Merger control in Ireland after the Uniphar/NaviCorp transaction: state of play meetings and market testing remedies

Gorecki, Paul

Trinity College Dublin

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Merger Control in Ireland After the *Uniphar/NaviCorp* Transaction: State of Play Meetings and Market Testing Remedies

By

Paul K Gorecki

Abstract

On 15 December 2022 the Competition and Consumer Protection Commission (CCPC), Ireland's national competition authority, prohibited the acquisition by Uniphar plc of NaviCorp Limited. In the two decades in which the CCPC has been responsible for merger control this was the first instance in which the agency had prohibited a notifiable transaction in which there had been remedy proposals. The paper argues that the CCPC did not follow international best practice with respect to state of play meetings with the parties and the market testing of remedies. Timelines were compressed. Options – withdrawing the merger notification and offering remedy proposals – were narrowed, biasing the outcome of the CCPC's merger investigation towards prohibition. The CCPC should reform its state of play/market testing procedures such that they are consistent with the timely and transparent processes employed in international best practice.

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*Department of Economics, Trinity College Dublin.

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I. INTRODUCTION

On 15 December 2022 the Competition and Consumer Protection Commission (CCPC), Ireland's national competition authority (NCA), prohibited the acquisition by Uniphar plc (Uniphar) of NaviCorp Limited (NaviCorp).[1] In the two decades in which the CCPC has been responsible for merger control this was the fourth occasion on which the CCPC has prohibited a notified transaction, the first since 2008.[2] In contrast to the CCPC's first three prohibition decisions, where the parties to the transaction offered no remedies to address the competitive harm that the CCPC expected to flow from the merger,[3] in *Uniphar/NaviCorp* the parties proposed remedies. Nonetheless, the CCPC considered that these remedies were inadequate and thus prohibited the merger. However, there was insufficient time for the CCPC to take into account – including market testing – the third (and final) set of proposed remedies.[4]

The purpose of this paper is to explore whether or not the procedures and thresholds adopted by the CCPC in assessing the competitive effects of the *Uniphar/NaviCorp* transaction and in considering and possibly market testing the remedies proposed by the parties, created unnecessary barriers that made it difficult for the parties – Uniphar and NaviCorp – to develop coherent credible remedies in a timely manner so as to secure a conditional CCPC clearance or, alternatively, to withdraw the merger notification.[5] The parties could have withdrawn the notification when the CCPC informed the parties of its competition concerns or after the rejection by the CCPC of the parties second set of remedy proposals or when the CCPC informed the parties that there was insufficient time for the agency to consider the third remedy package.[6] In short, the question addressed in this paper is: did the CCPC procedures/thresholds bias the outcome of the CCPC's merger investigation towards prohibition rather than conditional clearance or withdrawal of the notification?

This paper is divided into five sections, including the Introduction. Section II briefly sets out details of the CCPC's *Uniphar/NaviCorp* merger determination. The CCPC needs to inform Uniphar and NaviCorp of the relevant theories of harm (i.e. competition concerns) in a timely manner so that they have the time and space to plan and execute an appropriate response. Section III considers the adequacy of CCPC procedures in this regard in the light of the tight statutory merger control deadlines. The

[1] M/21/079 – *Uniphar/NaviCorp*. CCPC written merger determinations are available on its website: www.ccpc.ie.

[2] Merger control using a competition test has been administered by Ireland's NCA since 1 January 2003. The initial NCA was the Competition Authority, but in 2014 the Competition Authority merged with the National Consumer Agency to form the CCPC. Unless otherwise specified the record of the CCPC also refers to that of the Competition Authority. On the background of the institutional framework for merger control in Ireland see Andrews, Gorecki & McFadden (2015). Attention is paid in this paper to notified mergers only; at least one non-notified merger has been successfully challenged by the CCPC. For details see Andrews, Gorecki & McFadden (2015, p. 280, fn. 112).

[3] There is no reference to remedies being proposed by the parties or considered (e.g. subject to a market test) by the CCPC in M04/032 - *IBM/SBCS* and in M/06/039 – *Kingspan/Xtratherm*, while in M/08/009 – *Kerry/Breeo* (para. 1.44), reference is made to the fact that the "parties made no proposals either informally or formally … ."

[4] In the words of the CCPC, "[T]herefore, the Commission was not in a position to take the Third Draft Proposals into account as part of the basis of its determination" (M/21/079 – *Uniphar/NaviCorp*, para. 9.71).

[5] The term 'parties' refers to the undertakings involved in a notified transaction to the CCPC. In some instance the parties are Uniphar and NaviCorp, while in other instances the term is used more generally. The context makes the use clear.

[6] It should be noted that merger notifications have been withdrawn by parties on a number of recent occasions for procedural and administrative reasons, rather than because of competition concerns raised by the CCPC. For further discussion see CCPC (2023, pp. 14-15).

question of the threshold used by the CCPC in market testing remedies proposed by the parties is the subject of Section IV. Section V concludes by discussing, inter alia, whether these CCPC procedures and thresholds as exemplified by *Uniphar/NaviCorp* create unnecessary barriers to parties planning and executing a response to CCPC competition concerns within the statutory timetable for merger determination decisions.

II. UNIPHAR/NAVICORP: THE FACTS[7]

The *Uniphar/NaviCorp* transaction was notified to the CCPC on 24 December 2021.[8] At the end of its Phase I investigation the CCPC was not able to form the view that the transaction "would not be to substantially lessen competition [SLC] in any market for goods or services in the State."[9] The CCPC's Phase II investigation began on 22 April 2022 and concluded with its decision to prohibit the transaction on 15 December 2022, almost a year after notification. Important steps in the Phase II investigation included the issuing of an Assessment – a Statement of Objections under European Commission merger procedures – on 21 September 2022. In response the parties submitted several sets of proposals between 8 November 2022 and 14 December 2022, with the second set being market tested between 23 November 2022 and 6 December 2022. However, these proposals proved inadequate in terms of meeting the CCPC's competitive concerns while a third set were submitted too late to be properly assessed by the CCPC. Consequently the *Uniphar/NaviCorp* transaction was prohibited.

The CCPC defined two relevant product markets: the market for buying group services; and the market for common management and branding services (CMB). In both cases the geographic market was the State. Buying groups negotiate on behalf of their members discounts and supply terms with manufacturers, wholesalers and importers of pharmacy-only human pharmaceutical products. In return members – pharmacies – pay a monthly membership fee. In the case of CMB services pharmacies are purchasing management and branding services, where the latter refer to signage indicating a particular common brand (e.g. *Life* or *Allcare*). Membership dues are either a monthly fee or a percentage of the CMB member's turnover.[10]

The market for both buying group and CMB services under the CCPC's *Merger Guidelines* were considered to be highly concentrated with the increase in concentration occasioned by the merger likely to cause competition concerns. For buying group services it was a 4 to 3 merger, with Uniphar's market share increasing from [10-30] per cent to [70-80] per cent, with a post-merger Herfindahl-Hirschman Index (HHI) of 6,400, a delta of 2,151.[11] In the case of CMB services the corresponding numbers were: 4 to 3, [40-50] per cent, [60-70] per cent, 5,214 and 1,760, respectively.[12]

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[7] Unless otherwise stated all the information in this section is taken from the CCPC's M/21/079 – *Uniphar/NaviCorp* determination.

