetitive mergers are notified and casting it too narrowly, causing some anticompetitive mergers not to be notified. Arguably, and for understandable reasons, in Ireland the net was cast widely in the years immediately following the transfer of merger control from the relevant Minister to the Competition Authority on 1 January 2003. However, changes have taken place in 2006 and 2007 to reduce the number of mergers notified eliminating those that are likely to have little in the way of an effect on competition. These changes have reduced the number of mergers notified by at least 40 to 50 per cent. However, there are further changes that can sensibly take place that will reduce the number of notified mergers even further, albeit probably to a lesser extent than the earlier reforms.

The International Competition Network (ICN) has developed recommended practices (RPs) for merger notification procedures.[32] The first set of three RPs refers to identifying mergers that have a nexus to the jurisdiction:

A. Jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned.
B. Merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification.
C. Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.

In this section these RPs are used as the basis to make a series of proposals to improve the current merger notification criteria. These proposals, by and large, flow from the discussion in the previous section.

A. Redefining "Carry on Business on the island of Ireland"

In terms of the Competition Authority's interpretation of the phrase "carries on business" it could be argued that there is an inconsistency in that a firm with a physical presence and making sales in the island of Ireland has no lower limit set on the volume of sales it must make, whereas a firm located outside of Ireland has to make sales of at least €2 million. Arguably a firm with a physical presence in the island of Ireland (as opposed to the Republic of Ireland - i.e., the State) but with zero or only a few euros of sales is unlikely to be conducting or carrying on business or have "appreciable competitive effects within" Ireland.[33] Indeed, it might be more appropriately characterised as dormant.

Hence consideration could be given to redefining the Competition Authority's current interpretation of "carries on business," with the proposed changes in italics:

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

This revision could be accompanied by the Competition Authority examining the incidence of mergers that raised competition concerns by the level of sales to determine if there is a threshold level of sales at which a merger is likely to have an appreciable effect on

[32] For details see ICN, *Recommended Practices for Merger Notification Procedures.* See: http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf. Accessed 10 March 2011.
[33] The phrase is taken from the ICN *Recommended Practices for Merger Notification Procedures, supra* note 32.

competition. Competition concerns would include: Phase I mergers cleared with proposals, Phase I mergers cleared without proposals but that required some analysis of competitive effects; and all Phase II mergers. The Competition Authority has four years experience with the new interpretation. If it is the case that all mergers below a threshold of (say) €8 million did not raise competition concerns then this could be used instead of €2 million.

There is a danger in the discussion of confusing and conflating two concepts: "carries on business" and "an appreciable effect on competition." Any raising of the threshold to (say) €8 million from €2 million would be under the rubric of the latter concept. This is at present not included in the Competition Act 2002 and thus this would require an amendment to current legislation, rather than a revision in the Competition Authority's interpretation of the phrase "carries on business."

B. Redefining the Classes of Media Mergers

Under the 2007 Order the Minister designated certain classes of media merger as requiring notification under the Competition Act 2002. One of the classes of media merger has no nexus whatsoever with Ireland, as noted in the discussion above in Section II.D – where a media business located in the State acquires a media business in another jurisdiction. This is clearly inconsistent with the first of the ICN RPs reproduced above concerning appropriate nexus with the jurisdiction. Hence consideration should be given to amending the 2007 Order so that it reads as follows,

(a) mergers or acquisitions in which two or more of the undertakings involved carry on a media business in the State must be notified to the Competition Authority.

Essentially part (b) of the 2007 Order has been dropped, with (a) remaining unchanged. An examination of the 10 media mergers notified during 2009 and 2010 indicates that two would not have been notified as a media merger: in one case because one of the parties to a joint venture did not have any operations in the State;[34] while in the other the target did not generate any turnover in the State, although some TV viewers in the State could receive the firm's programmes due, for example, to the viewer's location on the border with Northern Ireland. The target's programmes were aimed at UK viewers and these viewers received a spill-over signal.[35]

C. Defining Carries on a Media Business in the State

The 2007 Order applies to undertakings involved that "carry on a media business" in the State. However, the latter term is not defined in the Competition Act 2002 nor has the Competition Authority defined what the term means by way of a notice. As a result there is no *de minimis* level of sales below which notification is not required. Media mergers have

[34]Competition Authority, *Determination of Merger Notification M/09/003 – Communicorp/Boxer Sweden/Boxer*, 13 February (Competition Authority, 2009). This involved a joint venture in which one of the parties, Boxer Sweden had no business activity in the State, although the joint venture was located in the State.
[35] Competition Authority, *Determination of Merger Notification M/10/027 – Northern&Shell/CLT-UFA*, 10 September (Competition Authority, 2010).

been notified to the Competition Authority in which there has been virtually no nexus to Ireland at all:

