



2016 in Review: Competition Law, Merger Control, State Aid and Procurement Law in Ireland

2017

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Introduction

The purpose of this publication is to brief you on key developments during 2016 in the areas of competition law, procurement law, State aid and merger control in Ireland.

The booklet has been prepared by lawyers in A&L Goodbody's EU, Competition & Procurement Law team who have been involved in, and advised on, many of the leading cases in this area.

In the area of competition law, Ireland's Competition and Consumer Protection Commission (**CCPC**) stepped up its enforcement activities during 2016 with the launch of an investigation into alleged price signalling in the private motor insurance sector. Earlier in the year, the Minister for Jobs, Enterprise and Innovation signed the new Grocery Goods Regulations into law. The High Court took a negative view of the CCPC's bulk seizure of electronic data during a dawn raid and held that the CCPC had unlawfully seized documents that it was not entitled to seize under its search warrant - this decision is now under appeal to the Supreme Court.

There were a number of significant State aid decisions concerning Ireland in 2016, most notably the Apple decision whereby Ireland was ordered to retrieve up to €13bn in taxes from Apple. In December 2016, the Court of Justice of the European Union upheld the decision by the European Commission that Ireland had granted unlawful State aid in the form of a lower air travel tax for flights located no more than 300km from Dublin Airport.

The 2014 public sector and utilities procurement directives were published in May 2016 with retrospective effect from 16 April 2016. At the time of writing, implementation of the Concessions Directive remains outstanding. The Irish Courts were very active in the area of procurement litigation during 2016 with some key judgments in the areas of reason giving, automatic suspensions, late tenders and competition issues arising from a centralised framework agreement.

There was a 14% decrease in the number of mergers and acquisitions notified to the CCPC compared with 2015 which may be attributable to the uncertainty generated by Brexit. Only one transaction was the subject of a Phase II review compared with two in 2015. The average number of days for a Phase 1 clearance for a no-issues merger was 37 calendar days.

A&L Goodbody's EU, Competition & Procurement Group is widely recognised as the leading and most experienced team in its field in Ireland and Northern Ireland. Consistently involved in most of Ireland's leading competition and procurement cases, it is the largest team, among all Irish law firms, dedicated to practising full-time in this area.

It is ranked as an elite competition practice in the top 100 competition law practices worldwide by Global Competition Review (2017). The team are at the forefront of EU, competition and procurement law practice in Ireland and are renowned for their unique experience, expertise, depth of knowledge and contributions to leading publications.

We hope that you will find this publication helpful and look forward to answering any question you may have.

Key contacts



Dr. Vincent Power | Partner
Head of EU & Competition
EU, Competition & Procurement
t: +353 1 649 2226
e: vpower@algoodbody.com



Alan McCarthy | Partner
EU, Competition & Procurement
t: +353 1 649 2228
e: amcarthy@algoodbody.com



Anna-Marie Curran | Partner
EU, Competition & Procurement
t: +353 1 649 2227
e: amcurran@algoodbody.com



Micaela Diver | Partner
EU, Competition & Procurement
t: +44 28 9072 7592
e: mdiver@algoodbody.com



Lorna McLoughlin | Solicitor
EU, Competition & Procurement
t: +353 1 649 2187
e: lmcloughlin@algoodbody.com



Kate McCann | Solicitor
EU, Competition & Procurement
t: +44 28 9072 7483
e: kmccann@algoodbody.com



Jessica Egan | Solicitor
EU, Competition & Procurement
t: +353 1 649 2323
e: jegan@algoodbody.com



Emma Wallace | Solicitor
EU, Competition & Procurement
t: +353 1 649 2582
e: ewallace@algoodbody.com



Thomas O'Donnell | Solicitor
EU, Competition & Procurement
t: +353 1 649 2549
e: todonnell@algoodbody.com

The contents of this publication are necessarily expressed in broad terms and limited to general information rather than detailed analysis or legal advice. Specialist privileged professional legal advice should always be obtained to address legal and other issues arising in specific contexts.

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2016 in review - 10 things you and your business need to know

- In terms of competition law enforcement, the Competition and Consumer Protection Commission's (**CCPC**) power to seize material from business premises during unannounced inspections or “**dawn raids**” was considered by the High Court in April 2016. In an important judgment, the High Court considered the limits on this power and granted an injunction preventing the CCPC from accessing, reviewing or making use of seized material before an assessment of relevance could be made. The decision is considered in detail on pages 6-9. The CCPC has appealed the decision to the Supreme Court and this is one to watch for 2017.
- Individuals convicted of competition law offences in Ireland may be **disqualified from acting as a director** of an Irish company. Full details are set out on pages 10-11.
- Continuing the theme of competition law enforcement, in September 2016, the CCPC launched an **investigation into suspected breaches of competition law** in the motor insurance sector in Ireland. Further details can be found on pages 9-10.
- Businesses in the **food and drink sector** should turn to page 11 for an overview of the Grocery Goods Regulations 2016. The new regime regulates certain aspects of the relationship between "grocery goods undertakings" and suppliers and creates criminal offences for breaches of the Regulations.
- One of the most talked about **State aid** decisions in 2016 was the decision by the European Commission ordering Ireland to recover up to €13 billion (plus interest) from Apple as repayment of tax benefits. An explanation of State aid and a full review of this decision are included on pages 13-15. Apple and Ireland have appealed the decision to the EU's General Court - another one to watch out for in 2017 and subsequently if there are appeals.
- The landscape of **procurement law** was subject to an overhaul in 2016 with the introduction of the European Union (Award of Public Authority Contracts) Regulations 2016 and the European Union (Award of Contracts by Utility Undertakings) Regulations 2016. The key changes you need to know are summarized on page 19-20.
- Turning to the courts, **seven key decisions of the High Court relating to procurement law** are reviewed on pages 21-38. Of particular importance, the High Court has considered the obligation to provide reasons for decisions (*RPS v Kildare County Council* reviewed on pages 22-25) and the ability of contracting authorities to accept tenders submitted after a deadline (*BAM v National Treasury Management Agency*, reviewed on pages 31-33). These decisions are a "must-read" for both contracting authorities and suppliers.
- Turning to **merger control**, 67 deals were notified to the CCPC in 2016 – a reduction of 14% from 2015. The CCPC opened one Phase 2 “full investigation” in 2016 in relation to the acquisition by Panda Green of Greenstar. This decision and other Irish merger control developments from 2016 are reviewed on pages 47-49.
- The **European Commission** has also assessed several significant Irish transactions in 2016. These include the (separate) acquisitions of Dundrum Town Centre and the ILAC Shopping Centre, the acquisition by ABP Food Group of a 50% controlling interest in Slaney Foods as well as the acquisition of Aviva and GloHealth by Irish Life Ireland. These decisions are summarized on pages 50-52.
- We consider the key points in the **Damages Directive**, due to be implemented into Irish law in 2017, and set out the key points business executives need to know following the imposition of the **highest ever European Commission fine in a cartel case** totaling just under €3 billion (considered on page 53).

PART 1: Competition law in Ireland

Ireland and Private Actions: The EU Damages Directive

Summary

The primary aim of the EU Damages Directive (**Damages Directive**) (signed into law in the EU on 26 November 2014) is to make it easier for businesses and individuals to claim for compensation when they have been victims of a breach of EU competition law.

Ireland's Minister for Jobs, Enterprise and Innovation, Mary Mitchell O'Connor TD, confirmed on 5 July 2016 that her department was drafting a Statutory Instrument (i.e., Ministerial order) to implement "Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of Member States and of the European Union" (the so-called "Damages Directive"). The Minister acknowledged, in a parliamentary question to Alan Kelly TD, that some provisions of the Damages Directive already exist in national legislation or in existing court rules but that the other provisions of the Damages Directive that need to be transposed into Irish law will be addressed in the transposing legislation, and/or by amending court rules

The deadline for the Member States to transpose the Damages Directive into national law was 27 December 2016. Ireland has not yet done this but it is expected that the statutory instrument will come into force in early 2017.

Currently, there are very few actions for damages in Ireland as a result of breaches of competition law because of a range of factors including the difficulties of finding a breach to begin with, the requirements for bringing damages actions in courts, the expense in bringing such actions and the lack of awareness of damages actions generally. The Damages Directive seeks to harmonise the rules governing damages across Member States in order that, in particular, small businesses and private individuals will have a more realistic option to claim damages for breach of competition law.

Damages claims generally

Access to damages for breaches of EU competition law is inconsistent and fragmented across the EU. Certain Member States have easier access to redress than in other Member States (the UK being one Member State where the process of victims seeking redress for a breach of EU (and UK) competition law is regarded as more effective than, for example, Ireland).

The Damages Directive seeks to standardise the approach to redress and to make it easier for victims of anti-competitive behaviour to claim compensation. This is done by improving the link between a private damages claims and public enforcement by authorities such as the Competition and Consumer Protection Commission (**CCPC**) in Ireland.

In particular, there will be better access to the evidence needed by victims to prove the damage suffered as a result of a breach of EU competition law as well as more time to make their claims.

What are the main improvements brought about by the Directive?

The main improvements introduced by the Damages Directive will mean that:

- Courts can order companies to disclose evidence when victims claim compensation - the courts will ensure that such disclosure orders are proportionate and that confidential information is duly protected.