[8] M/21/079 – *Uniphar/NaviCorp*, para. 1.1.

[9] M/21/079 – *Uniphar/NaviCorp*, para. 1.32. SLC is the statutory competition test used by the CCPC to assess mergers set out in the Competition Act 2002 as amended.

[10] There are also some one-off costs of joining a CMB. For details see M/21/079 – *Uniphar/NaviCorp*, para. 2.70.

[11] M/21/079 – *Uniphar/NaviCorp,* Table 5, p. 135 & Table 7, p. 139. Market shares measured using trade value of purchases. If membership numbers were used instead then the numbers were: [20-30] per cent, [50-60] per cent, 4,976 and 1,323, respectively.

[12] M/21/079 – *Uniphar/NaviCorp,* Table 11, p. 254 & Table 12, p. 256. Market share measured using membership numbers.

The same unilateral effects theory of harm was examined in both markets: that the loss of a close competitor in a highly concentrated market will result in an increase in prices (or a reduction in discounts), a loss of service quality and/or a loss of innovation to the detriment of retail pharmacies in the State.[13] In both markets the CCPC concluded after examining the evidence that the *Uniphar/NaviCorp* transaction would lead to a SLC. The CCPC was not persuaded that the efficiencies advanced by the parties nor the proposed remedy packages that the CCPC was able to properly assess would mitigate the anticompetitive impact of the transaction.

III. THE TIMING OF PROPOSED REMEDIES: A CATCH 22?

3.1 Introduction

In a notified transaction that raises significant competition concerns remedies are likely to be required in order for the transaction to be cleared. The issue for the parties to the transaction is thus not only the nature and content of any proposed remedy, but also the timing in terms of informing the competition authority of the proposed remedy. It is the latter issue that is addressed in this section of the paper, but it is, of course, in turn, related to when the parties are informed by the competition authority of its competition concerns in sufficient detail for the parties to develop coherent, credible and timely remedies. The parties could, of course, when informed of these concerns decide to withdraw the merger notification.

3.2 The CCPCs' Position

In *Uniphar/NaviCorp* the CCPC sets out its position concerning keeping the parties informed on the agency's progress in its merger investigation including but not limited to issues such as requests for information, market definition and theories of harm. So far as the author is aware this is the first time that the CCPC has provided such guidance albeit in the context of a merger determination,[14] rather than through separate standalone guidance, such as its 2014 *Merger Guidelines* or its 2021 *Mergers and Acquisitions Procedures*.

The CCPC argues that it "in carrying out its duties to assess whether there is a merger, to identify any SLC and to remedy it, the Commission has a wide margin of appreciation."[15] The agency comes to this conclusion based on its interpretation of the statutory mandate that it was given by legislators[16] and the standard of review of CCPC merger determinations as set out by the High Court in the successful appeal by the acquirer against the CCPC prohibition in the *Kerry/Breeo* transaction.[17] This wide margin

[13] In the theory of harm in the CMB services market reference to discounts was omitted.

[14] The guidance appears to be in reaction to arguments raised by the parties in their joint Written Response to the Assessment issued by the CCPC. For details see M/21/079 – *Uniphar/NaviCorp,* paras. 1.77-1.78. In other recent instances where the CCPC has issued an Assessment and the CCPC written determination is in the public domain, these concerns do not appear to have been raised by the parties. (For details see, M/18/063 – *Berendsen (Elis)/Kings Laundry;* M/21/004 – *AIB/BoI/PTSB – Synch Payments JV*; M/21/021 – *Bank of Ireland/Certain Assets of KBC*). In M/22/015 – *East Cork Oil/Misty Lane*, subsequent to the issuance of the Assessment, the parties withdrew the notification so no written determination was prepared by the CCPC, while in the case of M/22/040 – *Q-Park/Tazbell Services,* although an Assessment was issued on 26 May 2023, the merger investigation has, as yet, to conclude.

[15] M/21/079 – *Uniphar/NaviCorp,* para. 1.63.

[16] M/21/079 – *Uniphar/NaviCorp,* paras. 1.62-1.63.

[17] The High Court judgment is *Rye Investments Ltd v Competition Authority* [2009] IEHC 140, which is discussed in M/21/079 – *Uniphar/NaviCorp,* paras. 1.64 & 1.73. For a discussion of the High Court judgment in *Kerry/Breeo* see Andrews, Gorecki & McFadden (2015, pp. 299-302), and Gorecki (2009; 2021, pp. 145-151).

of appreciation extends, the CCPC argues, as to *when* to inform the parties of the details of the CCPC's investigation including the development of theories of harm (i.e. the agency's competition concerns).

Table 1
Critical Dates, Remedy Proposals & Market Testing, Uniphar's Acquisition of NaviCorp, 2021/22

Date	Event
24.12.2021	Transaction Notified.
22.04.2022	Phase II commenced.
15.09.2022	Parties first inquired about the possibility to enter into proposal discussions.
21.09.2022	Assessment issued to parties.
03.10.2022	Parties submitted First Draft Proposals.
11.10.2022	CCPC requests clarification on First Draft Proposals
24.10.2022	Parties respond to CCPC clarification request.
02.11.2022	CCPC informed parties First Draft Proposals rejected since they did not address the CCPC's SLC concerns and that they were neither comprehensive nor effective.
08.11.2022	Parties submitted Second Draft Proposals.
11.11.2022	CCPC informed parties Second Draft Proposals "not sufficiently clear, precise or certain to market test."
17.11.2022	Parties submitted Revised Second Draft Proposals.
23.11.2022 - 06.12.2022	CCPC market tested the Revised Second Draft Proposals.
12.12.2022	Parties submitted Updated Revised Second Draft Proposals.
13.12.2022	CCPC informed parties that Updated Revised Second Draft Proposals rejected since would not remove "identified SLC concerns" nor "all implementation risks."
14.12.2022	Parties submitted Third Draft Proposals.
15.12.2022	CCPC responded to the parties Third Draft Proposals, which it noted were "substantially different" from the Revised Second Draft Proposals and "go further." The CCPC disagreed with the parties view that a market test was unnecessary. The CCPC expressed doubts that the Third Draft Proposals would "ameliorate the SLC concerns in respect of the market for buying group services."
15.12.2022	The CCPC did not have sufficient time to assess whether the Third Draft Proposals would ameliorate its competition concerns including carrying out a market test. Therefore the CCPC was not able to take into account the Third Draft Proposals "as part of the basis of its determination" of the Proposed Transaction. The CCPC prohibited the transaction.

