



Irish Competition Law Update

Spring 2021

MERGER CONTROL OVERVIEW

Irish merger control has been anything but dull in the past 18 months. The Competition and Consumer Protection Commission (**CCPC**) has conducted some lengthy investigations leading to extensive remedies and, in one case, the withdrawal of a notification. These cases illustrate the need for transaction agreements to incorporate flexibility on long stop dates. Otherwise, the length of the CCPC's review process may undermine the chances of deals being completed. The CCPC has also taken the rare step of rejecting a merger notification as invalid. Moreover, the CCPC has introduced a Simplified Procedure for 'no-issue' transactions while adapting its practices in line with the move to remote working.

LINK/PEPPER – REVIEW EXCEEDED LONGSTOP

In February 2020, Link Group notified its proposed acquisition of Pepper European Servicing (**PES**) to the CCPC. In Ireland, Link Group and PES are predominantly active in the provision of non-performing loans servicing and financial services outsourcing. Under the relevant transaction agreement, the long stop date was 30 January 2021.

The CCPC took five months to complete its Phase I investigation, opening a Phase II investigation in July 2020 and issuing further RFIs in August 2020. The CCPC's website does not record any responses to the RFIs being received. On 1 February 2021, almost a year after notification, Link Group issued a stock exchange announcement stating that it was not proceeding with the acquisition of PES, as the relevant long stop date had passed without the transaction being completed. The notification was thus withdrawn and the CCPC closed its investigation.

ESB/COILLTE – 12 MONTH REVIEW

In February 2020, the Electricity Supply Board (**ESB**), the State-owned electricity provider, and Coillte, a State-owned company engaged in commercial forestry, notified the CCPC of their proposed joint venture to develop and construct renewable energy generation facilities in Ireland.

In March 2020, the CCPC issued a requirement for further information (**RFI**) to both parties. It did not receive complete responses to the RFI for over six months – a highly unusual delay, as it usually takes three or four weeks to respond to an RFI. Although parties proposed behavioural remedies in November 2020, these did not prevent the CCPC from opening a Phase II investigation in early December 2020. The CCPC's Phase I investigation thus lasted just under ten months.

In the course of its review, the CCPC identified two potential competition concerns regarding the direct or indirect exchange of competitively sensitive information (**CSI**):

- between ESB, the joint venture and project partners currently in co-development arrangements with Coillte; and
- between Coillte and the joint venture regarding third parties seeking access to Coillte-owned land for the purposes of developing and constructing an onshore wind farm in Ireland.

In January 2021, the parties submitted proposals aimed at addressing these competition concerns, including: (a) measures to prevent ESB-appointed directors accessing and exchanging CSI between ESB and the joint venture; (b) the appointment of an independent chairperson; (c) measures preventing the exchange between Coillte and the joint venture of CSI regarding those persons seeking access to Coillte's land; and (d) procedures to ensure Coillte personnel do not discuss or pass CSI relating to a third party to any director of the joint venture. The CCPC accepted these proposals and cleared the transaction at the start of February 2021. In total, the review process lasted just shy of 12 months.

ELIS/BERENDSEN/ KINGS LAUNDRY – 11 MONTH REVIEW

In August 2018, Elis Berendsen Ireland, a provider of laundry services to the healthcare and hospitality sectors, notified the proposed purchase of its rival, Kings Laundry, to the CCPC. Due to concerns regarding the potential impact of the transaction in both sectors, the CCPC opened a Phase II investigation in spring 2019. Ultimately, Elis/Berendsen committed to an up-front divestiture of key contracts for the supply of linen to public hospitals to a third party purchaser to be approved by the CCPC. On this basis, the CCPC cleared the transaction in July 2019, some 11 months after notification. However, it took a further 12 months to find a suitable purchaser and secure the necessary consents from the relevant hospitals, and the transaction did not close until July 2020 – nearly two years after it was notified.

