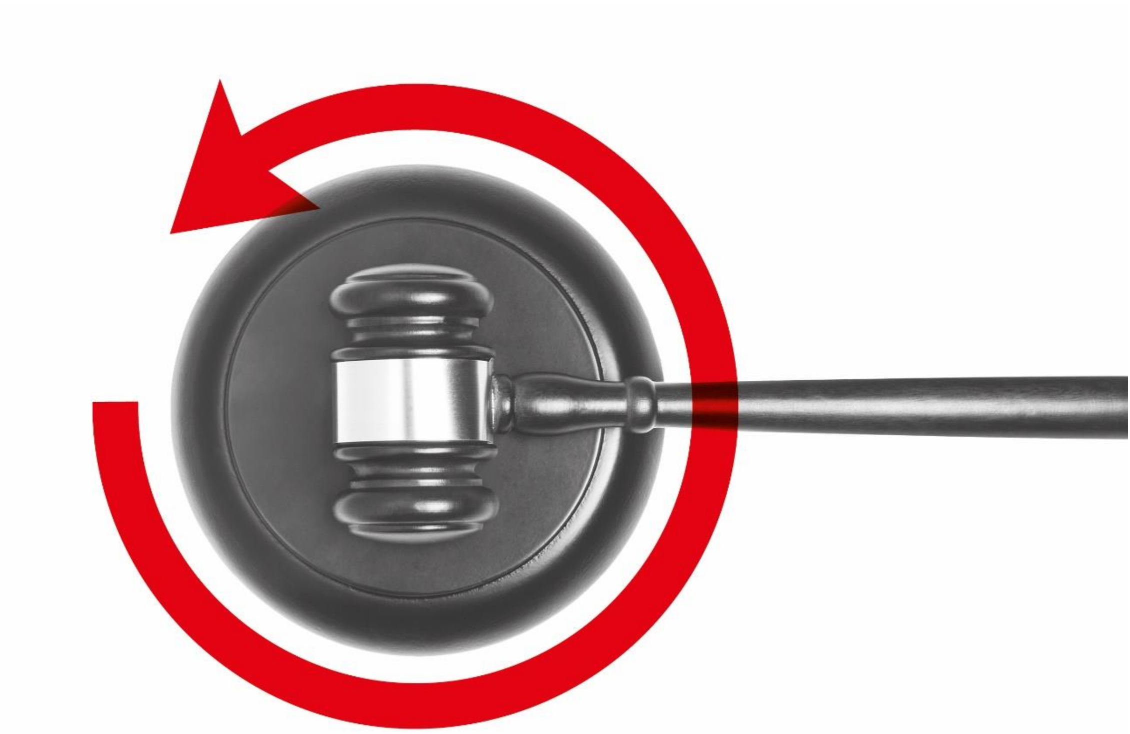
EVERSHEDS SUTHERLAND



Knowledge Update
EU & Competition Newsletter

Issue No. 3, 2021

Irish Merger Control

Joint venture between Kennedy-Wilson Holdings, Inc., and Avicdale Limited., a wholly owned subsidiary of AXA S.A.

On 10 June, the Competition and Consumer Protection Commission ("**CCPC**") cleared the proposed transaction between Kennedy-Wilson Holdings, Inc. and Avicdale Limited., a company indirectly controlled by AXA S.A. The companies intend to create a fully functional joint venture to invest in, develop, acquire, hold and manage private rented accommodation in County Dublin. Kennedy-Wilson Holdings, Inc. is a real estate investment company that owns, develops, operates, and invests in real estate. AXA S.A. is the holding company of the AXA Group, a global insurance group active in life, health, and other forms of insurance as well as investment management.

Acquisition by News Corp UK & Ireland Limited of sole control of Smurfit Kappa News Press Limited through its wholly-owned indirect subsidiary KIP Limited

The CCPC has cleared the acquisition of Smurfit Kappa News Press Limited ("**Smurfit**"), by KIP Limited ("**KIP**"), an indirectly owned UK incorporated subsidiary of News Corp UK & Ireland Limited ("**News Corp**"). Pursuant to a share purchase agreement, KIP will acquire the entire issued share capital and, therefore, sole control of Smurfit. News Corp is active in the publishing market, publishing various newspaper titles in the State, while KIP obtains newspaper printing contracts with third-party suppliers of printing services on behalf of News Corp. Smurfit is a contract printer active in the provision of printing services to national and regional newspaper publishers, specialising in broadsheet and tabloid printed products. The transaction did not constitute a media merger.

