A Guide To
Irish Merger Control

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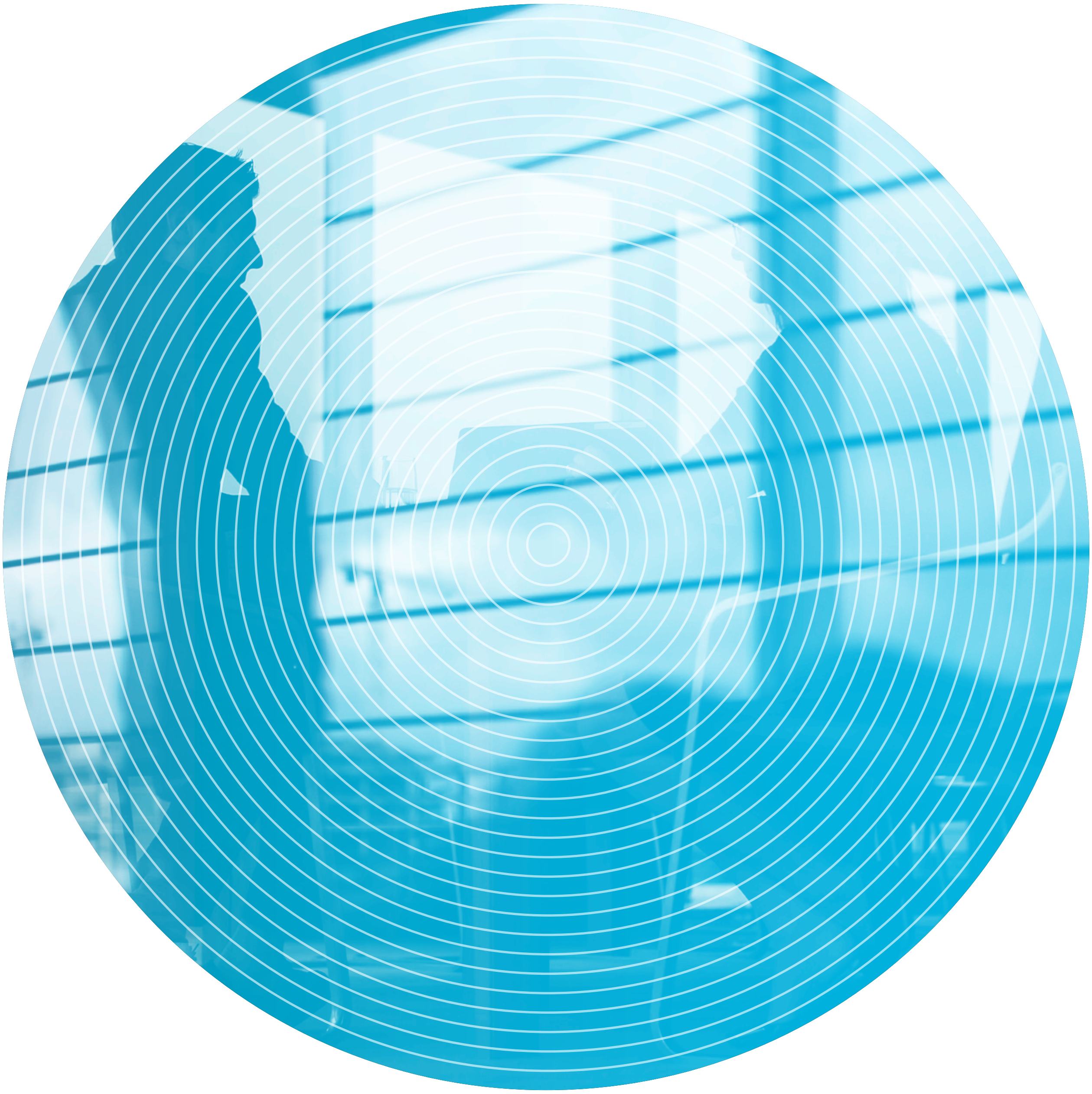

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Executive Summary

The Irish merger control regime is provided for in the Competition Act 2002, as amended (the "**Act**"). The essential provisions of the regime may be summarised as follows:

- mergers and acquisitions between firms that exceed certain turnover thresholds must be notified to and cleared by the Competition and Consumer Protection Commission ("**CCPC**") before they are completed; it is a criminal offence not to notify such mergers and they will be void if they are completed before clearance;
- "*media mergers*" (as defined in the Act) must be notified regardless of whether the turnover thresholds are exceeded;
- the substantive test for the assessment of mergers by the CCPC is whether the result of the merger will be "to substantially lessen competition in markets for goods or services" in Ireland;
- with the exception of media mergers, decisions to clear or prohibit (or impose conditions on) a proposed merger are taken exclusively by the CCPC;
- media mergers must be approved by the CCPC and the Minister for Communications, Climate Action and Environment (who may prohibit such a merger on grounds designed to protect diversity of ownership and diversity of content);
- the procedure for review of mergers involves two clearly defined phases, with uncontroversial mergers generally being subject to a Phase 1 investigation with clearance within 30 working days of notification (subject to extension). More complex cases are subject to a Phase 2 investigation conducted over a further period of 90 working days (subject to extension);
- if necessary in order to obtain clearance, parties may give legally binding commitments to the CCPC to take certain remedial action (such as the disposal of parts of the merged business or behavioural commitments);
- mergers between parties whose turnover does not exceed the thresholds in the Act (and which are not media mergers) do not have to be notified, but they may be voluntarily notified to the CCPC by the parties. This is an option which might be used in cases where the parties believe their transaction might be challenged in the courts (either by the CCPC or by third parties) on the grounds that it is likely to restrict competition;
- Ireland's merger control regime is modelled on the EU system and key terms are defined in largely identical ways to the EU Merger Regulation. As a result, the European Commission's Consolidated Jurisdictional Notice has generally been treated as persuasive on Irish threshold and jurisdictional issues.

Note: In this document, a reference to "Ireland" or to the "State" is a reference to the Republic of Ireland, not including Northern Ireland.

Which transactions have to be notified under the Act?

The notification obligation under the Act applies to a proposed "*merger or acquisition*" of the type specified in the Act, and where the turnover of the undertakings involved in the transaction exceeds the financial thresholds specified in the Act.[1] Thus, there are two elements to the assessment of whether a transaction is notifiable: the type of transaction and the size of the transaction.

However, the notification obligation under the Act has been modified by legislation in respect of transactions involving certain financial services entities and certain State entities (some of which were enacted during the financial crisis).[2]

Type of Transaction Test

A "*merger or acquisition*" occurs, and the type of transaction test is satisfied if:

(a) two or more undertakings, which were previously independent of one another, merge;[3] or

(b) one or more individuals or undertakings who or which already control one or more undertakings, acquire direct or indirect control (ie the ability to exercise decisive influence) over the whole or part of one or more other undertakings; or

(c) an undertaking acquires part of another undertaking and in doing so acquires assets (which includes goodwill) that constitute a business to which a turnover can be attributed; or

(d) undertakings agree to form a joint venture to operate in an economically autonomous manner on a lasting basis (a "full function joint venture").

Size of Transaction Test

This test will be satisfied where, in the most recent financial year:

(a) the aggregate turnover in Ireland of the "undertakings involved" is not less than €60,000,000; and

(b) the turnover in Ireland of each of two or more of the "undertakings involved" is not less than €10,000,000.

Turnover in Ireland is regarded by the CCPC to be that arising from sales made or services supplied to **customers located within Ireland**. It excludes any VAT or excise duty.

It is important to note that a "media merger" must be notified to the CCPC irrespective of whether the turnover of the undertakings involved meets these financial thresholds. For further information on media mergers see page 9.

How to Apply the Size of Transaction Test

In assessing the application of the above criteria, the relevant parties are the **purchaser(s)** and the **target company/ assets** to be acquired. The turnover of the purchaser for these purposes is that of the entire purchaser group. Turnover and location of the vendor is not generally a relevant factor in determining whether Irish merger control rules apply. In the case of the creation of a **full function joint venture**, the undertakings involved are the **parent**

1 The term "undertaking" is defined in the Act as *"a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits, shall include an association of undertakings."*

2 Such legislation includes: *European Union (Bank Recovery and Resolution) Regulations 2015 (S.I. No. 289/2015); National Treasury Management Agency (Amendment) Act 2014.*

3 Although the word "merge" is not defined in the Act, it will probably be interpreted as describing a situation where, by operation of law, one of the parties to a transaction ceases to exist after it is merged with another.

companies. Depending upon the transaction structure (particularly the number of parties taking control post merger), there may be more than two 'undertakings involved'- in such cases, this must be borne in mind when applying the financial thresholds.

What happens if the transaction is notifiable?

If both the type of transaction test and the size of transaction test are satisfied, the parties to the transaction are subject to a mandatory obligation to notify the transaction to the CCPC for review from a merger control perspective. The transaction is also subject to a standstill obligation meaning that it may not be put into effect until such time as the CCPC issues a merger control clearance (or the transaction is cleared by default). See below at page 8 for further detail on consequences of breach of these obligations.

What happens if the transaction is not notifiable?