Source: M/21/079 – *Uniphar/NaviCorp,* various paragraphs.

In this regard the CCPC states that,

> … there is no express statutory obligation on the Commission to provide feedback prior to the issue of the Written Assessment. Further, the parties were provided with the Assessment which set out in full the Commission's *preliminary* competition concerns and the Commission upheld the Parties' rights of representation/defence in providing the Parties the opportunity to submit the Written Response and to make an Oral Response (emphasis supplied).[18]

[18] M/21/079 – *Uniphar/NaviCorp,* para. 1.77.

The reference to *preliminary* competition concerns is at variance with CCPC (2021, para. 3.8) guidance on merger procedures that states, not unreasonably, that the "Assessment will set out clearly the Commission's concerns regarding the effect of the proposed merger on competition in the relevant markets."

The CCPC also states that the parties could have entered into discussions concerning remedy proposals at any time from the date of the notification 24 December 2021, but the parties "first inquired about the possibility to enter into proposal discussions" on 15 September 2022, scarcely a week before the issuance of the Assessment on 21 September 2022.[19] This late engagement by the parties, according to the CCPC, limited "the timeframe for … discussions to identify measures which would ameliorate any competition effects of the Proposed Transaction."[20] Indeed, as shown in Table 1 and alluded to in Section 1, the parties ran out of time in trying to develop a set of remedies that would successfully mitigate the CCPC's competition concerns.

Thus the CCPC squarely sets responsibility on the parties for presenting proposals that will remedy its competition concerns. The CCPC takes the position that it is not required to communicate its competition concerns to the parties prior to the Assessment, nor does the agency appear to have done so in *Uniphar/NaviCorp.* The CCPC argues that this reflects the wide discretion, based on various legal arguments, that it has over the way it conducts its merger investigations. But 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?

3.3 Developing Remedy Proposals: Some Considerations

Remedy proposals are designed, according to the CCPC, to "ameliorate the identified competition effects of the Notified Transaction."[21] The competitive effects are those, of course, identified by the CCPC. It is thus important for the parties to be apprised of the competition concerns of the CCPC in order for the parties to be able develop and present credible remedies to address those concerns. Dialogue between the parties and the CCPC is thus important for the parties to gain an understanding of the CCPC's concerns, especially where, for example, novel theories of harm are being advanced, new markets are being defined and there is a lack of precedents concerning the issues raised by the transaction.

The earlier the CCPC apprises the parties the more time the parties have to develop appropriate remedy proposals. Developing remedies may involve the parties contacting other firms, if, for example, the remedy consists of the providing an upfront buyer. On the other hand, if the parties decide, in view of the CCPC's competition concerns, that it is unable to offer credible remedies then it may decide to withdraw the merger notification thus saving itself and the CCPC (and third parties) needless legal and other expense as well as the use of scarce senior management time.[22]

[19] M/21/079 – *Uniphar/NaviCorp,* para. 1.78.
[20] M/21/079 – *Uniphar/NaviCorp,* para. 1.78.
[21] M/21/079 – *Uniphar/NaviCorp,* para. 9.25.
[22] It would appear that a number of merger notifications have been withdrawn by the parties on learning the CCPC's competition concerns. (For details see Section 5.4). A similar situation also occurs at the European Union level. (For details see Whish & Bailey, 2021, pp. 957-958).

Early engagement also has benefits for the CCPC. It provides a without prejudice discussion forum for raising the CCPC's competition concerns, including but not limited to market definition, proposed theories of harm and possible remedies. As with all merger investigations there is asymmetric information in that the parties are much more familiar with the markets than the CCPC, but the CCPC might, at the same time, be aware through its market investigation of certain facts unavailable to the parties. Thus early dialogue enables a mutually beneficial development of greater insight into the market facts and competitive effects of the merger and a shared understanding of their respective viewpoints which may, of course, include their differences.

In some merger notifications it may be that the parties are able to offer a credible remedy as early as the initial notification. There may be clear CCPC precedents in terms of market definition and theories of harm in the markets concerned, while simple easily administered credible remedies are readily available. Extensive pre-notification discussions may help to tease out the issues between the parties and the CCPC. On the other hand, where there are few if any CCPC (or other NCA) precedents, market definition is less certain, theories of harm less obvious and credible remedies not clear cut, then the need for dialogue and discussion between the parties and the CCPC is more important in order for the competition concerns to be identified, the parties given adequate time to develop credible remedies and the agency assess the proposed remedies. Uniphar's recent CCPC merger notifications provide a useful illustrations in both categories.

Uniphar's acquisition of Sam McCauley's 37 pharmacies falls into the former category.[23] Uniphar in contemplating this transaction could rely on a well-developed methodology, based on earlier CCPC merger decisions involving pharmacies, as to where the proposed acquisition of Sam McCauley would likely lead to competition concerns and what would be acceptable remedies.[24] No doubt this precedent facilitated the conditional clearance of the transaction by the CCPC in Phase I on 20 January 2023, with Uniphar agreeing to divest three of the 37 Sam McCauley pharmacies.

The *Uniphar/NaviCorp* transaction falls into the latter category. There were few relevant market definition precedents. While the CCPC had considered the CMB market in previous decisions, this was not the case for the buying group market, while there appeared to be no precedent to draw upon from other competition agencies.[25] The extensive discussion of the theories of harm by the CCPC in its determination together with the several sets of remedy packages put forward by the parties suggests a detailed fact based examination was required to validate the theories of harm, while the various iterations of remedies, summarised in Table 1, suggests that appropriate remedies were not clearcut and obvious.

3.4 International Best Practice

While the CCPC's *Merger Guidelines* set out the analytical framework that the agency uses to determine the competitive effects of a merger, there are no equivalent guidelines with respect to its interaction with the parties during a merger investigation, including the scheduling of state of play meetings. The CCPC (2021) does not mention, for example, such or similar meetings in its *Mergers*

[23] M/22/049 – *Uniphar/LXV Remedies (Sam McCauley).*
[24] Prior determinations include, for example, M/20/027 - *Uniphar/Hickey's* and the earlier CCPC decisions cited therein. In these determinations the product market is the supply of prescription medicines in retail pharmacies and the geographic market is the catchment area within a radius of two kilometres.
[25] M/21/079 – *Uniphar/NaviCorp,* paras. 3.16-3.19.

and Acquisitions Procedures. Nonetheless, the CCPC (and the Competition Authority before it) does draw on guidance issued by other agencies to supplement and complement its own guidance. In *Uniphar/NaviCorp*, for example, the CCPC uses the European Commission (2008) *Remedies Notice* analytical framework to evaluate the Revised Second Draft Proposals.[26] This raises the issue of whether or not other agencies have released guidance or statements concerning their interaction with the parties during a merger investigation.

