Lighting the way

EU & Competition Newsletter

September 2020

Merger Determinations

Irish Merger Control

CCPC clears Phoenix Tower's acquisition of an Eir owned subsidiary

The Competition and Consumer Protection Commission (the "**CCPC**") has cleared the proposed acquisition by Phoenix Tower International, a subsidiary of Phoenix Tower US Holdings LP, ("**Phoenix**") of Emerald Tower Limited ("**Emerald**") through its subsidiary Dolya Holdco Limited.

Emerald, ultimately owned by the Irish telecommunications provider Eir, operates passive telecommunications infrastructure for Eir such as telephone masts and towers on which mobile service providers can then lease space to mount their equipment on.

The CCPC noted there remained an incentive post-completion for Emerald to use the passive infrastructure as efficiently as possible to obtain a return on the investment. Accordingly, there remained an incentive for Emerald to continue allowing other mobile service providers to share Emerald's passive infrastructure. This, combined with the relatively small share of passive infrastructure owned by Emerald, presented no vertical competition concerns.

French group Orpea SA increases its presence in the Irish healthcare / nursing home sector

The acquisition by Orpea SA ("**Orpea**"), a French care home group listed on the Paris Euronext stock exchange, of a 50% stake and joint control in Brindley Healthcare Limited through its Irish registered Arthopoda Limited, has been cleared by the CCPC.

This comes on the back of Orpea's acquisition of the TLC Nursing Home Portfolio in March 2020. The CCPC determined that the proposed transaction would not substantially decrease competition in the nursing home sector in Ireland.

Businessman Larry Goodman set to take ownership of private hospitals the Blackrock Clinic and the Hermitage Clinic.

The CCPC has approved the acquisition by Portlon Trust, through its subsidiaries Parma Investments and Breccia, of shareholdings in Tullycorbett Ltd and Xroon Ltd (in which Blackrock Clinic co-founder George Duffy holds his shares), and also approved the acquisition by Parma Investments of the remaining co-founder shares.

Both deals will give Portlon Trust, which Mr Goodman controls, full ownership of Blackrock Clinic.
The CCPC also approved a third deal whereby Portlon Trust, through Parma Investments, acquired stakes held in the Hermitage Clinic in Lucan, Co Dublin. The approval means that Portlon Trust, through Parma Investments, will take full control of Torcross Ltd, the Hermitage Clinic's holding company.

Berendsen's acquisition of Kings Laundry is subject to divestment requirements, Monitoring Trustee appointed

The CCPC has cleared the proposed acquisition of Kings Laundry Limited by Berendsen Ireland Limited ("**Berendsen**") subject to various commitments being adhered to by Berendsen such as divesting a certain number of their contracts with healthcare customers to a suitable third-party supplier.

The CCPC specified the value and composition of the contracts to be divested with the third party choice being subject to CCPC approval. A monitoring trustee was also appointed. The CCPC ultimately approved Linencare as a suitable third-party purchaser. Following this, Berendsen made a submission to the CCPC demonstrating that it had carried out all the necessary commitments. The acquisition was put into effect on 7 July 2020.

Phase 2 investigation of Link Group/Pepper merger

On 22 July 2020 the CCPC decided to carry out a full Phase 2 investigation into the proposed acquisition by Link Group Administration Limited ("**Link**") of Pepper Ireland Finance Holdings Limited, Pepper Cyprus

Holdings Limited, Pepper (UK) Limited and Pepper Spanish Servicing S.L.U (collectively "**Pepper**") and its impact on competition in the market.

In Ireland, Link provides services such as investor relations, outsourcing of credit management services and funds solutions, whereas Pepper primarily offers advisory services, asset management and outsourced credit management services.

This case will be closely watched in light of the ongoing focus by Irish politicians on entities involved in the acquisition and management of residential mortgage loan-books. A focus which will only intensify once the economic fallout from the coronavirus pandemic crystallises in the coming months.

EU Merger Control

European Commission clears Alstom's acquisition of Bombardier

On 31 July 2020, the European Commission (the "**Commission**") approved, under the EU Merger Regulation, the acquisition of Bombardier Transportation by Alstom with approval conditional on full compliance with a commitments package offered by Alstom.