In principle, non-notifiable mergers can be put into effect without any CCPC notification or other interaction with the CCPC. The Act provides that general prohibitions of anti-competitive conduct (on anti-competitive agreements and abuse of dominance) do not apply to mergers that have been notified to and cleared by the CCPC. As a result, those mergers will not be open to challenge by the CCPC or by third parties relying on those general prohibitions. The Act also provides that mergers not subject to compulsory notification can obtain the benefit of this "immunisation" if notified to and cleared by the CCPC.
The rationale for this voluntary notification regime is that, particularly in a small economy, mergers that fall below the mandatory notification thresholds may, in exceptional cases, result in a substantial lessening of competition. Mergers notified voluntarily are subject to the same procedural rules as mergers to which the compulsory notification obligation applies. There are two advantages in submitting a voluntary notification. First, it obliges the CCPC to take a decision in relation to the notified merger within a set time limit. It also means that if the proposed merger is cleared, a third party will be unable to challenge the merger in the courts on competition grounds. In practice, relatively few deals are voluntarily notified to the CCPC.

What is the substantive test applied by the CCPC?

The CCPC is required to determine whether the result of a notified merger will or will not be to substantially lessen competition in markets for goods or services in Ireland. The CCPC has published Guidelines for Merger Analysis setting out a detailed description of how it will conduct its competition analysis. The Guidelines state that the CCPC's analysis will focus on the effect of the transaction on consumer welfare, in particular, by reference to the effect on price, output (quantity), quality, consumer choice and innovation.

4 CCPC, Mergers and Acquisitions Procedures, 31 October 2014.

What is the procedure for a review by the CCPC?

Overview

The Act provides for a two-phase review procedure. Transactions which do not raise competition concerns will be cleared by the CCPC during Phase 1. Phase 2 of the review procedure will be initiated where the CCPC is "*unable on the basis of the information before it to form the view that the result of the merger or acquisition will not be to substantially lessen competition in markets for goods or services in the State*"[4].

Notification

Each of the "*undertakings involved*" in the merger or acquisition is required to notify the CCPC. In other words, generally the purchaser and the target are required to notify the CCPC. The vendor of the target is not required to notify. A notification fee of €8,000 is payable.

Notification of the proposed transaction must be made before the transaction is put into effect after any of the following events:

(a) one of the undertakings involved publicly announces an intention to make a public bid or makes a public bid which has not been accepted;

(b) the undertakings involved demonstrate to the CCPC a good faith intention to conclude an agreement or a merger or acquisition is agreed;

(c) if a scheme of arrangement is involved, the scheme document is posted to shareholders.

The CCPC encourages joint notification (although parties are not legally obliged to notify jointly).

The CCPC has published a standard notification form on which merger notifications must be submitted. The notification form requires detailed information (relating to matters including the activities, customers and suppliers of the parties) and the submission of documents prepared for the purpose of evaluating the effects of the transaction on relevant markets. However, where there is little or no overlap between the businesses carried on by the purchaser and the target, certain parts of the CCPC's standard notification form need not be completed.

Phase 1 - Preliminary Examination

Following a preliminary examination, the CCPC is required to reach its Phase 1 determination, which is either:

(a) **Clearance** on the basis that, in its opinion, the result of the merger or acquisition will not be "*to substantially lessen competition in markets for goods or services*" in Ireland; or

(b) **Full Investigation** on the basis that a full investigation is necessary in order to assess the effect of the proposed merger on competition.

The CCPC is required to advise the parties of its Phase 1 determination within 30 working days after the "*appropriate date*", which is the later of:

- the date on which it receives a complete notification; or
- the date on which it receives additional information from the parties where the CCPC requests such information within 30 working days of the filing of the notification. In other words, a request for further information from the CCPC during a Phase 1 investigation will reset the time period to zero, with the time period starting to run again from the date the requested information is supplied to the CCPC.

This 30 working day deadline can be extended to 45 working days where the parties submit proposals to the CCPC to ameliorate the effect on competition of the proposed merger (such as, the disposal of part of the merged business). If the CCPC fails to advise the parties of its Phase 1 determination by the expiry of the 30 working day period, they will be permitted to put the merger or acquisition into effect.

Phase 2 - Full Investigation

If the CCPC decides to open a full investigation (also referred to as a Phase 2 investigation), this will end with a final determination, which will be either:

(a) a **Clearance**, (a determination that the proposed transaction may be put into effect); or

(b) a **Prohibition**, (a determination that the proposed transaction may not be put into effect); or

(c) a **Conditional Clearance**, (a determination that the proposed transaction may be put into effect subject to compliance with specified conditions).

