EVERSHEDS SUTHERLAND

Knowledge Update

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Irish Merger Control

Sector: Construction

Acquisition by Glenveagh Properties of sole control of Harmony Timber Solutions and GMP Developments

On 3 August 2022, the Competition and Consumer Protection Commission (the **"CCPC"**) received a notification of the proposed acquisition by Glenveagh Properties plc of sole control of Harmony Timber Solutions Limited and GMP Developments Limited. The CCPC cleared this transaction on 22 August 2022.

Glenveagh Properties plc is one of Ireland's leading homebuilders and develops and supplies residential property suburban areas, urban areas, and as part of partnerships with local authorities and state agencies. Harmony Timber Solutions Limited is an Irish company active in the supply of structural timber products, for example, timber frame units and open metal web joists to the construction industry, including developers, self-builders and specialist builders. GMP Developments Limited is the owner of an undeveloped site adjacent to Harmony Timber Solutions Limited's property. This entity has no other activities within the State.

This proposed acquisition was notified through the Simplified Merger Notification Procedure which is a simplified process reserved for notifiable mergers or acquisitions that clearly do not raise competitions concerns in Ireland.

Sector: Transport and Logistics

Acquisition by Kinetic TCo Pty and Globalvia Inversiones S.A.U. of joint control of the entire issues share capital of The Go Ahead Group plc cleared by the CCPC

The proposed acquisition by Kinetic TCo Pty Ltd and Globalvia Inversiones S.A.U. of joint control of the entire issued share capital of The Go Ahead Group plc through a newly formed special purpose vehicle, Gerrard Investment Bidco Limited was notified to the CCPC on 2 August 2022. It was subsequently cleared on 17 August 2022.

Kinetic TCo Pty Ltd is active in the provision of urban, regional and school, charter and corporate, aviation, and workforce bus services in Australia and New Zealand. Globalvia Inversiones S.A.U. operates in the mobility industry and manages transport infrastructure concessions that focuses on highways and railways. Globalvia Inversiones S.A.U.'s activities span globally with projects in Spain, the US, Ireland, Portugal, Costa Rica, and Chile. The Go Ahead Group plc provides bus and rail services to connect local communities on an international scale. They operate rail services in the UK, Singapore, Ireland, Sweden, Norway, and Germany. They also operate bus services in Singapore, Ireland, and Sweden.

Similar to the Glenveagh notification, this acquisition was notified through the Simplified Merger Notification Procedure.

Sector: Transport and Logistics

Acquisition by Monza BidCo of Parcel Connect

On 3 May 2022, the proposed acquisition by Monza BidCo Limited of Parcel Connect Limited was notified to the CCPC.

Monza BidCo Limited is an indirect wholly-owned subsidiary of Monza TopCo Limited which is a company registered in England by funds managed by Elysian Capital LLP. Elysian Capital LLP is an independent private equity firm focused on the lower mid-market in the UK and Ireland. Parcel Connect Limited T/A Fastway Couriers provides courier, parcel delivery, and collection services in Ireland.

This acquisition was cleared by the CCPC on 19 May 2022 following a phase 1 investigation. The CCPC found that this acquisition would not substantially lessen competition in any market for goods or services in the State.

Sector: Retail and Wholesale Grocery

Acquisition by Ferrero International S.A. and Fulfil Nutrition GB of entire issued share capital of Bartoni Limited

The proposed acquisition by Ferrero International S.A. of the entire issued share capital of Bartoni Limited, together with its wholly owned subsidiary Fulfil Nutrition GB Limited, from Fulfil Holdings limited has been cleared by the CCPC following a phase 1 investigation.

Ferrero International S.A. is a public limited company incorporated in the Grand Duchy of Luxembourg. Ferrero International S.A. produces foodstuffs and operates in the manufacturing and sale of confectionary and other sweet products, e.g. sweet spreads and biscuits. As well as this, Ferrero International S.A. supplies snack products in the State, including snack bars through the brand Eat Natural, which it acquired in 2020. Fulfil Nutrition GB Limited trades under the name Fulfil Nutrition and is active in the marketing and sale of protein bars and is active in the snack products industry in the State through the sale of energy bars.

In its determination, the CCPC noted that there is horizontal overlap between Ferrero International

S.A. and Fulfil Nutrition GB Limited as both entities supply snack products in the State, specifically, snack bars. The CCPC did not note any vertical overlap between the parties.

EU Merger Control

Acquisition of PHE by D'leteren's

The European Commission (the "**Commission**") has approved D'leteren's acquisition of PHE, subject to compliance with a number of commitments offered by D'leteren.

D'leteren is active, through its subsidiary Belron, in the repair and replacement of vehicle glass in a number of EU Member States. Some of the brands under its control include Carglass, Autoglass and Safelite. PHE is active in the repair of vehicle glass in France, and operates through a network of workshops under the brand Mondial Pare-Brise and through the Glass Auto Service label.

In an investigation carried out to determine whether the transaction would have reduced competition in the vehicle glass repair and replacement market, the Commission determined that the transaction would result in the creation of an entity combining the market leader and an unavoidable trading partner, with its closest competitor. Since a majority of car owners are insured for vehicle glass damage, insurance companies account for 80-90% of the demand for vehicle glass repair. As such, post-transaction, insurers would be unable to redirect a significant portion of their business to other specialist networks.

To address the concerns of the Commission, D'leteren offered to divest both Mondial Pare-Brise and the Glass Auto Service Label in their entirety, removing any overlap between D'leteren and PHE's vehicle glass repair and replacement services. The Commission concluded, having considered the commitments, that the transaction would no longer raise competition concerns.