- In March UK/Gus Ireland, the target had no media activities in Ireland, but because March UK "also ultimately owned Scotsman Publications Limited, which neither have a physical presence in the State nor does it supply its titles to newsagents in the State," the March UK was deemed to be carrying on a media business because Scotsman Publications Limited "had four postal subscribers in the State."[36]
- In the Lebedev/Independent merger both the acquirer and the target generated turnover of €500,000 or less from newspaper advertising in the State; in both cases the focus of the newspapers was the UK.[37]

Media mergers are being notified where one or both of the undertakings involved have no or very little nexus to the State. This needlessly raises the transaction costs for such mergers as well as consuming public resources. It is therefore proposed that the Competition Authority issue a notice setting out its interpretation or the 2007 Order is amended as follows:

(a) have a physical presence on the State (including a registered office, subsidiary, branch, representative office or agency) AND make sales and/or supply services to customers from a media activities in the State of at least €1 million in the most recent financial year, OR,
(b) have made sales into the State of at least €1 million in the most recent financial year from media activities.
(c) A media business defined in Section 23(10)(a)-(c) of the Competition Act 2002.

A lower threshold is used than for carrying on business given the political sensitivity concerning media mergers.[38] This could be reviewed after a year.

D. The Relevant Geographic Entity: the State or the island of Ireland

The geographic entity over which the Competition Authority and the Competition Act 2002 have jurisdiction is the State or the Republic of Ireland, not the island of Ireland, which also includes Northern Ireland. The latter is the subject of UK competition legislation administered by the Competition Commission and the Office of Fair Trading located in London. Thus in order to be consistent with the ICN's RPs the nexus for Irish merger control should match the local territory, the Republic of Ireland. However, in the case of carries on business the relevant geographic entity is the island of Ireland. Hence if the target in a merger case had sales of €2 million confined to the Belfast area of Northern Ireland, the target would be considered as carrying on business on the island of Ireland, but would have no sales in the

[36] Based on I. Bah & L. NiChualladh, *The Curious Tale of Pigs, Papers and Peru: Media Mergers in Ireland*, *supra* note 18, at 10.
[37] Competition Authority, *Determination of Merger Notification M/10/008 – Lebev/Independent*, 9 April (Competition Authority, 2010).
[38] See, for example, Advisory Group on Media Mergers, *Report* (Department of Enterprise, Trade and Employment, 2008). This may be accessed at: http://www.deti.ie/publications/commerce/2008/advisorygrouponmediamergersreport2008.pdf.

State. It would seem reasonable that the carry on business test should be limited in geographic scope to the State not the island of Ireland.

E. Merger Thresholds

This paper has concentrated on setting lower bound thresholds and defining the correct geographic entity in order to ensure that the merger has sufficient nexus to the State that the merger could have an appreciable competitive effect within Ireland. In terms of the other thresholds in the Competition Act 2002, particularly the turnover threshold of €40 million within the State, it appears that this is not considered too high. The Competition Authority in its proposals for changes in the Competition Act 2002 with respect to mergers did not identify situations where such a threshold caused otherwise anti-competitive mergers to be notified.[39] Furthermore the Competition Authority can in such instances request the merging parties to voluntarily notify, or it can investigate the merger as an agreement between undertakings that may restrict competition. Nevertheless there may a case for indexing these thresholds to inflation on annual basis as in the US.

IV. CONCLUSION

The point of departure for this paper is the argument of Patrick Massey that a "striking feature" of Irish merger control is the "large number of apparently unnecessary notifications involving mergers, which had no competition nexus with Ireland."[40] However, Massey does acknowledge that the Competition Authority has taken steps to reduce the scale of the problem, although he does not quantify the impact of these moves, analysis that was undertaken for this paper.

While Massey is undoubtedly correct in saying that a large number of mergers are notified that do not raise competition concerns, it appears that in this respect Ireland is no different from other jurisdictions where there are mandatory notification thresholds such as the EU and the US. This does not mean, of course, that efforts should not be made to further refine the merger notification criteria. Indeed, reforms made in 2006 and 2007 by the Competition Authority and the Minister, respectively, resulted in a drop in the number of merger notifications of at least between 40 and 50 per cent.

However, more can be done. Mergers are still being notified with little, if any, nexus to Ireland. We make a number of proposals in relation to setting lower bound thresholds for notification and defining the correct geographic entity to ensure that when a merger is notified to the Competition Authority it has sufficient nexus to the State to have an appreciable competitive effect within Ireland. These proposals related to the definition of carrying on business and carrying on a media business. The impact of these proposals is likely to be of a lesser magnitude than the 2006 and 2007 reforms.

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[39] For details see Competition Authority, *Public Consultation on the Operation and Implementation of the Competition Act 2002: Competition Authority Submission to the Department of Enterprise, Trade and Employment* (Competition Authority, 2007) at 19-36. However, in the submission the Competition Authority did draw attention to the problems with the definition of the class of media mergers discussed in Section II.D and Section III.C above.

[40] Massey, *supra* note 2, at 877.

These proposals should ensure that the market for merger control works more efficiently and public resources employed more appropriately, a particularly important issue in times of austerity.