- A final decision of a national competition authority finding an infringement will automatically constitute proof of that breach of EU competition law before courts of the same Member State in which the infringement occurred (the CCPC cannot make any such finding – only the Irish courts can do so in Ireland).
- Victims will have at least one year to claim damages once an infringement decision by a competition authority has become final.
- If an infringement has caused price increases and these have been "passed on" along the distribution chain, those who suffered the harm in the end will be entitled to claim compensation.
- Consensual settlements between victims and infringing companies will be made easier by clarifying their interplay with court actions. This will allow a faster and less costly resolution of disputes.

Private damages actions before courts and public enforcement of antitrust rules by competition authorities are regarded as complementary tools. The Damages Directive seeks to improve the interplay between them and to ensure that while victims are fully compensated, the role of competition authorities in investigating and sanctioning infringements is preserved. In particular, cooperation between companies and competition authorities under "immunity" (as in Ireland) or "leniency" programmes plays a key role in detecting breaches of EU competition law. The Damages Directive contains safeguards designed to ensure that facilitating damages actions does not reduce companies' incentives to cooperate with competition authorities.

The current position for claimants of damages in Ireland

There have been very few reported successful damages claims in Ireland for breaches of competition law (e.g., in 1997, *Donovan v ESB* led to an award of damages but this was for a breach of Irish competition law rather than EU competition law).

In Ireland, the Competition Act 2002, as amended (**Competition Act**) provides for a mechanism for victims of a breach of an anti-competitive agreement or an abuse of dominance under Irish or EU competition law to bring an action in the Irish Courts for relief (such as damages and exemplary damages) against any undertaking which is party to such a breach or against directors, managers or other officers of such an undertaking who authorised the breach.

When can a claimant bring an action in Ireland?

Civil competition enforcement and redress in Ireland involves two distinct processes which may or may not be linked. In Ireland, the first process (public enforcement) mainly involves a case being taken by the CCPC. These cases would be brought before the Circuit Court or the High Court where there is evidence of a breach of competition law and may result in civil sanctions (including injunctive relief or declaration of a breach of EU competition law by an undertaking.) The Irish Courts may also require commitments not to continue with such behaviour. Serious anti-competitive activity such as cartels may result in criminal prosecution by the Director of Public Prosecutions before the Irish courts.

The second process (private enforcement) is where a case is brought by an individual or business and involves a claim for damages before the Circuit Court or the High Court. There are two routes for these cases to be brought:

- follow-on cases for damages are brought after a decision on a breach of competition law has been made – the advantage for the claimant is that there is a prior decision that there has been a breach of competition law; and
- standalone cases are brought where there has been no decision about a possible breach of competition law – to bring a standalone case, the claimant will need to prove that a breach of competition law has occurred as well as the loss suffered in order to pursue damages through the Irish courts.

Implementation of the Damages Directive in Ireland

Some of the requirements set out by the Damages Directive already exist in Irish law. Implementing the Directive will likely involve large changes to a number of the Rules of the Superior Courts and pieces of existing legislation, although these will result in only relatively minor changes to substantive law and procedures.

Among the many technical issues that the implementation of the Damages Directive in Ireland will need to consider are:

- One system for damages actions for a breach of Irish competition law and for a breach of EU competition law or separate systems?
- Will the current limitation period of 6 years remain?
- Is there a need for a new trigger point for limitation periods to implement the Damages Directive correctly?
- Should the start of the limitation period provided for in the Damages Directive apply from commencement of the Irish implementation instrument?
- How will the new rules of disclosure be worked-into the Irish system of disclosure?
- Will there be a passing-on defence specifically legislated for in the implementing rules?
- Will the implementing legislation be carried-out by way of an amendment to the Competition Act or will there be separate legislation?
- Will there be an explicit provision for joint and several liability, as well as exemptions for parties with immunity under the Immunity Programme?
- Will the consensual dispute resolution mechanism require specific implementation?

Summary

The purpose of the Damages Directive is to make damages actions simpler and more effective. The method of implementation of the Damages Directive and the outstanding questions are key in this regard as is the need for the development of a culture of private enforcement in Ireland of competition law breaches.

Irish High Court Gives Concrete Guidance on Dawn Raids

Introduction

On 5 April 2016, the High Court of Ireland found that the CCPC seized material to which it was not entitled during its dawn raid of CRH's subsidiary and granted an injunction preventing the CCPC from accessing, reviewing or making use of the materials seized. The judgment provides useful insight for both businesses and practitioners on the CCPC's approach to dawn raids and arguably raises a question mark over the CCPC practice of the bulk seizure of electronic documents for subsequent off-site review without first having assessed the documents for relevance.

Background

As part of an investigation into alleged anti-competitive practices in the bagged cement sector, the CCPC conducted a dawn raid at the premises of Irish Cement Limited (Irish Cement) in County Louth. During the course of this search the authorised officers of the CCPC, acting pursuant to a search warrant, took a copy of the email inbox of a senior executive within the CRH Group of which Irish Cement is part.

The Court was ultimately satisfied that, on the balance of probabilities, some of the e-mails seized were not caught by the terms of the search warrant. In particular the inbox contained emails and attachments which were unconnected to the business of Irish Cement and related instead to other CRH Group companies with which the individual was involved. The central issue before the Court was what should be done with the emails which it was claimed the CCPC did not lawfully have in its possession.

Reliefs Sought

CRH applied to the High Court for a declaration that the CCPC had acted outside the scope of the search warrant and *ultra vires* and contrary to section 37 of the Competition and Consumer Protection Act 2014 (**Competition and Consumer Protection Act**) and sought an injunction restraining the CCPC from accessing, reviewing or making any use whatsoever of the records seized which did not relate to an activity in connection with the business of supplying or distributing goods or providing a service at Irish Cement in County Louth.

CRH also sought declarations that the CCPC had acted in breach of Article 8 of the European Convention on Human Rights (**ECHR**), Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (**Charter**), the plaintiff's right to privacy under Article 40.3 of the Constitution and the Data Protection Acts 1988 and 2003.

Powers of Authorised Officers

In general terms, Section 37 of the Competition and Consumer Protection Act deals with the powers of authorised officers of the CCPC when conducting competition law investigations. The Court considered that Section 37 was drafted in unambiguous terms; meaning there was no need to apply anything other than a literal interpretation.

The Court considered the powers arising under section 37(2) paragraphs (c) and (e) of the Competition and Consumer Protection Act to be "very broad" in that they grant seizure, retention, inspection and copying powers in respect of *any books, documents or records relating to an activity found at any place referred to in paragraph (a)*(emphasis added).

The reference to "place" includes *any place at which any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business, is carried on*. The term "activity" is also widely defined in that it is not limited to an activity of Irish Cement but includes *any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business*.

The Court found that the constraint on this "vast breadth of information which section 37(2) (c) and (e) allow the [CCPC] to 'hoover up'" is limited "by law and in practice" by section 37(1) which only permits authorised officers to exercise these powers for the purpose of obtaining any information which may be required in relation to a matter under investigation.

The "over-reach" in searches

This raises the question of what then is to be done with material (other than legally privileged material which is dealt with in the Competition and Consumer Protection Act), that is seized under Section 37 but should not have been seized, a question which the Court considered to be "largely, if not entirely, ungoverned by law".

The Court repeatedly emphasized that this "over-reach" in searches is unavoidable noting that:-

Unless the law were to require (and it does not) that authorised officers consider every individual document before they copy and/or take it, then it is likely if not inevitable that there will be some over-reach in every search.

Possible Approach

The CCPC had suggested that it would review the material and sieve out the material to which it was entitled. The CCPC pointed out that it was bound by the duty of confidentiality under Section 25 of the Competition and Consumer Protection Act. The plaintiff, and ultimately the Court, rejected this solution. Describing Section 25 as the "*leakiest of sieves*" when it comes to the protection of confidential information, the Court expressed the view that the plaintiffs could be forgiven for believing that Section 25 didn't meet their fundamental concern that the CCPC has possession of information which it was not entitled to possess.

The Court therefore granted an injunction prohibiting the CCPC from "*accessing... pending any (if any) agreement as might be reached between the parties to those proceedings to their mutual satisfaction, whereby a section 33-style or other arrangement is established to sift out that material that ought to have been taken from that which was not.*"

Section 33 of the Competition and Consumer Protection Act sets out the treatment of privileged legal material. Section 33 provides that where material is seized by the CCPC which is claimed to be legally privileged, there is a mechanism for such material to be vetted impartially with a view to determining whether that privilege has been correctly claimed. The Court described this as a "*perfectly sensible and practically operable process*" and stated that;

It appears to the Court that there is no reason why such a process could not have been voluntarily agreed between the Commission and the plaintiffs.

Invasion of Privacy

The Court did not accept that the collection of material not covered by the terms of the search warrant was a breach of Article 8 ECHR or of the plaintiff's right to privacy but considered that a breach would occur if the CCPC were to proceed to review the material:

The plaintiffs contend that for the [CCPC] to go through material that it was not authorized by warrant to remove gives rise, literally and legally, to an unwarranted breach of the right to privacy. This is a contention with which the Court respectfully agrees.

This arguably raises a question mark over the CCPC's practice of bulk seizure of emails for off-site review which would tend to capture emails which are not relevant to an investigation. During proceedings, the CCPC justified this practice on grounds that it minimised the impact of the raid on the business, allowed for review in a "controlled environment" and was generally in line with international best practices relating to digital evidence.