The European Commission (2008, para. 6 fn. 5) in its *Remedies Notice* refers to DG Competition's (2004) *Best Practices on the Conduct of EC Merger Control Proceedings,* which is posted on the DG Competition's website,[27] concerning how the Commission "communicates its competition concerns to the parties to allow them to formulate appropriate and corresponding remedies proposals." In particular, DG Competition (2004, para. 33) sets out the fact that it offers the parties state of play meetings at five key points during a merger investigation. Within two weeks of DG Competition commencing its Phase II investigation, for example, DG Competition (2004, para. 33) offers a state of play meeting with the parties that is designed,

> to facilitate the notifying parties' understanding of the Commission's concerns at an early stage of the Phase II proceedings. The meeting also serves to assist DG Competition in deciding the appropriate framework for its further investigation by discussing with the notifying parties matters such as the market definition and competition concerns outlined in the Article 6(1)(c) decision. The meeting is also intended to serve as a forum for mutually informing each other of any planned economic or other studies. The approximate timetable of the Phase II procedure may also be discussed.

DG Competition (2004, paras. 41 & 42) may hold additional meetings/feedback to discuss merger remedies.

DG Competition is not alone in keeping the parties explicitly abreast of developments during a merger investigation. The UK's Competition and Markets Authority (CMA, 2014a, para. 2.3), for example, sets out the virtues of transparency alluded to in Section 3.3, while in its discussion of merger procedures the CMA (2021, pp. 72-75) in delineating the key steps in a typical Phase II investigation provides numerous explicit and meaningful instances of interaction with the parties. One such instance is for the CMA (2021, para. 11.30) requesting feedback from the parties early in Phase II in response to an issues statement that "sets out one or more theories of harm which will form the framework for the CMA's competitive analysis at phase 2 and outlines the issues which the inquiry will be exploring."

The International Competition Network (ICN), of which Ireland is a member, has developed through discussion and dialogue recommended best practices (recommended practices) across all the major areas of competition law and practice.[28] Merger analysis and procedure is no exception. In the ICN (2018, p. 18) *Recommended Practices for Merger Notification and Review* one of the recommended practices is that "merger investigation procedures should include opportunities for meetings or discussions between the competition agency and the merging parties at key points in the investigation." Another ICN (2018, p. 19) recommended practice is that "merging parties

[26] M/21/079 – *Uniphar/NaviCorp,* para. 9.40.
[27] https://competition-policy.ec.europa.eu/mergers/legislation/best-practices_en.
[28] For further information on the ICN see: https://www.internationalcompetitionnetwork.org/about/.

should be advised not later than the beginning of a second stage inquiry why the competition agency did not clear the transaction within the initial review period."

In the comments that accompany the latter recommended practice, the ICN (2018, p. 19) state,

> *Comment 1*: The competition agency should provide the merging parties with an explanation (either orally or in writing) of the competitive concerns that give rise to the need for an in-depth review. In jurisdictions that use a two-phase review procedure, this explanation should be provided not later than the beginning of a second-stage inquiry. … At a minimum, the explanation should consist of a short and plain statement of the competitive concerns. Any such statement would not limit the competition agency's discretion to pursue new or additional theories of competitive harm that may emerge during the investigation.
>
> *Comment 2*: Providing such an explanation has several beneficial effects. First, it promotes transparency and predictability of agency action. Second, it promotes efficiency and reduces transaction costs in the review process by allowing the merging parties to focus on issues identified as problematic, thereby facilitating resolution of these issues as quickly as possible. Third, it reduces the potential for unnecessary delay.

Such sentiments are consistent with those of the European Commission and the CMA outlined above.

3.5 Discussion

It is clear that while the CCPC may well be correct that it does not have an express statutory duty to provide feedback to the parties prior to the issue of an Assessment, it nonetheless remains the case that there are sound reasons in terms of the merger control effectiveness and efficiency as well as fair procedures for the CCPC to provide feedback to the parties to a notified transaction much earlier than the issue of an Assessment (or Statement of Objections).

The European Commission and CMA follow such a path as do the ICN's recommended practices.[29] Earlier engagement means that the parties in a merger investigation can decide to withdraw the merger notification in view of the CCPC's competition concerns or alternatively offer remedy proposals with the aim of a conditional clearance. Even if the remedy proposals do not mitigate the CCPC concerns then the parties have the option of withdrawing the notification prior to the CCPC making a final determination.

Earlier engagement than the Assessment by the CCPC with respect to its competition concerns with the parties might have resulted in the Third Draft Proposals – which were "substantially different" and "go further"[30] - being market tested, raising the possibility that the transaction might have been cleared with conditions. Even if the Third Draft Proposals had been rejected by the CCPC, there may still have been time for the parties to exercise the option of withdrawing the notification and perhaps

[29] Furthermore the approach of the European Commission, the CMA and the ICN is consistent with the OECD's 2021 *Recommendation of the Council on Transparency and Procedural Fairness in Competition Law,* which contains, for example, that competition agencies, "[I]nform parties and offer them opportunities to engage meaningfully in the competition law enforcement process." For details see: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465.

[30] M/21/079 – *Uniphar/NaviCorp,* para. 9.69.

re notifying the transaction depending on, for example, how close the Third Draft Proposals had come to mitigating the CCPC's concerns.

In *Uniphar/NaviCorp* the parties decided to offer remedies rather than withdrawing the notification on learning of the CCPC competition concerns as set out in the Assessment and to present the Third Draft Proposals rather than withdrawing the notification on learning of the CCPC rejection of the Revised Second Draft Proposals. However, it is not clear how feasible it would have been for the parties to withdraw the notification after they had been informed by the CCPC that the agency did not have time to assess the Third Draft Proposals, since the CCPC prohibited the transaction on the same day – 15 December 2022 (Table 1).[31]

IV. MARKET TESTING REMEDY PROPOSALS

4.1 Introduction

An essential part of assessing whether remedy proposals submitted by the parties mitigate the CCPC's competition concerns is market testing. Such testing, according to the ICN (2018, p. 39) involves, "… either a formal or informal process by which a competition agency obtains views and comments from third-party customers, suppliers, and/or competitors …. . " These views are likely to be based on a non-confidential version of the remedy proposals, together with a series of competition agency questions perhaps accompanied by some background information.

