EUGENE F COLLINS

EU, Competition & Regulated Markets Group

Merger notifications to the CCPC

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With Great Power Comes Great Responsibility: some recent trends & reforms in Merger Notifications to the CCPC

Parties to a proposed merger would be wise to take note of recent legislative reforms and decisions and act strategically in their notifications to the Competition and Consumer Protection Commission ("CCPC").

These reforms strike an appropriate balance between business innovation and efficiency gains on the one hand, while curtailing the potential for an aggregation of market power on the other.

Background:

The lowering of merger notification thresholds in 2014 coupled with an improving economy has seen a large increase in the number of notifications being made to the CCPC.

Lower thresholds mean more deals are "caught" by the notification requirement, but generally, these smaller mergers are less likely to distort competition and be blocked by the CCPC.

The 2014 act also provides an effective statutory extension of the CCPC's Phase I investigation period from one month to 30 *working* days.

Divestments – a "third way"

Entities acquiring or merging with other commercial entities should understand that a merger investigation, on foot of "Phase II", doesn't always necessarily result in a simple cleared / blocked dichotomy. Some recent merger decisions decided, on foot of "Phase II" investigations, have indicated the CCPC's willingness to adopt more flexible remedies by way of conditional clearances. The Topaz and Valeo decisions are a welcome relaxation of the strict outcomes in merger control decisions in Ireland.Topaz/Esso decision:

Topaz notified the CCPC of its intention to acquire sole control of Esso Ireland. It was determined that given the market position Topaz would enjoy post-acquisition, the CCPC approved the merger only on the basis that Topaz would make divestments in respect of three of its retail fuel service stations in the Dublin area and in respect of 50% of its interest in a sea-fed fuel terminal at Dublin Port. On the basis of these divestment commitments made by Topaz, the CCPC formed the view that the proposed transaction would not substantially lessen competition in any market for goods and services in the State.

Valeo/Warrel/Roberts decision:

Valeo was permitted to acquire the target subject to binding divestiture commitments in relation to its ownership of the "YR" brown sauce brand. Here, the CCPC considered brown sauce to be a distinct and unique product, whilst the parties failed in their argument that ketchup and brown sauce were interchangeable substitutes in a broader cold sauces category.

"Failing Firm" arguments: Baxter /Fanin

Where there is certainty that an entity would leave the market in the absence of a merger, a "failing firm" defence is available, as a merger cannot be said to substantially lessen competition in circumstances where a business will be exiting the market in any event. However, there are strict criteria under the merger guidelines that must be met for this argument to be successful.

This year's Baxter/Fanin decision is particularly noteworthy as it is the first time an argument under s9 of the CCPC's 2014 merger guidelines on "failing firms" has been successfully invoked. The parties argued that Fannin's compounding business represented a failing segment of its activities for the purposes of the merger guidelines. Following an in-depth investigation and an independent financial examination, the CCPC was convinced that the competitive structure of the relevant market would deteriorate to at least the same extent in the absence of the proposed acquisition.

Future Merger Control

The trend in 2015 appears to have been a more innovative and interventionist CCPC that has increasingly invoked its statutory powers under the Competition Acts, increased its enforcement activities, and applied more flexible remedies in its merger decisions. It will be interesting to see the pace at which this continues in 2016. It is also noteworthy that the European Commission is currently carrying out a public consultation on further increasing the powers of national competition authorities in their role as domestic enforcers.

Merger control is inherently a balancing act between commercial expediency and regulatory oversight. As an ex-ante policy instrument, competition authorities must look ahead at potential future effects on the competitive process, be it through the availability of entry for competitors; future industry innovations; or changes in the economic landscape at large. Therefore, an increased role for the CCPC will necessitate a high degree of care, diligence and foresight in future merger decisions, which in turn may elongate the notification and decision processes for merging parties.

For further information on this topic please contact: Joanne Finn, Partner, EU, Competition & Regulated Markets Group, E: jfinn@efc.ie or Richard Hourihan, EU, Competition & Regulated Markets Group E: rhourihan@efc.ie