Data Protection

Also of interest is the suggestion by the Court that it was open to the persons present at the time of the dawn raid to refuse to release some or all of the personal data being sought by the CCPC. This refusal to hand over seems to be limited to personal data which the CCPC was "not entitled to" meaning personal data which is not relevant to the investigation.

The *European Commission's explanatory note on Commission Inspections* (September 2015) (**Explanatory Note**) notes that the EU data protection rules apply to all personal data collected during an antitrust investigation and that personal data of individual staff members of undertakings may be copied or obtained during an investigation and may become part of the authority file.

Comment

The decision raises a question mark over the CCPC practice of the bulk seizure of electronic documents for subsequent off-site review without first having assessed the documents for relevance.

In the context of dawn raids by the European Commission (**Commission**) this issue does not appear as frequently as the Commission tends to conduct on-site reviews over a number of days with premises being sealed overnight where necessary. In the few cases where this issue has arisen the EU General Court has appeared to condone the practice of the Commission of seizing documents for subsequent review.

For example, in *Nexans v Commission* (Case T-135/09), Nexans challenged the legality of the Commission's acts of copying the computer files of an employee and removing them for inspection, rather than inspecting them on the *Nexans* premises. The Court declared this challenge inadmissible, finding that the contested acts of the Commission did not constitute actionable measures.

In the Explanatory Note, the Commission refers explicitly to this practice as follows;

If the selection of documents relevant for the investigation is not yet finished at the envisaged end of the on-site inspection at the undertaking's premises, the copy of the data set still to be searched may be collected to continue the inspection at a later time. This copy will be secured by placing it in a sealed envelope. The undertaking may request a duplicate. The Commission will invite the undertaking to be present when the sealed envelope is opened and during the continued inspection process at the Commission's premises. Alternatively, the Commission may decide to return the sealed envelope to the undertaking without opening it. The Commission may also ask the undertaking to keep the sealed envelope in a safe place to allow the Commission to continue the search process at the premises of the undertaking in the course of a further announced visit.

Appeal directly to the Supreme Court

On 27 June 2016, the CCPC was granted leave to appeal the decision of the High Court directly to the Supreme Court, by-passing the Court of Appeal (see *CRH PLC & ors v The Competition and Consumer Protection Commission* [2016] IESCDET 86). The CCPC made the application under Article 34.5.4° of the Constitution which allows the Supreme Court accept jurisdiction over an appeal where it is satisfied that exceptional circumstances exist and that such a move is warranted in the interests of justice, or because it involves a matter of general public importance.

In granting leave to appeal the order directly, the Supreme Court accepted that it had been demonstrated that the

"decision of the High Court reflected in its judgment and in the order appealed against is of general public importance, traversing as it does legislation which was enacted as recently as 2014, which, it is argued by the Respondents, infringes the Respondents' right to privacy under the Constitution and under the [European Convention on Human Rights]."

In regard to the requirement for exceptional circumstances to exist, the Supreme Court ruled that the CCPC had adequately demonstrated the

"urgency of the matter and the importance of obtaining a hearing and a determination which will bring finality to the issues between the parties."

The Supreme Court also noted that the CCPC was seeking a priority hearing for the appeal so it is likely to be heard by the Supreme Court sooner than is traditionally expected in such cases.

Competition Investigation launched in the Irish Motor Insurance Sector

On 13 September 2016, the CCPC announced that it had issued: (a) witness summonses; and (b) information requests to various parties in the motor insurance sector in Ireland.

The CCPC has stated that witness summonses and information requests were sent to major motor insurance providers and industry groups representing insurers and brokers.

The background to the matter was described by the CCPC when it stated that it "is currently investigating suspected breaches of competition law in the motor insurance sector. The investigation relates to industry participants openly signalling up-coming increases in motor insurance premiums in the State." This could involve an application of the theories of "price signalling" to the motor insurance sector.

The CCPC Chairperson, Isolde Goggin, said in a statement at the time that:

"markets work best where businesses vigorously and independently compete against each other for customers. Statements signalling future pricing predictions or intentions may result in a degree of unspoken coordination, which may breach competition law. Statements by senior industry players have raised serious suspicion as to whether there is a link between these messages and subsequent price increases. The evidence collected through both the witness summonses and the information requests will assist us in establishing whether there has been a breach of competition law. The CCPC has been monitoring the motor insurance industry and we know from our contacts with consumers that the sharp rise in motor insurance premiums has had a significant impact on them. We continue to closely monitor developments and will, if necessary, take action to stop specific anti-competitive practices in the motor insurance sector." Interestingly, she also asked for evidence saying "if anyone believes they have evidence of a breach of competition law in the motor insurance sector we would ask them to contact the CCPC."

A "study" had been undertaken of the non-life insurance sector which was published in 2005 but this is more specific than a general study. The CCPC has not published any timeline or roadmap for the present investigation. The output will be studied carefully not only in the context of motor insurance but also in regard to any thinking by the CCPC on the evolving but somewhat unclear topic of price signalling.

Competition Law Offence: Disqualification from Acting as a Director of an Irish Company

It was confirmed in March 2016 that any person convicted of an offence under section 6 and 7 of the Competition Act in Ireland will be disqualified from acting as a director of an Irish company.

Section 839(1)(a) of Ireland's Companies Act 2014 provides for the automatic disqualification of a person convicted of certain offences, for a period of time, as a director of an Irish company.

In specific terms, the section provides:

"(1) A person is automatically disqualified if that person is convicted on indictment of (a) any offence under this Act, or any other enactment as may be prescribed, in relation to a company, or (b) any offence involving fraud or dishonesty.

(2) A person disqualified under subsection (1) is disqualified for a period of 5 years after the date of conviction or for such other (shorter or longer) period as the court, on the application of the prosecutor or the defendant and having regard to all the circumstances of the case, may order.

(3) A person disqualified under subsection (1) is deemed, for the purposes of this Act, to be subject to a disqualification order for the period of his or her disqualification.

(4) Subsection (1) is in addition to the other provisions of this Act providing that, upon conviction of a person for a particular offence, the person is deemed to be subject to a disqualification order."

On 23 March 2016, Ireland's Minister for Jobs, Enterprise and Innovation adopted the "Companies Act 2014 (Section 839) Regulations 2016".

Regulation 3 of these Regulations provides that the offences under section 6 and 7 of the Competition Act are prescribed for the purposes of section 839(1)(a) of the Companies Act 2014. In effect, this means that any person who is convicted of being party to an anti-competitive arrangement (section 6) or involved in abusing a dominant position (section 7) will be disqualified from being a director in the circumstances outlined in section 839 of the Companies Act 2014.

The advantage of the adoption of a statutory instrument is that it puts beyond doubt the question of whether or not a person convicted of a breach of section 6 or 7 of the Competition Act would be disqualified; it is now clear that they may be disqualified where the two statutes (i.e., the Companies Act 2014 and the Competition Act) and these new regulations apply.

Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 implemented

On 27 January 2016, the Minister for Jobs, Enterprise and Innovation signed into law the Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 (Grocery Goods Regulations). These Regulations entered into force on 30 April 2016.

The Grocery Goods Regulations touch on three issues: contracts; compliance; and enforcement. Within those three issues, they deal with topics such as promotions, shelf space, wastage, advertising, marketing costs and so on.

In terms of contracts, a "grocery goods contract" is defined as meaning a contract for the sale or supply of grocery goods by a supplier to a relevant grocery goods undertaking. A "relevant grocery goods undertaking" is, in turn, defined as a grocery goods undertaking engaged in the retail or wholesale of grocery goods in the State that has, or is a member of a group of related undertakings that has, an annual worldwide turnover of more than €50 million" so it applies to wholesalers as well as retailers. It could also apply to new entrants to the Irish market even though their Irish operations would be quite small. A relevant grocery goods undertaking (but not the supplier) must ensure that all of the terms and conditions of a grocery goods contract to which it is a party, are expressed in clear understandable language and recorded in writing. Moreover, such a contract needs to be signed and retained by the supplier and the relevant grocery goods undertaking. The Grocery Goods Regulations also deal with issues such as variation, termination or renewal of such contracts. There are also rules on forecasts, *force majeure* and third party supply obligations. The Regulations also generally (but not entirely) prohibit payments from suppliers as a condition of stocking, displaying or listing as well as regulate payments (30 day payment terms being the norm) and promotions.

There is an increased burden in terms of compliance requirements for "relevant grocery goods undertakings". This increased burden includes designation and training of staff, maintenance of records and the preparation of an annual compliance report. It is notable that the burden rests very much on the wholesalers and retailers rather than the suppliers.

In terms of enforcement, there are criminal penalties imposed for breaches which will help to ensure compliance and adherence to the new regime.

The Grocery Goods Regulations apply to grocery goods contracts entered into on or after 30 April 2016. If a grocery goods contract entered into before 30 April 2016 is renewed on or after that date, the Regulations shall apply to the contract on and after the date of its renewal.

On 18 March 2016, the Department published Guidelines on the Grocery Goods Regulations which seek to provide information and guidance on the main provisions.

PART 2: EU State Aid law and Ireland 2016

There were a number of significant State aid decisions and initiatives by the European Commission (**Commission**) and EU Courts concerning Ireland in 2016. These covered a diverse range of sectors such as transport, financial services, energy and manufacturing. A number of the State aid decisions have involved repayment by recipients of State aid. Such an outcome is an obvious business risk and therefore dealings with the State in relation to aid measures can have serious implications for businesses unless such aid is in line with the State aid rules.