Acquisition of Equans by Bouygues

The Commission has approved Bouygues acquisition of Equans, subject to compliance with a number of commitments offered by Bouygues. Bouygues and Equans are both global providers of multi-technical and engineering services for a wide range of sectors. Bouygues, via Colas Rail Belgium, and Equans are among very few providers of electrical engineering services for railway contact lines in Belgium. Railway contact lines are transmission systems for supplying trains with electric power via current collectors through overhead lines.

Given the status of Bourgues and Equans as two of the leading providers of installation and maintenance services for railway contact lines in Belgium, the Commission raised a number of competition concerns. The market itself was deemed to be one with "significant barriers to entry" and in addition to this, the merged entity would have very large market shares. The effect of this being that it would face competition from very few participants in calls for tenders.

To address these concerns, Bouygues offered to divest Colas Rail Belgium in its entirety, including all assets, personal and ongoing and future contracts in respect of its railway contact lines and track installation businesses.
As a result of this divestment, Colas Rail Belgium will remain an independent competitor. This commitment, which was market tested, alleviated the competition concerns of the Commission. On this basis, the acquisition was approved.

EU Investigations and Decisions

Commission opens investigation into the proposed acquisition of VOO and Brutele by Orange

The Commission has opened an in-depth investigation to assess the proposed acquisition of VOO and Brutele by Orange. Orange is a French global telecommunications operator, who actively operates in Belgium on its own network. VOO is a Belgian cable operator active in specific Belgian regions. Brutele is also a Belgian cable operator active in specific Belgian regions.

The Commission has expressed concerns that the transaction may reduce competition in the retail markets for the supply of fixed internet services, audio-visual services, and multiple-play bundles in Belgium.

Orange provide retail mobile and fixed telecommunication services in Belgium. VOO and Brutele are leading providers of retail mobile and fixed telecommunications services also. The Commission preliminary concerns are that in the markets for (i) fixed internet access, (ii) audio-visual services, and (iii) multiple-play bundles, the transaction may:

- reduce the number of operators from three to two in areas covered by VOO an Brutele's own fixed networks eliminating a competitive constraint from the relevant markets;
- increase the likelihood of coordination on the retail markets between the remaining operators in areas covered by VOO and Brutele's networks;
- increase the bargaining power of the merged entity in the market for the wholesale acquisition of TV channels; and
- impact the deployment of third-party mobile network following the migration of VOO

mobile customers to Orange's mobile network.

The Commission has 90 days, until 6 December 2022, to make its decision.

General Court hands down judgment in Illumina and GRAIL challenge of the decision of the Commission to review the acquisition of GRAIL by Illumina.

The acquisition of GRAIL by Illumina was referred to the Commission by several EU Member States under Article 22 of the EU Merger Regulation (the "EUMR"), which provides a mechanism for the referral of transactions which do not meet either national or EU thresholds but affects trade between EU Member States and threatens to significantly affect competition in a territory concerned. The EU referral policy encourages EU Member States to refer any concentration even where they do not have jurisdiction. This is in order to target, among others, "killer acquisitions" e.g the acquisition of a company with a low turnover with high competitive potential with the intention of eliminating competition.

The Commission opened an in-depth investigation into the proposed transaction on 22 July 2021 over concerns that it may reduce competition and innovation in the market for the development and commercialisation of cancer detection tests based on sequencing technologies.

On 18 August 2021, Illumina announced publicly that it had completed its acquisition of GRAIL, while the Commission's review was still ongoing. The "standstill obligation" set down in the EU Merger Regulation requires that merging companies do not implement transactions unless and until they have been notified and cleared by the Commission.

The General Court, in its judgment, confirmed the Commission's interpretation of Article 22 EUMR that it can review transactions that have been referred by an EU Member State even if a transaction does not meet the relevant national merger control thresholds. In particular, the General Court held that the objective of the EUMR was to permit effective control of all concentrations with significant effects on competition in the EU.

Further, on 6 September 2022, the Commission announced that it has prohibited the already implemented acquisition of GRAIL by Illumina. The Commission cited that the remedies offered by Illumina were not sufficient to address the competition concerns whereby emergent competition in blood based early cancer detection tests would be hindered or even eliminated.

State Aid

Commission approves €500 million Irish scheme to support investment towards a sustainable recovery

The Treaty on the Functioning of the European Union (**"TFEU"**) generally prohibits State aid but the Commission accepts that, in certain circumstances, Member State intervention is necessary for a well-functioning economy to avoid market failure. State aid must go through the Commission's approval procedure to ensure that aid granted by a Member State or through State resources does not affect competition within the EU by favouring certain companies or the production of certain goods.

Accordingly, the European Commission has approved a €500 million Irish scheme which aims to incentivise companies to accelerate or expand capital investment in Ireland, including green and new digitalisation technologies for greater competitiveness and productivity under the State aid Temporary Framework. The aid will take the form of direct grants used to finance investments in tangible and intangible assets as a stimulus to overcome an investment gap accumulated in the economy as a consequence of the coronavirus pandemic. The measure will apply to a variety of sectors including manufacturing, information and communication, scientific and technical activities.

The Commission established that the Irish scheme aligns with the State aid Temporary Framework, in particular:

(i) The aid amount per beneficiary will not exceed 1% of the total budget;
(ii) The aid will benefit investments in tangible and intangible assets but not financial investments;
(iii) The aid will not exceed the maximum aid intensities set out in the Temporary Framework;
(iv) The public support will be granted no later than 31 December 2022.

Similarly, the Commission found the Irish measure to be necessary, appropriate and proportionate to foster investment for particular economic activities of importance for sustainable recovery, harmonious with Article 107 (3)(c) of the Treaty on the Functioning of the European Union. Thus, the European Commission approved the €500 million Irish aid measure under the EU State aid rules.

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