The CCPC must inform the parties of its final determination within 120 working days of the "*appropriate date*". Thus, generally speaking, the CCPC has a further 90 working days to reach its final determination once it moves the review to a Phase 2 investigation. However, this period can be extended as the CCPC has the power to "stop the clock" during a full investigation. If the CCPC issues an information request to the parties within 30 working days of opening a full investigation, the 120 working day period is suspended until the parties comply with the information request (or the deadline for response expires).

If the CCPC fails to communicate a final determination to the parties, they are permitted to put the merger or acquisition into effect 120 working days after the "*appropriate date*".

The 120 working day deadline is extended to 135 working days if the parties submit remedial proposals to the CCPC.

If the CCPC adopts a Prohibition or a Conditional Clearance determination, any of the notifying parties (but not a third party) may appeal that decision to the High Court within 40 working days

Appeals

If the CCPC adopts a Prohibition or a Conditional Clearance determination, any of the notifying parties (but not a third party) may appeal that decision to the High Court within 40 working days after being informed of the CCPC's decision. The High Court may annul, confirm, or modify the CCPC's final determination. The High Court may also remit the transaction to the CCPC with a direction to make a determination taking into account the findings of the High Court.

An appeal from the High Court's decision on questions of law only may be made to the Court of Appeal.

What happens if there is a failure to comply with the notification or standstill obligation?

Failure to Notify- Criminal Consequences

Failure to notify a transaction to the CCPC where the parties' turnover exceeds the thresholds is a criminal offence. The maximum fine, on summary conviction, is €3,000 (with a maximum daily default fine of €300) and, on conviction on indictment, is €250,000 (with a maximum daily default fine of €25,000).
It is also a criminal offence to contravene a Prohibition or a Conditional Clearance adopted by the CCPC.

Standstill Obligation- Transaction is Void

Any merger subject to the mandatory notification obligation (or which has been voluntarily notified) must not be put into effect before it is approved (or deemed to be approved) by the CCPC. That is, until the CCPC clearance issues or review period expires, the transaction is subject to a standstill obligation. If the parties purport to put the transaction into effect before the clearance issues, known as "gun-jumping", the merger is void as a matter of Irish law.

What about "ancillary restrictions"?

A decision by the CCPC that a proposed merger will not result in a substantial lessening of competition will also cover all "ancillary restrictions" that are directly related and necessary to the implementation of the merger and that have been referred to in the parties' notification. These may include non-compete covenants, licences of intellectual property, purchase and supply obligations and so forth.

The most common form of ancillary restrictions are non-compete covenants. In relation to non-compete restrictions agreed by the seller on the sale of a business, the CCPC's practice, where the transfer includes goodwill, has been to permit restrictions for a maximum period of two years after completion. Where the transfer includes both goodwill and technical know-how, the CCPC may permit restrictions for a longer period. A non-compete must also be appropriately limited in geographical scope and in subject matter.

What information is made public?

Within seven days of receiving a notification, the CCPC publishes a notice of the notification on its website. This notice indicates the names of the parties to the notified transaction and the industry sector affected by it and gives third parties the opportunity to make submissions to the CCPC in relation to the proposed merger.

The CCPC is also required to publish its determinations at the end of the Phase 1 and Phase 2 investigations. The CCPC does not publish the parties' notifications and is required to have due regard for commercial confidentiality when publishing its determinations.

What are the procedures for media mergers?

A "*media merger*" must be notified to and approved by the CCPC regardless of whether the turnover thresholds are exceeded. It must also be notified to and approved by the Minister for Communications, Climate Action and Environment before it can be put into effect. The review processes do not run concurrently- the Ministerial review process only commences once the CCPC review is complete. A "media merger" arises where:

(a) two of the undertakings involved carry on a media business in Ireland; or

(b) one of the undertakings involved carries on a media business in Ireland and one of the undertakings involved carries on a media business elsewhere.

The term "carries on a media business in Ireland" as referred to in (a) and (b) above means, in relation to a media business:

I. having a physical presence in Ireland and making sales to customers in Ireland; or

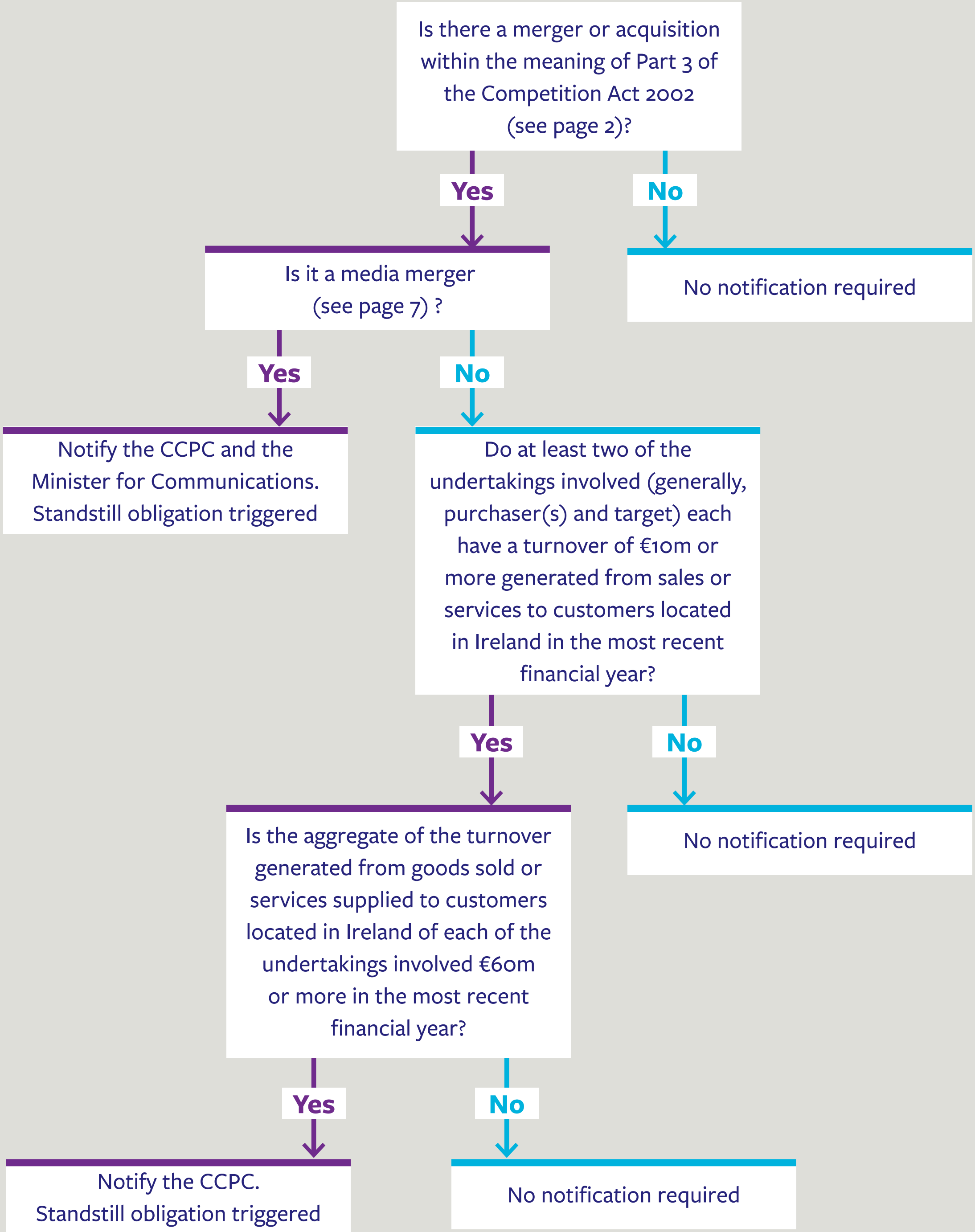
II. having made sales in Ireland of at least €2 million in the most recent financial year.

Media businesses include: publication of news/current affairs periodicals and newspapers (including online); broadcasting services; providing news and current affairs content to broadcasting services; and making news and current affairs materials available over a communications network (where there is editorial control over the material).

The Ministerial review process commences 10 working days after the CCPC determination issues. The Minister assesses the merger by reference to media plurality considerations and may prohibit a media merger which would be contrary to the public interest in protecting plurality of media in Ireland. The Minister may also accept commitments from the undertakings involved which would rectify any media plurality concerns that the Minister may have.

An uncontroversial media merger would generally be cleared within 30 working days of the commencement of the review period (referred to as an 'Initial Investigation'). Where a media merger cannot be approved (with or without commitments) following an Initial Investigation, it moves to a Full Investigation. A Full Investigation involves a review of the media merger by the Broadcasting Authority of Ireland ("BAI"). The BAI has 80 working days (capable of extension) to review the media merger and report to the Minister. Once the BAI report issues, the Minister has a further 20 working days to determine whether to approve the media merger (with or without conditions) or to prohibit the media merger. The Act is silent on the matter of what happens if the Minister fails to take a decision by the end of the Initial Investigation or the Full Investigation.

Is a Transaction Mandatorily Notifiable?



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