What is State aid?

Under the EU rules, State aid is provided where a company receives government support and obtains an advantage over its competitors. The Treaty on the Functioning of the European Union (**TFEU**) prohibits State aid unless it is justified (e.g. for overriding economic development reasons). The Commission ensures that State aid complies with EU rules (subject to decisions of the EU Courts) and the Irish Courts also have a role in supervising aspects of State aid.

What are the elements of State aid?

State aid is an advantage in any form conferred on a selective basis to undertakings by public authorities of the Member States. Subsidies granted to individuals or general measures open to all companies are not covered by this prohibition and do not constitute State aid (e.g. general taxation measures or employment legislation). To be State aid, a measure needs to have the following features:

- a measure taken by the State or the provision of State resources which can take a variety of forms (e.g. grants, guarantees, interest and tax reliefs or providing goods and services on preferential terms);
- the intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions;
- competition has been or may be distorted; and
- the measure is likely to affect trade between Member States.

In some circumstances, State measures can be regarded as necessary for a well-functioning economy. Therefore, the TFEU allows for a number of policy objectives for which State aid can be considered compatible with the TFEU rules. However, illegal State aid can result in all such aid being repaid by the recipient to the State (plus interest).

The following examples demonstrate the range of sectors that have been affected by the application of the TFEU rules on State aid in Ireland over the last 12 months.

European Commission rules that Apple has been given preferential tax treatment in Ireland of up to €13bn

On 30 August 2016, the Commission announced its decision that Ireland had given illegal tax benefits to Apple and ordered that Ireland retrieve up to €13bn from the tech giant.

Introduction and Background

In June 2014, exactly one year after requesting information on Ireland's tax ruling practice, in particular any rulings granted in favour of the Apple Group companies, the Commission adopted a decision to open a formal investigation into the 1991 and 2007 tax rulings issued by Irish Revenue in favour of Apple Sales International (**ASI**) and Apple Operations Europe (**AOE**) on the grounds that these rulings could constitute unlawful State aid under Article 107(1) of the TFEU.

Transfer Pricing

The issue of tax rulings which validate transfer pricing has undeniably been on the Commission's enforcement agenda in recent times. In this context, transfer pricing refers to the prices charged for commercial transactions between various parts of the same group of companies, in particular prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of the same group. Transfer pricing influences the allocation of taxable profit between subsidiaries of a group located in different countries.

The Commission has initiated a number of investigations and adopted a number of decisions in this space since 2013; these include Fiat, Amazon and McDonald's in Luxembourg and Starbucks in the Netherlands. Interestingly, the Commission's Notice on the Notion of State Aid, published on 19 May 2016 contains three pages dedicated to tax rulings. This "new wave" of cases has not come without criticism, however, with commentators claiming that perhaps the Commission is using the State aid framework to be seen to be doing something about tax, that there is a clear anti-US bias and the Commission has not been consistent in its approach.

The Apple decision in Ireland is the latest decision from the Commission within this contextual framework and on 19 September 2016, a formal case was opened in respect of possible State aid in favour of GDF Suez.

Apple in Ireland

Apple Inc, headquartered in the USA, is the parent company of the Apple Group companies. There are a number of Apple Group companies incorporated in Ireland, some of which are tax resident in Ireland (for example Apple Distribution International and Apple Sales Ireland) and some which are not.

Due to exceptions in the Irish Taxes Consolidation Act 1997 (which has since been modified by Finance Acts 2013 and 2014 a company that is incorporated under Irish law or centrally managed and controlled in Ireland, or both, is normally considered tax resident in Ireland and therefore liable to corporation tax on its worldwide profits.), although incorporated in Ireland, ASI and AOE were not considered tax resident in Ireland. Under Section 23A of the Taxes Consolidation Act 1997, relevant companies incorporated in Ireland with a trading activity in Ireland that were centrally managed and controlled outside of Ireland were not considered tax resident in Ireland. This was the case because ASI and AOE both had trading activity in Ireland through their branches but were ultimately controlled by Apple Inc, tax resident in USA. Neither ASI and AOE were tax resident in any other tax jurisdiction during the period that the rulings were in place – neither ASI nor AOE have a physical presence or any employees. Therefore, both ASI and AOE were considered "stateless" for tax residency purposes.

In Ireland, ASI is a fully owned subsidiary of AOE and AOE is a fully owned subsidiary of Apple Operations International, also incorporated in Ireland.

ASI and AOE's Irish branches carry out a number of functions in the Europe, Middle-East, India and Africa regions (**EMEIA**) and the Asia-Pacific territory (**APAC**), including responsibility for the execution of procurement, sales and distribution activities associated with the sale of Apple products to related parties and third-party customers (ASI) and the manufacturing and assembly of a specialised range of computer products at its facilities in Ireland including iMac desktops, MacBook laptops and other computer accessories, all of which are manufactured for EMEIA (AOE).

Apple's sales operations in Europe were arranged in such a way that customers were contractually buying products from ASI in Ireland rather than from the shops that physically sold the products to customers. In this way Apple recorded all sales, and the profits stemming from these sales, directly in Ireland.

The 1991 and 2007 Tax Rulings, Investigation and Decision

The Commission's investigation focused on the allocation of the profits recorded in Ireland within ASI and it analysed whether the 1991 and 2007 tax rulings made by the Irish Revenue in favour of ASI and AOE constituted illegal State aid. The 1991 and 2007 rulings endorsed a method for determining the net profit of the Irish branches of ASI and AOE proposed by Apple by allowing taxable profit allocated to these Irish branches. The Commission held that the reference system against which the rulings should be examined is the ordinary rules of taxation of corporate profit in Ireland, which have as their intrinsic objective the taxation of profit of all companies subject to tax in Ireland.

Following its investigation, the Commission concluded the following:

- The 1991 and 2007 tax rulings derogate from the ordinary rules of taxation of corporate profit in Ireland because the methods endorsed by the rulings allow both ASI and AOE to determine their annual taxable profit in Ireland in a manner that departs from a reliable approximation of a market-based outcome in line with the arm's length principle and therefore conferred a selective advantage on ASI and AOE;
- The 1991 and 2007 tax rulings lead to a lowering of ASI's and AOE's corporation tax liability in Ireland due to the fact that the Irish Revenue endorsed profit allocation methods based on an "unsubstantiated assumption" that the Apple IP licences should have been located outside of Ireland. The European Commission concluded that the allocation of Apple's IP licences outside of Ireland was not an allocation that could have been agreed to in an arm's length context between two unaffiliated companies;
- Even if the Irish Revenue had been correct to accept the unsubstantial assumption that the Apple IP licences held by ASI and AOE should be located outside of Ireland, the profit allocation methods endorsed in the contested tax rulings still produce an outcome that departs from a reliable approximation of a market-based outcome in line with the arm's length principle. The European Commission is of the opinion that the 1991 and 2007 rulings endorse a taxable remuneration which the Irish branches would not have accepted, from the perspective of their own profitability, if they were separate and independent companies engaged in same or similar activities under the same or similar conditions. Since these profit allocation methods lower the tax liability of both companies under the ordinary rules of taxation of corporate profit in Ireland as compared to non-integrated companies whose taxable profit under the system is determined by prices negotiated at arm's length on the market, the tax rulings confer a selective advantage on ASI and AOE;
- Neither Ireland nor Apple provided a conclusive justification for the provision of the selective advantage by way of 1991 and 2007 tax rulings. (Although the burden of proof lies with Ireland, Apple attempted to argue that the exercise of discretion is intrinsic to the Irish corporate tax system and that the rulings contributed to the effectiveness of the system and were proportionate – the European Commission did not, however, agree);
- It is the Apple Group as a whole that benefitted from the State aid in Ireland granted to ASI and AOE because any favourable tax treatment afforded to ASI and AOE ultimately benefits the Apple

Group by freeing up additional financial resources that can be used to benefit the entire corporate group;

- The State aid granted by Ireland through the 1991 and 2007 rulings is incompatible with the internal market; and
- Ireland did not notify the Commission of any plan to issue the 1991 and 2007 tax rulings as it is obliged to do under Article 108(3) TFEU, nor did it respect the standstill obligation and therefore the rulings constitute unlawful aid, put into effect in breach of Article 108(3) TFEU.

Recovery

By virtue of Article 16(1) of Regulation (EU) 2015/1589, the Commission is under an obligation to order recovery of unlawful and incompatible aid. Member States are also required to take all necessary measures to recover the unlawful aid that is found to be incompatible with the internal market. Interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery must also be recovered.

The Commission stated that in relation to unlawful State aid in the form of tax measures, the amount to be recovered should be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. The Commission held, based on the 10 year limitation period laid down by Article 17 of Regulation (EU) 2015/1589, recovery should include aid granted from 12 June 2003 onwards and should extend to 27 September 2014 (the date on which ASI and AOE's fiscal year ended). The amount of aid to be recovered, therefore, is around the €13bn mark.

Appeal

Ireland has lodged an application with the EU General Court (**General Court**) to annul the entire decision.