An initial investigation by the Commission found there was horizontal overlap between Bombardier and Alstom's activities as they are both competitors in the manufacture and supply of high-speed train infrastructure. To address this potential horizontal overlap, Alstom committed to implement a number of measures. Alstom committed to divest itself of some production facilities in France and Germany. Alstom also pledged to put in place measures with the aim of preserving its position as part of an existing consortium which is bidding to be part of the HS2 high-speed rail project in the UK.

European Commission investigates proposed acquisition of Fitbit by Google

On 4 August 2020, the Commission opened an investigation into the proposed acquisition of Fitbit by Google under the EU Merger Regulation citing concerns that Google's market position would be further entrenched in the online advertising market.

By acquiring Fitbit, Google would acquire: (1) the database maintained by Fitbit about its users' health and fitness; and (2) the technology to develop a database similar to Fitbit's. The Commission considers that in the EEA that Google is dominant in the supply of online search advertising services and holds a strong market position in the supply of online display advertising services and in the supply of "ad tech" services.

An acquisition by Google of FitBit would increase its data advantage, from FitBit's wrist-worn devices and in the personalisation of advertisements via its search engine making it more difficult for rivals to match Google's online advertising services. The Commission is due to make a decision by 9 December 2020.

CCPC's Annual M&A Market Round-Up 2019

Earlier this year, the CCPC published its annual statistics detailing the number of mergers notified to it during 2019.

In total, 47 mergers / acquisitions were notified to the CCPC in 2019, representing a significant 52% decrease from 2018. The decrease, however, is likely to be largely accounted for by the increase in the financial thresholds at which a merger notification is required.

For non-extended Phase 1 investigations, the CCPC took on average 24.7 working days to issue a determination.

It remains to be seen what impact the global coronavirus pandemic will have on M&A activity in the Irish market for 2020 with the twin problems of economic uncertainty and depressed consumer confidence that it has unleashed.

Practice Notes

Business Owners Beware – A CCPC Warning To Businesses

On 1 July 2020, the CCPC issued a warning to businesses as the country begins to reopen after the coronavirus pandemic induced lock-down.

The CCPC warned that when reviewing their prices, businesses must act independently in setting prices. This warning comes on the back of various public announcements by trade associations concerning new charges which businesses in a particular sector could apply in order to offset the additional costs of adhering to public health guidance.

However, the CCPC reminded businesses that the practice of trade associations suggesting future prices, or coordinating ways of passing on the additional costs to consumers could constitute an infringement of competition law.

Accordingly businesses should beware when following these advices and act independently in assessing new price points.

Coronavirus Outbreak – EU State Aid Temporary Framework

On 19 March 2020[1] in response to the coronavirus pandemic the Commission adopted a temporary framework under articles 107(2)(b), 107(3) of the Treaty on the Functioning of the European Union and amended on 3 April 2020[2] (the "**Framework**"). The Framework enables member states to use flexibility under state aid rules whilst limiting the negative consequences to the level playing field in the Single Market in order to support their ailing economies.

The Framework allows member states to provide state aid through the following measures:

(1) Aid in the form of direct grants, repayable advances or tax advantages, loan guarantees, subsidised interest rates for loans along with credit channelled through financial institutions;
(2) Short-term export credit insurance;
(3) Support for coronavirus related R&D, the construction and upscaling of testing facilities, along with the production of products relevant to tackling the coronavirus outbreak; and
(4) Targeted supports such as deferring tax payments and/or suspension of social security contributions and wage subsidies for employees.

Examples in Ireland of the Framework being implemented include the Irish Restart Grant consisting of €250 million worth of supports for affected SMEs with support taking the form of direct grants equivalent to the commercial rates payable by a business.[3]

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[1] Communication From The Commission "*Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*" (2020/C 91 I/01); https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0320(03)&from=EN

[2] Communication From The Commission "*Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*"
https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_1st_amendment_temporary_framework_en.pdf

[3] European Commission Daily News dated 4 June 2020; https://ec.europa.eu/commission/presscorner/detail/en/mex_20_995

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