Bank of America Corporation and CVC Credit Partners Group Holding Foundation acquire joint control over Celtic Roads Group (Waterford) DAC

On 15 July, the CCPC cleared the proposed acquisition of joint control over Celtic Roads Group (Waterford) DAC by Bank of America Corporation (through its subsidiary Merrill Lynch International) and CVC Credit Partners Group Holding Foundation (through CVC Credit Partners Global Special Situations Holdings, L.P. and CVC European Credit Opportunities (No. 8) S.à r.l.). Bank of America Corporation is a global investment bank and financial services provider headquartered in Charlotte, North Carolina. CVC Credit Partners Group Holding Foundation is an investment management firm, active in the provision of financial services. The target company, Celtic Roads Group (Waterford) DAC, operates the N25 Waterford by-pass dual carriageway under a Public Private Partnership Agreement with Transport Infrastructure Ireland.

Bank of Ireland / Davy (Wealth Management and Capital Markets)

The proposed acquisition by Bank of Ireland Nominee 1 Limited, an Irish incorporated wholly owned subsidiary of The Governor and Company of Bank of Ireland ("**Bank of Ireland**") of Amber Note Unlimited Company, the wealth management and capital markets divisions of Davy was notified to the CCPC on 20 August 2021.

Bank of Ireland provides a broad range of banking and other financial services with offices in the State, the United Kingdom, the United States of America, Germany, France and Spain. Amber Note Unlimited Company, operates offices at six locations in the State, the UK and Luxembourg, with its head office in Dublin.

Completion of the acquisition will be conditional on the satisfaction of customary conditions including approval by the Central Bank of Ireland and the CCPC.

EU Merger Control

Commission clears acquisition of EPS by Entega and of EMS by Entega and Viessmann

The European Commission (the "**Commission**") has approved, under the EU Merger Regulation, the acquisition of sole control of Energy Project Solutions GmbH ("**EPS**") by Entega. EPS analyses and optimises energy potential for companies and businesses. The Commission has also approved the acquisition of joint control over Energy Market Solutions GmbH ("**EMS**") by Entega and Viessmann. EMS provides household and commercial customised electricity products as well as smart service solutions for new energy market participants. All companies operate in Germany.

The Commission determined that the proposed acquisition raises no competition concerns as the companies do not compete closely and the increases in combined market share are very small. The Commission also noted that a number of large competitors would remain in the relevant market after the merger.

EU State Aid Decisions

Coronavirus Measures

The Commission has approved, under EU State aid rules, a number of State support measures to assist various sectors affected by the coronavirus. An €800 million Greek scheme to support companies active in the tourism sector was approved by the Commission under the State Aid Temporary Framework. The aim of the scheme is the provide companies with working capital needed for access to raw materials required for their tourism operations. Aid will come in the form of direct grants and is open to companies of all sizes. The Commission has also approved an €800 million Italian scheme that will assist companies performing "Developing Contracts" under the COVID-19 Temporary Framework. Such contracts consist of research activities and/or crucial production of products that are required for addressing the pandemic. An Austrian scheme supporting organisers of events who have been impacted by coronavirus has also been approved by the Commission. The aim of the scheme is to compensate organisers for costs of cancelled or significantly restricted events due to measures implemented by the Austrian Government in response to the spread of the virus. The events must have been scheduled to take place between 1 July 2021 and 31 December 2022. The Commission has also approved a German aid package worth €523.5 million in favour of the airline Condor. The package relates to compensation for the airline for damages suffered as a result of the coronavirus outbreak alongside restructuring support to enable Condor's return to viability post-pandemic.

On 23 July, the Commission adopted an extension of the scope of the General Block Exemption Regulation. This regulation allows Member States to implement certain State aid measures without prior Commission scrutiny. Among other aspects, the adoption of the extended scope includes revised rules in relation to certain State aid measures that support the green and digital transition and are at the same time, relevant for the recovery from the economic effects of the coronavirus pandemic.

European Commission Decisions

Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars

The Commission has fined Daimler, BMW and Volkswagen Group (Volkswagen, Audi and Porsche) for breaching EU antitrust rules by colluding on technical development in the area of nitrogen oxide cleaning in diesel passenger cars. The conduct of the manufacturers violates EU rules that prohibit undertakings placing a restriction on technical development under Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") and Article 53 of the EEA Agreement.