Energy in Ireland: The Energy Capacity Mechanisms Sector Enquiry

In April 2015, the Commission launched a State aid sector enquiry to gather information on existing or planned capacity mechanisms, i.e. measures taken by Member States to ensure that electricity supply can match demand in the medium and long term. The sector enquiry aims at examining, in particular, whether such measures ensure security of electricity supply without distorting competition between electricity suppliers or hindering cross-border trade. This sector enquiry is the first under EU State aid rules and covers a representative sample of Member States that have capacity mechanisms in place or are considering them, namely: Ireland, Belgium, Croatia, Denmark, France, Germany, Italy, Poland, Portugal, Spain and Sweden. In regard to the enquiry, the Commission stated that: *"While governments have a legitimate interest in ensuring that there is sufficient electricity supply to avoid blackouts, competition policy should make sure that public measures underpin investments in electricity supplies, are consistent with policy instruments aimed at fostering decarbonisation, and do not unduly favour particular producers or technologies."*

The Commission issued an interim report in April 2016 which pointed to a lack of proper and consistent analysis by many Member States of the actual need for capacity mechanisms. It also appeared to the Commission that some capacity mechanisms in place could be better targeted and be more cost-effective.

The energy capacity enquiry is ongoing and the Commission may soon make an assessment of the compatibility with EU state aid rules of Ireland's capacity mechanism.

The Air Travel Tax cases

Background

In March 2009, Ireland introduced an excise duty (the Air Travel Tax (**ATT**)) which airline operators had to pay in relation to every departure of a passenger on an aircraft from an airport located in Ireland (other than those with fewer than 10,000 passengers a year), save for transit and transferring passengers. At the time of the introduction of the tax, it was levied on the basis of the distance between the airport of departure and arrival i.e. €2 in the case of a journey from an airport to a destination no more than 300km from Dublin airport and €10 in every other case. Ireland then modified the tax so that, as of March 2011, a single rate of €3 applied to all destinations.

The Commission's ATT decisions

On 13 July 2011, the Commission found that four of the measures (including the non-application of the ATT to transfer and transit passengers) did not constitute State aid.

However, the Commission investigated the difference in rates for flights to destinations located no more than 300 kilometres from Dublin Airport and, on 25 July 2012, the Commission found that Ireland had granted unlawful State aid in the form of a lower ATT applicable to such flights. The Commission ordered Ireland to recover the incompatible State aid from the beneficiary airlines and indicated that the amount of the State aid was the difference (i.e. €8) between the lower rate of the air travel tax (i.e., €2) and the standard rate (i.e., €10) levied on each passenger. These decisions were appealed to the EU General Court (**General Court**).

ATT – Appeal against the Commission finding of no State aid case (transit and transfer passengers)

The Commission opened an in-depth State aid investigation into Ireland's exemption for airlines from paying air travel tax for transfer and transit passengers. Following an appeal, on 25 November 2014, the General Court annulled the Commission's 2011 findings that the exclusion of transfer and transit passengers did not result in State aid. The General Court found that the Commission should have initiated the formal State aid investigation procedure to gather any relevant information to verify whether the disputed measure was "selective" and allow interested third parties to present their observations. On 28 September 2015, the Commission opened an in-depth State aid investigation into the whether the tax exemption provides certain companies with a selective advantage in breach of State aid rules. The Commission investigation is examining in particular whether the exemption serves to avoid levying the tax twice on the same journey, and whether exempting transfer flights only when they were booked in a single-booking discriminates against airlines not applying a single-booking policy.

ATT - Appeal against the Commission finding of State aid case regarding ATT

Following an appeal, on 5 February 2015, the General Court annulled the Commission decision of 25 July 2012 in so far as it ordered the recovery of aid from the beneficiaries for an amount which is set at €8 per passenger. The Commission appealed that judgment to the EU Court of Justice (**CJEU**).

On 21 December 2016, the CJEU found that the airlines that were able to benefit from the reduced rate enjoyed a competitive advantage of €8 in comparison to airlines that paid the standard rate and that Ireland is to recover the aid ensuring restitution of that advantage. The CJEU stated that the recovery of aid entails the restitution of the advantage the airlines were able to procure from the application of the reduced rate, not the restitution of the economic benefit that may have been conferred on those companies by the aid as a result of the exploitation of the advantage. The CJEU held, contrary to the opinion of the General Court, that the Commission was not required to examine whether and to what extent the beneficiaries of the aid actually utilised the economic advantage arising from the application of the lower rate.

Healthcare in Ireland - Risk Equalisation Scheme

On 27 April 2015, contacts were made between the Commission and the Irish authorities regarding the prolongation of a risk equalisation scheme (**RES**) on the private medical insurance market in Ireland. The scheme consists of a compensation mechanism allowing for risk sharing between insurers relating to health insurance and intergenerational solidarity in Ireland. The previous RES scheme was introduced in 2013 following a decision by the Commission that the compensation granted through the scheme was compatible with the State aid rules and the RES scheme was approved by the Commission for the period between 1 January 2013 and 31 December 2015. On 2 December 2015, Ireland notified the new RES for the period 1 January 2016 until 31 December 2020 to the Commission for approval under the Treaty. The Irish authorities informed the Commission that the levels of credits and stamp duties applicable under the scheme are revised on a yearly basis and the new rates for the 2016 RES were applicable as of 1 March 2016. These rates will be revised and new rates will eventually apply as of 1 March 2017. Four submissions were made to the Commission on the notification. The Commission approved the new RES under the State aid rules on 29 January 2016.

Production of Alumina

On 22 April 2016, the General Court confirmed the decision of the Commission ordering the repayment of tax exemptions granted by France, Ireland and Italy for alumina production. Ruling for the third time in these cases, the General Court considered, and contrary to its first two judgments of 2007 and 2012, that the Commission's decision was valid and that the State aid must therefore be recovered for the period between 3 February 2002 and 31 December 2003.

The Commission had found that Ireland (as well as France and Italy) exempted undertakings from excise duty on mineral oils used for the production of alumina. The Commission later held that those measures, financed by State resources, conferred an advantage on the recipient companies, were selective, distorted competition and affected the EU's Single Market. Therefore, in 2005 it adopted a decision according to which the exemptions granted by France, Ireland and Italy in respect of heavy fuel oils used in the production of alumina constituted unlawful State aid. The Commission ordered the recovery of the aid granted between 3 February 2002 and 31 December 2003. An appeal has been lodged in the Court of Justice against the decision of the General Court.

Credit Unions in Ireland - Fourth Prolongation of the Credit Union Restructuring and Stabilisation Scheme

On 16 October 2014, the Commission approved the restructuring and stabilisation scheme for the Credit Union Sector in Ireland (**Scheme**). The Scheme was approved until 1 April 2015. On 5 May 2015, the Commission approved a first prolongation of the scheme until 31 October 2015 and on 16 November 2015, a second prolongation until 30 April 2016.

The Scheme is based on the Credit Union and Co-operation with Overseas Regulators Act 2012 (**2012 Act**). The 2012 Act was prepared under the Programme of Financial Support for Ireland from the European Union and the International Monetary Fund. The 2012 Act provides for the establishment of a Credit Union Fund of €250 million to support the restructuring of credit unions and a further €30 million to support their stabilisation. It also provided for the establishment of the Credit Union Restructuring Board with the mandate of approving stabilisation plans as well as restructuring plans and recommended the provision of repayable financial support for restructuring proposals. On 4 May 2016, the Commission agreed to the third prolongation of the Scheme until 31 October 2016 under the State aid rules subject to certain commitments agreed to by Ireland (i.e. regarding viability, burden-sharing and avoiding distortions of competition).

On 11 October 2016, the Commission agreed to a fourth prolongation of the scheme until 30 April 2017 which was again subject to certain commitments concerning viability, burden-sharing etc.

Credit Unions in Ireland - Tenth Prolongation of the Credit Union Resolution Scheme H2 2017

On 20 December 2011, the Commission approved the Credit Union Resolution Scheme (**CUR Scheme**). On the basis of subsequent notifications, the Commission approved eight prolongations of the CUR Scheme by its decisions of 3 September 2012, 14 December 2012, 18 July 2013, 16 January 2014, 17 July 2014, 29 January 2015, 2 July 2015 and 17 December 2015 and 20 June 2016 (until 31 December 2016).

The CUR Scheme is based on the provisions of the Central Bank and Credit Institutions (Resolution) Act 2011 which sets out the basis for and the nature of State financial support for Credit Unions in a resolution context. On 1 December 2016, the Irish authorities notified an additional prolongation of the CUR scheme until 30 June 2017. On 19 December 2016, The Commission approved the additional prolongation of the CUR scheme until 30 June 2017.

Financial services

In addition, financial institutions in Ireland continue to adapt to the State aid decisions of the Commission following the global financial crisis including the credit unions and these will likely continue to be a feature of the next 12 months.

PART 3: Procurement law in Ireland

The landscape of procurement law was subject to a complete overhaul in 2016 with the introduction of the European Union (Award of Public Authority Contracts) Regulations 2016 and the European Union (Award of Contracts by Utility Undertakings) Regulations 2016. The new Regulations, which came into effect in April 2016, transpose Directive 2014/24/EU and Directive 2014/25/EU respectively. As of the date of publication, the Concessions Directive (Directive 2014/23/EC) has not yet been implemented into Irish law. In December 2016, the Commission sent a Reasoned Opinion to Ireland formally requesting Ireland to take action to remedy this.