REJECTION OF MERGER FILING

The CCPC has rejected the notification of a proposed joint venture between the four major Irish retail banks (AIB, Bank of Ireland, KBC Bank Ireland and Permanent TSB).

The joint venture, which is reportedly intended to create a banking app to allow users to make payments in real time (similar to Revolut), was notified to the CCPC on a voluntary basis on 8 January 2021. However, having conducted a preliminary analysis, the CCPC took the unusual step on 21 January 2021 of rejecting the notification as invalid and publishing a press release on the matter.

Rejecting the notification, the CCPC stated that the parties had not provided full details of the transaction, with the result that it was unable to determine whether the joint venture constituted a triggering event (a merger or acquisition within the meaning of Irish merger control, including a full-function joint venture), and, moreover, whether it should in fact have been notified on a mandatory basis.

The structure of the joint venture is not public. That said, the case is noteworthy for the purported use of the voluntary notification regime. The voluntary regime applies only to mergers or acquisitions (including joint ventures) that involve a change of control, but which do not satisfy the jurisdictional thresholds for mandatory notification. There is no mechanism for the review of transactions which do not involve a change of control (for example, the acquisition of non-controlling interests, or the establishment of non-full-function joint ventures). The proposed transaction was re-notified on 8 April 2021.

SIMPLIFIED MERGER NOTIFICATION PROCEDURE

In July 2020, the CCPC introduced a simplified merger notification procedure aimed at shortening review periods for transactions that do not give rise to competition concerns. The CCPC will apply the Simplified Procedure: where there is no horizontal or vertical overlap between the parties; if the combined market shares of the merging parties are less than 15% (in the case of horizontal overlap) or 25% (in the case of vertical overlap); or in a move from joint to sole control.

Where the Simplified Procedure applies, the parties are not required to complete certain sections of the Merger Notification Form, for example, information on suppliers, customers and competitors in the areas of competitive overlap. In no overlap cases, there is no requirement to define the relevant market or provide market share estimates. However, the CCPC expressly reserves the right to require full or further information at any point, for example in transactions involving concentrated or neighbouring markets, maverick firms or pipeline products.

Importantly, the CCPC will not confirm to parties that their transaction qualifies for the Simplified Procedure until after the expiry of the deadline for third party submissions, usually two weeks after notification. In the six months to January 2021, the CCPC cleared seven mergers under the Simplified Procedure with an average time of 13.4 working days to issue a Phase I decision, compared to an average of 22.9 working days in 2020 under the usual review process.

COVID-19: ELECTRONIC MERGER NOTIFICATIONS

In response to the COVID-19 restrictions, the CCPC started to accept electronic merger filings. Previously, filings had to be delivered in hard copy to the CCPC's Dublin office. Notifying parties may e-mail a filing, together with all supporting documentation (including proof of payment of the notification fee and relevant annexes) to a dedicated mailbox. The e-mail must be received by 4.30 pm on a working day for that day to count as 'day one' of the CCPC's 30 working day Phase I review period.

FDI SCREENING

There is no foreign investment control regime in Ireland at present. In July 2020, the Irish Government approved heads of an Investment Screening Bill, but it has not yet published draft legislation. Given that the bill, once published, would need to go through the parliamentary review process, we do not anticipate that the controls will enter into force in 2021.

The Government has not indicated the threshold at which an investment would trigger screening. However, it stated in its April 2020 public consultation that the screening mechanism should not lessen Ireland's attractiveness to inward foreign direct investment which is hugely important to the domestic economy. Specifically, Ireland has nominated the Department of Enterprise, Trade and Employment as the body responsible for the various cooperation and reporting obligations under the FDI Screening Framework (Regulation (EU) 2019/452).

BREXIT – IMPACT ON MERGER CONTROL

The CCPC has stated that it anticipates an increase in complex Irish merger notifications as a result of Brexit. Given that UK turnover is no longer taken into account for the purposes of the EU jurisdictional thresholds, deals which previously triggered an EU filing may now trigger parallel EU and UK filings, or parallel filings in the UK and in one or more EU Member States. In particular, deals between businesses with significant Irish and UK turnover which previously triggered an EU filing may now instead trigger parallel Irish and UK filings. While the substantive tests of the Irish and UK merger control regimes are currently similar, the regimes differ in their processes and timescales.