The car manufacturing companies held regular meetings between June 2009 and October 2014 to discuss the technical developments of emission-reducing technology. The technology was available to "clean better than what is required by law" but the car manufacturers colluded to avoid competition on this prospect. The parties reached an agreement on certain technical specifications and shared commercially sensitive information on these elements. The Commission found that this removed uncertainty from the market and therefore the parties restricted competition on product characteristics. This was deemed to be participating in the limiting of technical development in direct contravention of Article 101 TFEU and Article 53 EEA Agreement.

In determining the fines, the Commission took into account the value of the parties' sales of diesel passenger cars equipped with the concerned technology in the EEA in 2013 (the last full year of infringement), the gravity of the infringement and the geographic scope. The Commission imposed fines totalling over €875 million on the parties. Daimler received full immunity for highlighting the existence of the cartel to the Commission. Volkswagen Group received a 45% reduction due to cooperating with the investigation and providing evidence to the Commission. Notably, all parties were afforded a reduction of 20% as this is the first Commission decision based solely on a restriction of technical development and not on price fixing, market sharing or customer allocation. All parties received a further reduction of 10% due to acknowledging the existence of the cartel and their liability for infringing EU antitrust rules.

European Commission Investigations

Commission opens investigation into possible anti-competitive conduct of Facebook

The Commission has opened a formal antitrust investigation to assess whether Facebook violated EU competition rules by using advertising data gathered from advertisers in order to compete with them in markets where Facebook is active, such as classified ads. The Commission has particular concerns that Facebook may distort competition for online classified ads services. When companies advertise their services on Facebook, they provide Facebook with commercially valuable data. The Commission is concerned that Facebook might then make use of the data obtained from competing providers in this context to help "Facebook Marketplace" outcompete them in neighbouring markets where Facebook is also active.

The formal investigation will also assess whether Facebook ties its online classified ads service "Facebook Marketplace" to its social network, in breach of EU competition rules. The Commission will examine whether the way "Facebook Marketplace" is embedded in the social network constitutes a form of tying which gives it an advantage in reaching customers and forecloses competing online classified ads services.

If proven, the practices may fall foul of EU prohibitions on anti-competitive business agreements under Article 101 TFEU and/or an abuse of a dominant market position under Article 102 TFEU.

Commission opens investigation into possible anti-competitive conduct by Google

The Commission has opened a formal antitrust investigation to assess whether Google has violated EU competition rules by favouring its own online display advertising technology services in the "ad tech" supply chain, to the detriment of competing providers of advertising technology services, advertisers and online publishers.

The Commission's investigation will focus on display advertising, notably examining whether Google is distorting competition by restricting access by third parties to user data for advertising purposes on websites and apps, while reserving such data for its own use. The investigation will also focus on whether Google has restricted competition by obligating publishers and advertisers to use Google's ad services to display ads on YouTube.

The practices may fall foul of EU prohibitions on anti-competitive agreements under Article 101 TFEU and/or an abuse of a dominant market position under Article 102 TFEU if proven by the Commission.

Practice Note

Publication of Pre-Legislative Scrutiny Report of the Competition Bill 2021

The Joint Oireachtas Committee on Enterprise, Trade and Employment (the "**Committee**") has published its Pre-Legislative Scrutiny Report of the Competition Bill 2021 (the "**Bill**"). The Bill aims to transpose EU Directive 2019/1, namely the European Competition Network (Empowerment) Directive.

The Committee reviewed the General Scheme of the Bill and held discussions with Department of Enterprise, Trade and Employment officials, members of the CCPC, and representatives of the Commission for Communications Regulation ("**ComReg**").

The Committee identified 17 key issues arising from the Bill, among them were matters relating to distinguishing what a "competent authority" is and whether it refers to the CCPC, to ComReg or both. Constitutional, EU and international human rights issues regarding punitive sanctions, privacy concerns and an absence of a right of appeal in certain situations were also noted. Overt and covert surveillance powers provided for in the Bill were further listed as a potential concern. The Committee particularly stressed the importance of national authorities having adequate resources to fully implement new powers that will be afforded by the Bill.

The Chair of the Committee, Maurice Quinlivan TD, acknowledged however that the Committee largely welcomed the provisions of the General Scheme of the Bill.

Key contacts

For further information, please contact:

Sean Ryan
Partner, Corporate

T: + 353 1 6644 207
SeanRyan@
eversheds-sutherland.ie

Katie Haberlin
Senior Associate, Corporate

T: +353 1 6644 970
KatieHaberlin@
eversheds-sutherland.ie

Shane Kelly
Solicitor, Corporate

T: +353 1 6644 973
ShaneMKelly@
eversheds-sutherland.ie

eversheds-sutherland.ie

10/21 7113304.1