Turning to the courts, 2016 has been an interesting year with several key procurement decisions handed down by the High Court in 2016. The extent of the duty on contracting authorities to provide reasons was explored in the case of *RPS Consulting Engineering Limited v Kildare County Council* [2016] IEHC 113. The decision in *BAM PPP PGGM Infrastructure Cooperative U.a. v National Treasury Management Agency* [2016] IEHC 546 represents the first Irish decision to consider the issue of late submission of procurement documents in the context of a completely electronic tender submission. In *Powerteam Electrical Services Limited t/a Omexom v Electricity Supply Board* the High Court considered the test to be applied in applications to lift an automatic suspension. In the final procurement decision of 2016, *Copymoore v Commissioners for Public Works Ireland* [2016] IEHC 709, the High Court considered several interesting issues including the legality of minimum qualification criteria and the intersection between public procurement and competition law.

Procurement Directives Transposed into Irish Law

On 5 May 2016 the European Union (Award of Public Authority Contracts) Regulations 2016 and the European Union (Award of Contracts by Utility Undertakings) Regulations 2016 were published.

These Regulations transpose Directive 2014/24/EU on Public Procurement (the Public Procurement Directive) and Directive 2014/25/EU on Procurement by Entities operating in the Water, Energy, Transport and Postal Services sectors into Irish law (the Utilities Directive), respectively. Both the Public Procurement Directive and the Utilities Directive are part of the broader package of reform of the public procurement rules in the EU. The third directive, Directive 2014/23/EU on the Award of Concession Contracts, is the final part of that reform package and as of the date of publication has not yet been transposed into Irish law.

Both the Public Contract Regulations and the Utilities Regulations are deemed to come into operation on 18 April 2016. This means that all procurement competitions going forward will have to comply with these new Regulations.

Some key points

- The Regulations largely follow the copy out approach and the wording used is very similar to the Directives.
- Where discretion was granted to Member States under the Directives, this discretion was largely passed on to contracting authorities under the Regulations.
- The Regulations contain a number of additional defined terms. For example terms such as "corruption", "disability" and "label" are all given prescribed meanings under the Irish Regulations.
- As expected, and similar to the approach taken by the UK, the division of contracts into lots was not made mandatory.
- The new Regulations revoke the European Communities (Award of Public Authorities' Contracts) Regulations 2006 and the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007.

Transitional Arrangements

Contract award procedures which commenced prior to 18 April 2016 are not subject to the new Regulations. Contract award procedures are considered to have been "commenced" when a contracting authority has done any of the following;

- a) sent a notice to the Publications Office of the European Union in order to invite tenders or requests to be selected to tender, or to negotiate in respect of, a proposed public contract or framework agreement;
- b) published any form of advertisement seeking offers or expressions of interest in a proposed public contract or framework agreement;
- c) contacted any economic operator in order to –
 - i. seek expressions of interest or offers in respect of a proposed public contract or framework agreement, or
 - ii. respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed public contract or framework agreement, or;
- d) sent a notice to the Official Journal in accordance with the Regulations of 2006 in order to publicise its intention to hold a design contest.

Framework agreements concluded post 18 April 2016 and contracts awarded on foot of such framework agreements are also excluded from the new Regulations as long as the contract award procedure to which they relate commenced prior to 18 April 2016 in the manner set out above.

The one exception to these transitional arrangements is Regulation 72 on modification of contracts during their term. All contracts, even those awarded on foot of contract award procedures which are outside the scope of the 2016 Regulations, are subject to the rules in Regulation 72.

Template Documents

The OGP published a suite of template procurement documents to reflect the new Regulations.

Action against Ireland for Failure to implement Concessions Directive

On 8 December 2016 the Commission sent a reasoned opinion to Ireland and 14 other Member States requesting them to fully transpose one or more of the three new directives on public procurement and concessions into national law (Directives 2014/23/EC, 2014/24/EC and 2014/25/EC). A reasoned opinion is a formal determination by the Commission that a Member State is in breach of its legal obligations under EU law.

The request to Ireland concerns the failure to implement the Concessions Directive (Directive 2014/23/EC) into Irish law by the deadline of 18 April 2016. 11 Member States have yet to implement any of the new procurement directives into national law. Ireland has two months to notify the Commission of measures taken to bring national legislation in line with EU law.

If Ireland fails to comply with the reasoned opinion, the Commission can initiate infringement proceedings in the Court of Justice of the European Union. The implications for failure to comply with EU law can be significant and can lead to financial penalties being imposed. In approximately 95% of infringement cases, Member States comply with their obligations under EU law before they are referred to the EU Court of Justice (**CJEU**).

Powerteam Electrical Services Limited t/a Omexom v Electricity Supply Board [2016] IEHC 87, judgment of Costello J of 12 February 2016

Summary

In *Powerteam Electrical Services Limited (Powerteam) v Electricity Supply Board ("ESB")* the High Court granted an application for the lifting of an automatic suspension order. The Court applied the established *Campus Oil* principles holding that while damages would not be an adequate remedy for the applicant, the balance of convenience clearly favoured the lifting of the suspension.

Background

Powerteam was an unsuccessful applicant in a tender competition for a multi-operator framework for overhead line works (the **Framework Agreement**) and initiated proceedings against ESB pursuant to Regulation 8(1)(b) of the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (the **2010 Regulations**) (as amended by the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2015) (together the **Remedies Regulations**). The application to lift the automatic suspension was brought by ESB pursuant to Regulation 8(2) of the Remedies Regulations.

Applicable Test

The Court held that the applicable test was that set out in Regulation 8A(2) of the Remedies Regulations. Regulation 8A(2) provides that the court must consider whether it would be appropriate to grant an injunction restraining the contracting entity from entering into the contract. The correct approach was to consider the application as if the applicant (i.e. Powerteam, the respondent in the substantive proceedings) was making a notional application for an injunction to restrain the awarding of the contract in question. It is only if the court concludes that it would refuse the hypothetical application for an interlocutory injunction that the onus of proof shifts to the respondent as the moving party pursuant to Regulation 8A(2)(b) of the Remedies Regulations.

Applicable Principles

In deciding whether to grant an injunction under Regulation 8A(2), Costello J. applied the principles in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 (the **Campus Oil Principles**). The Campus Oil Principles require the Court to consider:-

- 1) Is there a fair or bona fide issue to be tried?
- 2) If so, the court should consider the adequacy of damages initially from the view of the applicant and, if damages would not adequately compensate the applicant, then from the perspective of the respondent;
- 3) If damages would not adequately compensate either party, the court then ought to consider the balance of convenience;
- 4) Finally if all matters are equally balanced the court may seek to preserve the status quo.

The Court rejected Powerteam's argument that the applicable principles were those as set out in Regulation 9(4) of the Remedies Regulations. Regulation 9(4) provides that when *considering whether to make an interim or interlocutory order, the Court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.*

Applying the Campus Oil Principles

ESB conceded that the applicant raised a fair question to be tried in the proceedings. In relation to the adequacy of damages, the Court considered that damages would not be an adequate remedy.

Powerteam made a number of arguments on this point. In particular, the Court took into account evidence provided by Powerteam that it would not be able to maintain its workforce in Ireland in the intervening period and would therefore be forced to cease its operations in Ireland. This evidence was not contested by ESB. Costello J. held that, *prima facie*, if a business will probably cease to trade if an injunction is withheld, damages are not an adequate remedy.

The applicant also argued that it would suffer a loss of reputation and market position if it was not on the Framework Agreement and therefore damages would not be an adequate remedy. This argument was rejected by the Court. Costello J. was not satisfied that the contract at issue was of such an "exceptional and prestigious character" as to warrant the conclusion that the loss of the contract would cause such significant reputational damage as to be incapable of compensation.

Balance of convenience

Although Powerteam provided an undertaking as to damages, the Court considered that damages would not be an adequate remedy for ESB and it was therefore necessary to consider the balance of convenience. Considering the five arguments put forward by ESB, Costello J. found that balance of convenience lay in favour of lifting the suspension. The Court accepted that the absence of a framework agreement created a very serious issue for ESB in relation to the security of supply and the safety of supply of electricity throughout the State. This was sufficient to determine that the balance of convenience was in favour of lifting the suspension.

Costello J. also held that the Court was entitled to have regard to the effect of the suspension on other parties, including the successful tenderers. The Court noted that this was a public utility which provided essential services to the entire State; it was critical that there be security of supply and safety of supply. The Court held that any question over either of these issues weighed "*very heavily indeed*" in the balance of convenience.

Decision

The Court granted the application to lift the suspension in the exercise of the jurisdiction conferred under Regulation 8A(2)(a) and on the basis of the *Campus Oil* principles. Costello J. held that if the Court was wrong on this issue and that the application should have been decided in light of the provisions of Regulation 9(4), the result would be the same. The applicant proposed conditions to be attached to the order lifting the suspension however the Court declined to attach any conditions to the order.

Comment

This is the second judgment since the introduction of the amended Remedies Regulations in which an application has successfully been made to lift an automatic suspension. The High Court's decision provides further clarity for litigants in procurement cases in relation to the test to be applied and guidance on the factors relevant to an assessment. It is clear that any litigant seeking to maintain the automatic suspension will face a difficult task in convincing the courts that the suspension should not be lifted.