These questions may relate to, for example in the case of a remedy involving the divestiture of a business, gauging the degree of interest in purchasing the divested business by third parties and what, if any, modifications might be necessary for the business to become commercially attractive to buy. In the case of an access remedy, on whether or not the proposed terms and conditions of use are acceptable to would be customers and, if not, how the terms and conditions might be modified.

As such the views of customers, suppliers, and/or competitors form an important part of the information set on which a competition agency such as the CCPC makes a determination concerning whether or not a remedy proposal is acceptable. While there is general agreement on the vital importance of market testing by competition agencies the issue that this section explores is the threshold that needs to be satisfied in order for a competition agency to market test remedy proposals, which are typically prepared by the parties, usually after engagement and dialogue with the competition agency.

It might be argued that the question of the threshold for market testing remedy proposals is academic with little relevance to merger control. This is not, however, the case. There are typically strict timetables for merger control procedures, so there may be limited opportunities to market test remedy proposals. This was the case in *Uniphar/NaviCorp* where the lack of feedback prior to the Assessment limited the ability of the parties to address the CCPC's SLC concerns since these had not been communicated to the parties.[32] Hence remedy proposals/market testing had to be compressed into the post-Assessment period implying that there was insufficient time to test the Third Draft

[31] M/21/079 – *Uniphar/NaviCorp* paras. 9.69-9.72.

[32] Of course, to the extent that the parties addressed at least some of the CCPC's competition concerns would have likely narrowed the scope and content of any remedy proposals required to mitigate the remaining competition concerns.

Proposals advanced by the parties, which, as noted above, were "substantially different" than the Revised Second Draft Proposals.

4.2 The CCPC's Position

The CCPC rejected the First Draft Proposals in *Uniphar/NaviCorp* because they "would not address the SLC concerns identified by the Commission in the Relevant Markets for a number of reasons."[33] In response to the feedback by the CCPC on the First Draft Proposals, the parties submitted the Second Draft Proposals. According to the CCPC the Second Draft Proposals in *Uniphar/NaviCorp* were "not sufficiently clear, precise or certain to market test."[34] The parties responded to the CCPC's concerns by submitting the Revised Second Draft Proposals. These were market tested by the CCPC "in order to help establish whether they were likely to be appropriate, proportionate and effective in ameliorating the identified SLC concerns in the Relevant Markets."[35]

In the context of market testing the Revised Second Draft Proposals the CCPC articulated its position on the role and function of market testing when it stated that such testing,

> … takes into account the views of market participants. However, market testing forms one facet of the Commission's overall analysis of proposals. Market testing is not determinative in its own right, but is an important perspective through which the Commission evaluates proposed remedies. The Commission can and does consider factors beyond views expressed during market testing in determining whether proposed remedies are appropriate, proportionate, and effective in addressing the Commission's SLC concerns (emphasis in original).[36]

The CCPC then added "[F]or the avoidance of doubt, market testing of any proposals received by the Commission does not imply that the proposals ameliorate the identified competition effects of a Notified Transaction."[37]

A number of points can be made concerning the CCPC approach to market testing in *Uniphar/NaviCorp*. First, the CCPC retains discretion as to whether or not to market test remedies, given that it rejected the First and Second Draft Proposals in *Uniphar/NaviCorp* without a market test in either case, while deciding to market test the Revised Second Draft Proposals. Second, there was an iterative process between the parties and the CCPC in developing remedy proposals to the point at which they were market tested. The parties made initial proposals, the CCPC provided feedback, the parties revised the proposals, which were rejected, new proposals were submitted and so on until the CCPC was satisfied that the proposals have reached the stage that they could profitably be market tested.

Third, the CCPC is correct that market testing in but one facet of its overall analysis of proposals. The CCPC rightly also considers market conditions such as barriers to entry and expansion, the closeness of competition between the parties and other market participants and so on in determining whether or not a merger will lead to a SLC. But in relation to market testing the issue surely is that given these

[33] M/21/079 – *Uniphar/NaviCorp,* para. 9.14.
[34] M/21/079 – *Uniphar/NaviCorp,* para. 9.16.
[35] M/21/079 – *Uniphar/NaviCorp,* para. 9.24.
[36] M/21/079 – *Uniphar/NaviCorp,* para. 9.24. The CCPC made a similar statement in M/21/021 – *Bank of Ireland/Certain Assets of KBC*, fn. 634, p. 245.
[37] M/21/079 – *Uniphar/NaviCorp,* para. 9.25. This appears to be the first time that the CCPC made this statement. It is not contained in the merger determination referred to in the previous footnote.

market conditions, what threshold does the CCPC apply in deciding whether or not to market test proposed remedies?

Fourth, it is not clear what threshold is applied by the CCPC in deciding whether or not to market test remedy proposals. That a threshold exists is manifest by the fact that some remedy proposals are rejected for the purposes of market testing while others are accepted. It appears that the CCPC will not market test proposals that it considers do not address its SLC concerns, but, at the same time, any proposals that are market tested "does not imply that the proposals ameliorate the identified competition effects of a Notified Transaction." It is not clear how to interpret the latter CCPC statement. Perhaps all that the CCPC is saying is that while the proposals do not necessarily mitigate the agency's competition concerns, they may nevertheless be capable of mitigating those concerns, hence the need for market testing.

4.3 International Best Practice

The CCPC has not provided guidance on the issue of market testing, beyond that contained in the *Uniphar/NaviCorp*. The CCPC's *Merger Guidelines* presents its analytical framework for substantive merger assessment, while the CCPC's *Mergers and Acquisitions Procedures* is concerned with the timing of proposals, not the issue of market testing.[38] Nonetheless, as noted in Section 3.4, the CCPC (and the Competition Authority before it) draws on guidance issued by other agencies to supplement and complement its own guidance. This raises the issue of whether or not other agencies have released guidance or statements concerning the threshold for market testing.

The European Commission *Remedies Notice* (2008, paras. 79, 91) – which the CCPC draws upon in *Uniphar/NaviCorp* - sets out the four requirements that proposals submitted by the parties must meet in order for the Commission to clear the merger. These requirements include, for example, that the proposals "shall address all competition concerns raised by the concentration and shall fully specify the substantive and implementing commitments entered into by the parties" and "that a non-confidential version of the commitments for the purposes of market testing them with third parties" accompany the proposals.[39] Proposals submitted in accordance "with these requirements will be assessed by the [European] Commission." If the European Commission consider that the proposals remove serious doubts/competition concerns following consultations then the Commission "will adopt a conditional clearance decision."[40] The consultations include "when considered appropriate … third parties in the form of a market test."[41]

A number of points concerning market testing by the European Commission can be made. First, the proposals must meet the European Commission's competition concerns, which as discussed in Section 3.4, are likely to have been imparted to the parties by the European Commission at various points in Phase I and Phase II. Second, in submitting proposals the parties are required to complete *Form RM*

[38] CCPC (2021, paras. 2.1 & 3.14).
[39] European Commission (2008, para. 91). The first of the four requirements differ as between Phase I and Phase II, with the quotation in the text re addressing substantive concerns taken from the Phase II requirements.
[40] The European Commission (2008, para. 92) sets out the distinction between serious doubts about the merger, expressed by the Commission prior to the issuance of a Statement of Objections, and competition concerns raised in the Statement of Objections.
[41] For details of the consultations see European Commission (2008, para. 80), which apply to both Phase I and Phase II merger assessments.