CCPC PRICE SIGNALLING CASE

In September 2020, the CCPC issued preliminary findings to five private motor insurers, a broker and a brokers' association alleging that they had participated in anti-competitive conduct. The CCPC stated that the alleged anti-competitive conduct consisted of public announcements of premium increases as well as other contacts between competitors.

The CCPC had commenced this investigation in September 2016. During its investigation, the CCPC gathered a substantial amount of electronic material as well as extensive oral testimony through witness summons hearings and meetings.

The CCPC emphasised that its findings are provisional and no conclusion should be drawn at this stage that there has been a breach of competition law. It has invited the parties to offer commitments regarding their future behaviour to address its concerns. Under current Irish competition law, the CCPC has no power to make a competition law infringement finding or to impose sanctions. Instead it may institute civil proceedings against the parties in the High Court or seek criminal prosecution. However, the CCPC is soon due to gain increased enforcement powers under the implementation of the ECN+ Directive (see below).

CCPC SECURES COMMITMENTS FROM TICKETMASTER

The CCPC concluded its investigation into suspected anti-competitive practices by Ticketmaster on the basis of commitments under Section 14B of the Competition Act 2002 (as amended). Under the Section 14B procedure, the CCPC can apply to the High Court to make the commitments given by a party into an Order of Court. There is no finding of competition law breach against the party.

The High Court made the Order of Court as regards the Ticketmaster commitments on 15 December 2020, and they became effective on 29 January 2021.

The CCPC had commenced the investigation in January 2017. It was concerned that Ticketmaster was abusing a dominant position in the market for the supply of ticketing services for live events through exclusive arrangements, rebates and high service charges. Under the commitments, Ticketmaster undertakes to limit the duration of exclusivity clauses in relevant contracts and to refrain from offering upfront payments to customers in order to circumvent that commitment. The CCPC has stated that the commitments resolve its concerns. Ticketmaster denies that its conduct breached competition law.

LEGISLATIVE REFORM: IMPLEMENTATION OF ECN+

There has been a delay in the implementation of the ECN+ Directive (Directive (EU) 2019/1) into Irish law – this was due to happen by 4 February 2021. ECN+ represents a significant change in the Irish competition enforcement landscape, not least as it requires the introduction of a non-criminal system of fines for breaches of EU competition law. At present, Ireland has a purely criminal regime, with fines imposed by the Courts and not the administrative national competition authorities (e.g. the CCPC and the Commission for Communications Regulation).

The General Scheme of the implementing statute is undergoing pre-legislative scrutiny before a parliamentary Committee on Enterprise, Trade and Employment. This is the stage before publication of the draft legislation, which is expected in April 2021.

As part of the legislative process, the Department of Enterprise, Trade and Employment is considering measures in addition to the requirements of the ECN+ Directive. It ran a short consultation in January 2021 on the introduction of certain measures to increase the CCPC's enforcement powers in areas not covered by this Directive. Key proposals under consideration are the grant of specific powers to the CCPC to conduct surveillance and interception in competition investigations, the creation of a specific criminal offence of bid-rigging, and the grant of additional powers to review voluntary merger notifications in respect of completed transactions.

It will take a number of months for the draft statute to work its way through the Irish parliament, so final legislation is not likely to be in place before summer/autumn 2021.

DAMAGES LITIGATION

The *Trucks* cases in Ireland are moving slowly. Since September 2016, over 50 sets of proceedings have been issued in the Commercial Division of the High Court against the addressees of the European Commission's Trucks Infringement Decision. However, no judgments have been issued. Notwithstanding the [Irish Damages Regulations](#), competition law damages litigation in this jurisdiction remains limited, due in part to the [prohibition on third party litigation funding and lack of formal mechanism for collective actions](#).

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