RPS Consulting Engineers Limited v Kildare County Council, judgment of Humphreys J. of 15 February 2016

Summary

In RPS Consulting Engineers Limited (**RPS**) v Kildare County Council (the **Council**), the High Court found that the Council had a legal obligation to provide RPS, an unsuccessful tenderer, with reasons that have been

individually considered and formulated so as to clearly specify the relative advantages of the winning tenderer over RPS. The High Court also found that the Council had a legal obligation to positively respond to a request by RPS for further information related to the rejection of their tender within 15 days of having notified RPS. This is the first case where the sufficiency of reasons provided to unsuccessful tenderers has been considered in detail by an Irish court.

Background

The challenge brought by RPS related to the tender process for engineering consultancy services in relation to the design and construction of the Athy southern distributor road. The tender was published by the Council on 21 October 2014. RPS was successful in reaching the final stage of the tender, but was ultimately unsuccessful in being awarded the contract. This was despite the fact that the RPS tender was more competitive on price than the successful bidder.

On 2 April 2015, the Council issued RPS with a "notification of award decision" (the **Notification**). This provided RPS with the scores attained under the Council's marking system and included a scoring table and statement of the reasons why RPS's tender bid was unsuccessful. The scoring system employed by the Council consisted of the scores in each criterion being marked as excellent, very good, or good etc. attracting marks of 100%, 80%, 60% and so on respectively. The Court considered that the Council had changed its scoring system by applying an undisclosed banded scoring system although as RPS had not challenged the scoring system, it was not considered as a ground for quashing the decision – instead, the Court took it into account in assessing the adequacy of the reasons given.

In its judgment, the High Court noted (paragraph 7):-

"The reasons [provided in the Notification] were a combination of a repetition of the criteria, a repetition of the scores but phrased in terms of "good", "very good", and so on, and a handful of additional words, 16 in total, which contained a vague and general reference to the manner in which the preferred tenderer was superior in qualitative terms to the applicant. Despite being ahead on price, the applicant was held to be behind on quality by a relatively narrow margin."

RPS was not satisfied with the reasons provided, and maintained the view that the Council had failed to provide detailed feedback in a sufficiently transparent manner. In a number of subsequent letters to the Council, RPS took the position that the *"comments provided do not enable us to determine the relative advantages of the preferred bidder and [are] not sufficiently transparent as to how such substantial quality scores were lost."* RPS also requested more detailed feedback and a de-brief feedback meeting with the Council. The Council took the position that it was satisfied that it had fully met its obligations in connection with the tender process and under the procurement rules and that RPS had been provided with the reasons for the decision. RPS subsequently applied for relief to the High Court on 1 May 2015, outside the standstill period of 14 days but within the statutory limitation period of 30 days.

Decision

The High Court identified the essential point on which the case turned as being *"namely, whether the council provided sufficient reasons for its decision."* The High Court noted, and placed great importance on the fact, that similar reasons were used for each one of the unsuccessful tenderers.

The High Court held that the Council had not provided RPS with sufficient reasons and that it was legally obliged under Directive 2004/18/EC to positively respond to requests for further information made by an unsuccessful tenderer within 15 days from the date of receipt of that request.

The applicable EU & Irish Law

At the outset, the High Court identified the general EU law requirement to give reasons in a procurement context and the two-stage process involved in providing reasons, namely, the initial stage where a summary of

reasons is required to be provided under the Remedies Directive (Directive 89/665/EEC as amended by directive 2007/66/EC) at the time of the announcement of the contract award decision and the subsequent stage where a tenderer is entitled under the substantive Directives (i.e. Directive 2004/18/EC as replaced by Directive 2014/24/EU) to more detailed reasons upon request unless there are substantial grounds for not doing so.

The High Court observed that although the obligation under Directive 2004/18/EC to provide more detailed reasons upon request was not directly transposed into Irish law by the 2010 Regulations, it is a right specifically conferred by EU law and is directly applicable (enforceable in an Irish court in the same way as domestic legislation).

The level of sufficiency required when providing reasons

The Court went on to consider, in detail, the level of sufficiency required when providing an unsuccessful tenderer with reasons.

With regard to the provision of scores alone, the Court held that this will only be appropriate where they relate to purely quantitative assessments and not to qualitative ones (e.g. pricing).

Where there is a qualitative element involved, the Court inferred that a narrative comment is required. The Court then went further stating that, where there is mismatch between the quantitative and the qualitative (e.g. when a losing tenderer submitted a lower price than the winner (as was the case here)), a stronger emphasis will be placed on the need for specific and valid objective reasoning to be provided to the losing tenderer to justify such an outcome.

In regard to the need for narrative comments to refer to specific identified matters, the Court set down seven "standards" that it suggested should guide the provider of the reasons, namely:

- a) If an award turns on quantitative criteria such as price, scores alone may be sufficient in relation to such quantitative criteria (as is laid down by Regulation 6(5) of the 2010 Regulations);
- b) There is a heightened obligation to give reasons where there is a qualitative element involved, especially where an unsuccessful tenderer offered a more competitive price;
- c) The awarding authority must give reasons as to the advantages of the successful tenderer relative to the unsuccessful tenderer to whom the reasons are addressed. There is a legal requirement for a bespoke statement of reasons;
- d) Succinct comments will not necessarily be sufficient;
- e) The reasons given must be sufficiently precise to enable unsuccessful tenderers to ascertain the matters of fact and law on which the authority based the rejection of their offer and accepted the offer of the successful tenderer;
- f) The authority must mention the matters which should have been included in the unsuccessful tender or the matters that were contained in the successful tender. From these, it should be clearly identifiable why the preferred tender was advantageous by reference to particular matters, respects, examples or facts supporting a general assertion of relative advantage; and
- g) On top of the general requirement to provide reasons, an unsuccessful tenderer may request additional information about the reasons for their rejection in writing. The request must be responded to positively unless specific exceptions apply. (The Court said that this was due to the direct effect of EU law and Article 41 of Directive 2004/18/EC (which was replaced by Directive 2014/24/EU but both are similarly applicable in this context)).

The Court pointed to the requirement under Regulation 6 of the 2010 Regulations for a contracting authority to furnish a "summary of the reasons for the rejection" of a tender and, specifically, the requirement that this summary comprise "the characteristics and relative advantages of the tender selected". The Court was of the view that the reasons provided by the Council in this case were not in line with the "standards" outlined above, and that they did not satisfy the requirements of Regulation 6.

Time limits

On the issue of time limits, the Court held that the 30 day time limit set out by Regulation 7(2) of the 2010 Regulations starts to run when the unsuccessful tenderer is initially notified. The inference to be drawn here is that, even if an unsuccessful tenderer is provided with insufficient reasons in the initial notification, the time limit will still run from the date of that initial notification even if additional information is subsequently provided.

The Court also noted that, due to the need for legal certainty, the standstill period of 14 or 16 days would still run from the date of notification in this case. Again, the inference to be drawn is that the time periods will begin to run even where reasons provided to the unsuccessful tenderer in the initial notification may be insufficient.

Remedy

Interestingly, the Court did not quash the initial statement of reasons provided to RPS – the Court therefore must have considered this an adequate summary of the reasons. However, the Court did quash the subsequent refusal of the Council to provide additional information and the Council were ordered to provide within 15 days of the date of judgment a statement of the reasons including the characteristics and relative advantages and, in particular, the principal specific facts and matters by reference to which each characteristic or advantage could be judged.

Obiter comments

The Court also made some obiter comments in relation to Ireland's transposition of the Directives and aspects that should be considered by the legislature namely; (i) it could be made clearer where scores alone would suffice as "reasons"; (ii) the obligation to provide further information upon request should be expressly transposed into Irish law; and (iii) the standstill period should possibly be extended to 30 days to allow applicants time to request further information related to the rejection of their tender and time for authorities to then respond.

Comment

The RPS case sets out a high standard of information that contracting authorities should provide to unsuccessful tenderers. This will impact heavily on the administrative resources of contracting authorities particularly when providing information to several unsuccessful tenderers. The case makes it clear that contracting authorities are obliged to comply with requests from unsuccessful tenderers for further information and may be required to provide even more bespoke and specific detail than was contained in the reasons provided in the initial summary notification.

Student Transport Scheme Ltd v Minister for Education and Skills, judgment of Hogan J. of 27 May 2016 (Ryan P., Hogan J. and Peart J. presiding)

Summary

In *Student Transport Scheme Ltd (STS) v Minister for Education and Skills*, the Court of Appeal dismissed STS's appeal finding that the arrangement between the Minister for Education and Skills (the **Minister**) and Bus Éireann for the supply of the school transport services was not a contract concluded in writing for the purpose of the EU procurement rules and, therefore, the Minister was under no obligation to engage in a tender process for the provision of those services during the period in question (i.e. the school year 2011-2012).

Background

The scheme for the school transport service was initially agreed between the Minister and CIE (the holding company for Bus Éireann) in 1967 by way of letter, which was supplemented by a more detailed agreement in 1975. The scheme, which was run on a cost recovery basis, was entrusted to Bus Éireann in 1996. While the scheme had evolved over the years, the Court noted that it remained fundamentally the same as that agreed in 1967.

High Court Proceedings

In October 2011, STS commenced proceedings in the High Court where it alleged that a contract in writing for the supply of the school transport service for the school year 2011-2012 existed between the Minister and Bus Éireann. STS argued that, under the Public Procurement Directive 2004/18/EC (the **2004 Directive**), the Minister was obliged to put this contract out to tender.