Relating to Remedies,[42] the completion of which includes not only the remedy proposals and how they remove competition concerns, but in the case of a divestment extensive details of the divested business and why the business is likely to be acquired by a suitable purchaser. Third, market testing is part of wider consultation process that might also Member States (including NCAs), national regulatory authorities and non-EEA competition authorities.

Fourth, market testing is discretionary since the European Commission only market tests where it considers such a step "appropriate." This is consistent with the evidence. In a series of mergers the European Commission has rejected proposals for the purposes of market testing because they are, according to Vande Walle (2021, p. 23), "clearly inadequate."[43] On the other hand, in some "exceedingly rare instances" the European Commission has, according to Vande Walle (2021, p. 23) approved proposals without undertaking a market test.

Fifth, there is no explicit threshold for market testing detailed in the European Commission *Remedies Notice* or its *Form RM Relating to Remedies.* Nonetheless, it would seem reasonable to infer from the European Commission's informing the parties at the start of Phase II of its serious doubts/competition and the necessity for the parties to complete the *Form RM Relating to Remedies,* that the European Commission market tests proposals that prima facie remove or are capable of removing its serious doubts/competition concerns.

Sixth, the CCPC had regard to the European Commission *Remedies Notice* to evaluate "the extent to which the … [Revised Second Draft Proposals] submitted by the Parties ameliorate the effects of the Proposed Transaction on the Relevant Markets."[44] The evaluation takes into account all of the evidence including the results of the market testing.[45] It is not clear, however, how and the extent to which the CCPC relies the European Commission *Remedies Notice* as the basis for deciding whether or not to market test remedies proposed by the parties.

The CMA (2018, para. 3.1) can, at its discretion, decide to accept undertakings in lieu (UIL) proffered by the parties during Phase I of a merger investigation, instead of making a decision to move to Phase II. In making a UIL – in other words, a remedy proposal – the parties complete the CMA (2014b)'s *Remedies Form for Offers of Undertakings in Lieu of Reference*, similar to the European Commission's *Form RM Relating to Remedies.* A UIL must, according to the CMA (2018, para. 3.28), be a clear-cut remedy. If the CMA (2018, para. 4.20) considers that the UIL "might be acceptable in principle as a suitable remedy, the CMA will then start the process of detailed consideration of the proposed UILs."[46] Such consideration includes consultation with third parties on the UIL; the CMA (2018, para. 4.27) publishes the UILs on its website inviting comments.

At Phase II, the CMA (2018, para. 4.57), not only puts forward its own proposals but also those submitted by the parties where the latter "will be expected to demonstrate that their proposed

[42] For details see: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2023)2400&lang=en.
[43] Vande Walle (2021, p. 23, fn. 103) provides references to the particular European Commission merger decisions.
[44] M/21/079 – *Uniphar/NaviCorp,* para. 9.40. It should be noted that the parties in *Uniphar/NaviCorp* in supporting the Revised Second Draft Proposals presented arguments to meet the first of the four requirements referred to above in the European Commission *Remedies Notice*. For details see M/21/079 – *Uniphar/NaviCorp,* paras. 9.22, 9.23.
[45] M/21/079 – *Uniphar/NaviCorp,* paras. 9.42-9.64.
[46] The CMA uses the terms consultation rather than market testing.

remedy options will address effectively the provisional SLC and the resulting adverse effects."[47] The CMA (2018, para. 4.56) *Notice of Possible Remedies* includes not only its own remedy (or remedies) but may also include those of the parties, together with comments on the latter set of proposals.[48] Hearings are then conducted at which the view of third parties may be sought and which in turn may lead to the refinement of the proposals and further comment.[49]

Several points may be noted about the CMA's approach to consultation on possible remedies. First a clear Phase I threshold is stated for the CMA to undertake consultation on remedy proposals offered by the parties: the UIL's must be clear cut and might be acceptable in principle as suitable to resolving the competition concerns raised by the merger. Second, at Phase II, unlike the European Commission and the CCPC, the CMA puts forward its own remedies for consultation, together with those put forward by the parties. The latter will be expected to address the CMA's competition concerns.

In contrast, the Bundeskartellamt (2017, para. 121) in its guidance on remedies is quite explicit concerning the threshold that is required in order for a remedy to be market tested:[50]

> In general, the Bundeskartellamt does not conduct any market tests if the commitments proposed are **clearly unsuitable** to eliminate the competition concerns identified during the investigation. Market tests are usually conducted in all cases where it appears to be at least possible that the commitments proposed are suitable (emphasis in original).

The agency's guidance provides extensive discussion of the information requested in market testing and the type of firms that are likely to be contacted.[51]

The ICN (2018, p. 39) recommended practices on merger control comment on market testing as follows:

> *Comment 7*: Market testing, involving either a formal or informal process by which a competition agency obtains views and comments from third-party customers, suppliers, and/or competitors, should be encouraged when it helps to determine if the proposed remedy will adequately address competitive concerns. Third-party views and comments should be evaluated by an agency, while remaining attuned to self-interest or any other motives that might attempt to influence the agency's views.

This does not, however, deal with the threshold for market testing proposal remedies.[52]

4.4 Discussion

The market testing of proposed remedies is important in assessing whether such remedies mitigate the competition concerns identified by competition agencies. The procedures and practices of the European Commission, the CMA and the Bunderkartellamt all point towards the setting of requirements that proposed remedies need to meet in order to ameliorate the competition concerns identified by the agency. Guidance is provided, for example, to the parties in varying degrees of what

[47] See also CMA (2021, para. 12.14).
[48] See, for example, CMA (2022).
[49] CMA (2018, paras. 4.58-4.67; 2022, paras. 13.18-13.19).
[50] The Bundeskartellamt (2017, para. 126) can only clear a merger with remedies in Phase II.
[51] Bundeskartellamt (2017, para. 122-124).
[52] See also ICN (2016, pp. 20-21) for further discussion.

should be contained in the remedy proposals (e.g. in a *Remedies Form)*. While it is not always the case for the European Commission, the CMA and the Bunderkartellamt, the threshold for market testing is that the remedy proposals "might be acceptable in principle" or "at least possible that the proposed commitments are suitable."

Given the close parallels between CCPC merger procedures and those of other competition agencies, there are good grounds for the CCPC following best practice elsewhere with respect to market testing. The CCPC could, for example, request the parties complete a *Remedies Form* in submitting remedy proposals. At a minimum it would seem reasonable that proposals that are market tested by the CCPC should be viewed ex ante as being potentially capable of ameliorating CCPC SLC concerns, subject of course to the results of the testing and other unanticipated contemporaneous developments. If this minimum threshold is not met, then it begs the obvious question of why market test?

One answer is that market testing by the CCPC, as stated in Section 4.3, is part of the process of gathering information and is but *one* facet of the overall analysis of the proposals. Agreed, but by the time proposals were market tested the CCPC had been assessing *Uniphar/NaviCorp* for nearly eleven months including preparing a 391 page Assessment setting out its competition analysis. Hence the CCPC should have been in a position to judge whether or not a given set of proposals *likely mitigated* or *were capable of mitigating* its SLC concerns, subject, of course, to the market testing results. Otherwise, the CCPC could still, notwithstanding positive market testing results (e.g. in the case of a divestment, the finding that there were a large number of credible buyers for the divested assets), reject the proposals as not satisfying its SLC concerns.

V. CONCLUSION

5.1 Introduction

This conclusion explores three issues. First, whether the CCPC's merger procedures with respect to informing the parties of its competition concerns and the threshold for market testing unnecessarily compressed timelines, limited the parties options in terms of withdrawing the merger notification and developing/offering remedies such that the outcome of the *Uniphar/NaviCorp* merger investigation was biased towards prohibition. Second, the degree to which the remedy packages offered by the parties were likely to have mitigated the CCPC's competition concerns. Third, the recent dramatic increase in the frequency of the use of Assessments by the CCPC, as exemplified by *Uniphar/NaviCorp*, without comment or explanation by the CCPC.

5.2 A Procedure Driven Bias Towards Prohibition?

The *Uniphar/NaviCorp* merger is the only instance since the CCPC was given responsibility for merger control on 1 January 2003 in which it has prohibited a merger where the parties proposed remedies. In the other three instances where the CCPC prohibited a merger over this time period no remedies were offered by the parties. In all the other instances in the past twenty years where the parties offered remedies (albeit in some instances after several iterations) the CCPC has cleared the merger with conditions.[53]

[53] In some instances the parties offered remedies, but the CCPC rejected the remedies as unnecessary and cleared the merger unconditionally. This is likely to be extremely rare. One example is M/06/057 – *Coillte/Weyerhauser*, para. 6.22.

The question posed at the beginning of this paper was whether the timing of the CCPC informing the parties in *Uniphar/NaviCorp* of its competition concerns combined with the threshold used for market testing the proposed remedies, limited the ability of the parties to put forward credible remedies in a timely manner that would have mitigated the CCPC's competition concerns or, alternatively, to have withdrawn the merger notification. In other words, were the options of the parties in terms of developing proposed remedies and/or withdrawing the notification unnecessarily restricted by the CCPC merger procedures biasing the outcome towards the prohibition of the transaction?

This is obviously a difficult, if not impossible, question to answer. It requires a comparison with the record of actual events as they unfolded in *Uniphar/NaviCorp,* with a plausible counterfactual in which there was time and space to explore, for example, the Third Draft Proposals put forward by the parties but which due to time constraints it was not possible for the CCPC to assess including conducting a market test. But what would that counterfactual look like?

A plausible counterfactual draws upon best practice as exemplified the procedures and processes of the European Commission, the CMA and the Bundeskartellamt, as well as the ICN's *Recommended Practices for Merger Notification and Review.* The CCPC, as noted above, drew on the European Commission *Remedies Notice* in assessing the Revised Second Draft Proposals. Furthermore, in a number of other Phase II merger investigations the CCPC has been able to convey its competition concerns to the parties without recourse to an Assessment[54] or articulate its concerns and for the parties to present remedy proposals prior to issuing an Assessment.[55]

The counterfactual would be characterised by:

- regular state of play meetings between the parties and the CCPC in which the latter would set out, inter alia, its competition concerns. At least one of these meetings would occur well before the issuance of any Assessment and at a minimum soon after the commencement of Phase II;

- written guidance (including a *Remedies Form*) on the requirements necessary for a proposed remedy to ameliorate the CCPC's competition concerns. Amply precedent exists for such guidance as set out in Section 4.3; and,

- an explicit statement of the CCPC threshold used to market test a remedy proposal (e.g. the remedy proposals are capable of meeting the CCPC's competition concerns or appear to be able to meet them or might be acceptable in principle).

If *Uniphar/NaviCorp* had been assessed under the counterfactual then the parties would have been better informed at an earlier stage of the CCPC's competition concerns.

This has several implications. First, the parties could have decided to withdraw the notification well before the issuance of any Assessment, thus saving the CCPC and the parties considerable time and expense. Second, the parties could have offered remedy proposals at a much earlier stage than post the Assessment. The more time and space afforded the parties may have resulted in better proposals being developed earlier than was the case. Other things being equal, this implies that there would

[54] See, for example, M/20/003 – *Link Group/Pepper.*
[55] See, for example, M/21/004 – *AIB/BoI/PTSB – Synch Payments JV*, paras. 1.58-1.67.

likely have been time to market test the Third Draft Proposals. Indeed, if the initial proposals had been better informed by guidance there may have been no need for the Third Draft Proposals. Third, it seems reasonable to assume, given the increased time and space to develop and market test remedy proposals under the counterfactual, that the CCPC would have been in a much improved position to assess in a timely manner the parties remedy proposals and that the parties would have been better situated to withdraw the notification if the final set of proposals were rejected by the CCPC.

5.3 Were the Remedy Proposals Fit for Purpose?

In some instances where the CCPC has cleared a merger subject to a remedy it is possible for an outside commentator to conduct a careful examination of the remedy and come to a view as to whether or not the remedy is likely to mitigate the CCPC competition concerns.[56] Such an examination is possible because details of the remedy are presented in the CCPC determination, together with the agency's competition assessment of the transaction.

In principle such an exercise should also be possible in *Uniphar/NaviCorp.* The CCPC's determination details its competition concerns in the two relevant markets identified in Section II, while the parties presented three sets of remedy proposals. The issue is thus the degree to which the proposals are able to mitigate the CCPC's competition concerns.

Such a course of analysis is not, however, possible in *Uniphar/NaviCorp* because the various remedy packages were redacted in their entirety by the CCPC in its written determination.[57] In the CCPC's discussion of whether the Revised Second Draft Proposals mitigate the agency's competition concerns, it appears that these proposals contain structural and access elements, but without further elaboration.[58]

The CCPC (2021, para. 4.3) states in its *Mergers and Acquisition Procedures* that:

> [T]he Commission will publish notice of its determination on its website on the same day as the determination is made. The Commission will publish the written determination on its website, *with due regard for commercial confidentiality*, within 60 working days after the making of the determination. In advance of publication of the determination, the Commission will allow the undertakings involved an appropriate period to indicate whether certain information in the written determination should be redacted on the grounds of commercial confidentiality (emphasis supplied).

In the case of the Revised Second Draft Proposals a non-confidential version was prepared by the parties for the purposes of market testing.[59] It would therefore seem inconsistent for the CCPC not to include in its written determination, at a minimum, the non-confidential version of the Revised Second Draft Proposals. Such an omission makes it not only difficult for an outside observer to examine the merits of the remedy proposals offered by the parties, but also makes it harder for practitioners

[56] See, for example, Gorecki's (2020) ex ante analysis of the remedy in M/18/063 – *Berendsen (Elis)/Kings Laundry.*

[57] On the First Draft Proposals, see M/21/079 – *Uniphar/NaviCorp,* para. 9.9; the Revised Second Draft Proposals, see M/21/079 – *Uniphar/NaviCorp,* paras. 9.19-9.20; the Third Draft Proposals, see M/21/079 – *Uniphar/NaviCorp,* para. 9.68.

[58] On the structural aspect see M/21/079 – *Uniphar/NaviCorp,* para. 9.22, on access see M/21/079 – *Uniphar/NaviCorp,* paras. 9.23, 9.44, 9.45.

[59] M/21/079 – *Uniphar/NaviCorp,* para. 9.18.

advising clients in a merger transaction raising serious competition concerns as to what remedy proposals might and might not be acceptable to the CCPC.

5.4 Wider Implications

It might be argued that the analysis of a subset of the CCPC's procedures in the *Uniphar/NaviCorp* case is of limited relevance to merger control in Ireland. Prohibition decisions are few and far between, with only one – *Uniphar/NaviCorp* – involving remedies. Such a view would, however, be mistaken.

One of the procedural concerns highlighted in this paper is the CCPC's view that it need not provide feedback to the parties prior to the issuance of the Assessment. For much of the period since the issuance of an Assessment in *Kerry/Breeo* on 25 July 2008[60] no Assessments were issued by the CCPC. In other words, merger remedies, including those of a structural nature, have been agreed between the parties and the CCPC without recourse to an Assessment.[61]

In the recent past that situation has, however, changed dramatically.[62] In the period 2017-2019 of five Phase II mergers in one (or 20 per cent) instance an Assessment issued;[63] in the subsequent three year period, 2020-2022, of the eleven Phase II mergers in five (or 45 per cent) an Assessment issued.[64] In 2017-2019 no mergers were prohibited by the CCPC or withdrawn by the parties after receiving an Assessment; in the latter period, however, one merger was prohibited by the CCPC (i.e. *Uniphar/NaviCorp*) while one was withdrawn after receiving an Assessment (M/22/015 – *East Cork Oil/Misty Lane)*.[65]

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[60] M/08/009 – *Kerry/Breeo,* para. 1.41.

[61] See, for example, M/15/020 – *Topaz/Esso Ireland*, involved the divestment of three retail fuel service stations and Esso Ireland's 50 per cent in a fuel storage terminal at Dublin Port, including its role as operator of the terminal. The author advised the CCPC in this transaction.

[62] In this paragraph mergers are dated by the year in which they were notified. A CCPC determination may, however, occur in a subsequent year. It should be noted that the CCPC has not commented on the change in, for example, its annual *CCPC Mergers and Acquisitions Report.*

[63] The Phase II mergers are: M17/068 - *Irish Times/Sappho (Irish Examiner*); M/18/016 – *Trinity Mirror/Northern & Shell*; M/18/063 – *Enva/Rilta*; M/18/063 – *Berendsen (Elis)/Kings Laundry*; M/18/067 – *LN Gaiety/MCD Productions*. Only in M/18/063 – *Berendsen (Elis)/Kings Laundry*, para. 1.23 was an Assessment issued. It should be noted that in the ISEL presentation referred to in the acknowledgements incorrectly stated the number of Phase II mergers as four not five.

[64] The Phase II mergers with an Assessment are: M/21/004 – *AIB/BoI/PTSB – Synch Payments JV*, para. 1.67; M/21/021 – *Bank of Ireland/Certain Assets of KBC*, para. 1.37; M21/079 – *Uniphar/NaviCorp,* para. 1.45; M/22/015 – *East Cork Oil/Misty Lane*, https://www.ccpc.ie/business/mergers-acquisitions/merger-notifications/m-22-015-east-cork-oil-misty-lane/; M/22/040 – *Q-Park/Tazbell Services*, https://www.ccpc.ie/business/ccpc-issues-assessment-to-parties-in-relation-to-q-park-tazbell-services/ ; those without an Assessment: M/20/003 – *Link Group/Pepper;* M/20/005 – *ESB/Coillte (JV);* M/21/040 – *AIB/Certain Assets of Ulster Bank*; M/21/071 – *Tesco Ireland/Joyce's Supermarkets*; M/21/076 – *PTSB/Certain Assets of Ulster Bank*; and M/22/067 – *Thorntons Recycling/Carducci Holdings (The City Bin Co.).*

[65] In two cases the notification was withdrawn by the parties prior to an Assessment being issued: M/20/003 – *Link Group/Pepper* was withdrawn following the CCPC setting out its competition concerns but before these concerns had been memorialised in an Assessment (https://www.ccpc.ie/business/mergers-acquisitions/merger-notifications/m-20-003-link-group-pepper/); and M/22/052 - *Linnaeus Veterinary/Blackhall Facilities* was withdrawn on 16 January 2023 in Phase I after "an extended period of engagement with the CCPC" (https://www.ccpc.ie/business/mergers-acquisitions/merger-notifications/m-22-052-linnaeus-veterinary-blackhall-facilities/). Prior to that the latter transaction had been notified (M/22/017 – *Linnaeus Veterinary/Blackhall Facilities*) and withdrawn. According to press reports the merged entity would have been the market leader in veterinary practices (https://businessplus.ie/ma/mergers-acquisitions/mars-veterinary-clinics/).

Irrespective of whether or not the CCPC has discretion over whether or not to communicate its competition concerns to the parties prior to issuing an Assessment or whether or not it needs to articulate more clearly the status of any market test it conducts, international best practice in both cases suggests that there are better alternatives than CCPC current practice as set out in *Uniphar/NaviCorp.* The use of the timely and transparent processes employed in international best practice improves merger control for the benefit of both the parties as well as the CCPC itself. It provides greater certainty. Resources - both private and public – are used more effectively. Transparency, accountability and certainty are increased.

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