The High Court rejected STS's arguments and made a number of findings (see *Student Transport Scheme Ltd. v. Minister for Education and Skills* [2012] IEHC 425.), including:

- a) STS had not established that the contract was for "*pecuniary interest*", an essential element under Article 1(2)(a) of the 2004 Directive for a contract to be considered a "*public contract*" and for EU procurement rules to apply;
- b) that STS had failed to establish that there was an ordinary commercial contract between the parties, another essential element for EU procurement rules to apply derived from case law of the CJEU;
- c) that the case law of the CJEU defined a "*contract*" for the purpose of the 2004 Directive as requiring "*the normal conditions of a commercial offer made by [the service provider]*" to be present; and
- d) the fact that a service provider was obliged to provide a service and to do so for a fixed price was not sufficient of itself to exclude the possibility of a contract for the purpose of the 2004 Directive, according to the case law of the CJEU.

Court of Appeal Proceedings

At the outset, the Court outlined the provisions of Article 1(2)(a) of the 2004 Directive which defines "*public contracts*" as: "[C]ontracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of the Directive." The Court observed that CJEU case law confirmed that all elements of Article 1(2)(a) must be satisfied for the EU procurement rules to apply. The Court set out the following four questions to be dealt with in the appeal, answering or giving an opinion on all four. The Court noted, however, that failure to answer one of the questions in the affirmative could be an independent ground for STS's challenge to fail:

1. Was there a contract in writing between the Minister and Bus Éireann within the meaning of Article 1 of the 2004 Directive?

The Court, while accepting that the scheme agreement was "*in writing*" for the purposes of the 2004 Directive, took a holistic view of the "*concluded in writing*" requirement and did not consider that it was satisfied in this case. It likened the agreement to "*an administrative instruction... to perform the service with which CIÉ duly complied.*" This was despite the fact that the agreement had been described as a "contract" by the State and Bus Éireann in the past. Applying the CJEU's decision in *Commission v. Ireland* (Case C-523/03 [2007] ECR I-11353), the Court was of the view that there was, at most, an administrative arrangement between two statutory bodies providing for some form of financial contribution, and that this in itself is insufficient to constitute a "*contract concluded in writing*" for the purposes of the 2004 Directive.

2. Was any such contract for “*pecuniary interest*” in the manner in which this term is generally understood from the relevant case law?

On the issue of whether the agreement could be considered to be for “*pecuniary interest*” for the purpose of the 2004 Directive, the Court overturned the High Court’s determination on this point. The High Court had decided that there was no element of “*pecuniary interest*” because the agreement was operated on a cost recovery basis and did not provide for any element of profit. The Court, however, applied the CJEU judgment in *Azienda Sanitaria Locale di Lecce* (Case C-159/11) (which was delivered some months after the decision of the High Court), and ruled that “*a contract providing for remuneration on a cost recovery basis does not cease to be a contract for pecuniary interest on that account*” and, therefore, is not excluded from coming within the scope of the 2004 Directive.

3. Was any such contract one of indefinite duration which ante-dated the operation of the EU’s public procurement regime?

In addressing this question, the court reaffirmed that it is undisputed “*that a contract of indefinite duration falls outside the scope of the public procurement regime.*” In applying the case law of the CJEU, the Court stated that a contract of indefinite duration which ante-dates the coming into force of the EU procurement regime which has not been altered in any material way will not come within the scope of the 2004 Directive. The Court looked back six months (i.e. the extent of the relevant limitation period) prior to the commencement of the present proceedings (to April 2011) and found that no material changes had been made within this time period. It noted that, although, there were some minor pricing amendments, these changes did not shift the economic balance in favour of the operator and were not material. The Court concluded that this was a contract of indefinite duration and, therefore, one that fell outside the scope of the 2004 Directive.

4. Whether any such contract was really a unilateral administrative measure solely creating obligations for Bus Éireann within the meaning of the case law of the CJEU?

The Court characterised this question as the *Asemfo* (Case C-295/05 [2007] ECR I-2999)/ *Correos* (Case C-220/06 [2007] ECR I-12175.) exception which sets out: “[T]hat contractual arrangements between State bodies which involve the entrusting of functions to a State body in circumstances where the latter is in no position to refuse and which arrangements do not provide for normal or ordinary commercial arrangements between the parties generally fall outside of the public procurement regime.” The Court stated that the High Court had already made a finding of fact (which the Court could not question) that the scheme had been entrusted to CIE. On the question of ordinary commercial arrangements, the Court stated that there was no evidence that Bus Éireann enjoyed the normal commercial freedoms to negotiate terms, or terminate the contract for its own commercial reasons. The Court, however, did not consider it was necessary to make a determination as to whether the exception applied in this case in light of the appeal failing on other grounds.

Comment

This case confirms the position that a contract that operates on a cost recovery basis can be a contract for pecuniary interest and, therefore, is not automatically excluded from coming within the scope of the EU procurement rules. It also reaffirms the position that minor amendments to a contract of indefinite duration that existed prior to the coming into force of the EU procurement regime will not bring that contract within the scope of the procurement Directives.

Forum Connemara Limited v Galway County Local Community Development Committee, judgment of Hedigan J. of 10 August 2016

Finding

The Irish High Court has found that there was no error in relation to the decision taken by Galway County Local Community Development Committee (the **Committee**) to award Galway Rural Development Company Limited

(GRDCL) with the implementation of the Social Inclusion and Community Activation Programme (SICAP) in Co. Galway. The case was brought by Forum Connemara Limited (**Forum Connemara**) who sought to have the Committee's decision quashed following their unsuccessful tender to be the sole service provider of SICAP in the region.

Facts

On 30 September 2014, the Committee made a decision that there should be only one service provider or programme implementer for SICAP for the entire County of Galway. Previously, Galway County was divided into two areas or lots with the delivery of SICAP shared between Forum Connemara and GRDCL respectively. A tender process commenced in October 2014 and Forum Connemara submitted a tender for the single contract. GRDCL was awarded the contract in early 2015 and Forum Connemara was notified that they had been unsuccessful by way of a letter dated 2 March 2015.

Forum Connemara commenced a challenge on 23 March 2015, seeking an order overturning the decision of 30 September 2014 to structure the contract as a single lot, as well as an order overturning the decision of 2 March 2015 to reject its tender.

Procedural Background – High Court & Court of Appeal

On 23 March 2015, Barrett J. in the High Court granted Forum Connemara leave to apply for judicial review of the Committee's decision to designate one SICAP service provider to the Co. Galway region. Forum Connemara was also given leave to seek to have the decision to contract award decision quashed. An order was also made staying the contract award decision until the determination of the proceedings.

The Committee countered with an application to strike out proceedings on the basis of delay. The Committee contended that a delay of 22 weeks from when the decision to consolidate lots was made prevented Forum Connemara from bringing an action to have the decision judicially reviewed.

Taking into account the voluntary nature of Connemara Forum, the unusual nature of the procurement contract and the significant public concern following the Committee's decision in September 2014, Barrett J. was satisfied that 'good reasons' existed to extend the 30 day time limit for such actions and permit Forum Connemara's challenge to proceed.

The Committee appealed the delay aspect of Barrett J's decision. Irvine J in the Court of Appeal held that Barrett J. had erred in finding 'good reasons' which warranted an extension of the 30 day time limit. Irvine J. noted that, with their participation in the tender process, Forum Connemara had approbated the Committee's decision for its own commercial benefit. The Court of Appeal held that enabling such an action to proceed would constitute a "*gross impairment of the effectiveness of the implementation of the Community Directives on the award of public contracts*".

Judicial Review – High Court

The proceedings before Hedigan J. were solely concerned with a review of the Committee's decision to award the contract to GRDCL.

Dismissing Forum Connemara's preliminary objection regarding a lack of standing or *locus standi* of the Committee, Hedigan J. engaged in an examination of whether the Committee fulfilled their duty to provide reasons for their decision.

In submissions, Forum Connemara asserted that the SICAP tender may have been a "mixed" tender with characteristics of both Annex IIA and Annex IIB contracts under Directive 2004/18/EU as implemented into Irish law by SI 329 of 2006. Annex IIB service contracts are considered to have less potential for cross-border trade and are therefore not subject to the full rigours of the Directive and implementing Regulations. Addressing Forum Connemara's assertion that the SICAP tender may have been a "mixed" tender with characteristics of

both Annex IIA and Annex IIB contracts, Hedigan J. was satisfied that the SICAP tender was an Annex IIB contract as the opening page of the Invitation to Tender specifically identified the contract as such. As an Annex IIB contract, the tender was not subject to the specific reason-giving obligations under Article 41 of the Directive.

Noting a general requirement to give reasons also existed, Hedigan J. held that the Committee's letter of notification to Connemara Forum dated 2 March 2015 sufficiently discharged the Committee's general duty and specific obligations to provide reasons for their decision. In their letter, the Committee "*went beyond any general requirement to give reasons*" by identifying a number of shortcomings in Connemara Forum's tender under the points action plan, staffing resources, performance management, validated programme of learning and networking structures with key stakeholders. The letter also included details of the scores where the successful tenderer equalled or exceeded the applicant.

The Court held that it could not be ascertained from either Connemara Forum's letter in response to the Committee's letter of notification or in the pleadings in the application for judicial review that the organisation did not fully comprehend the reasons underlying the Committee's decision.

Hedigan J also noted that the issue of proportionality did not arise in the case as the Committee was not in a position to "*change the parameters of what is a national programme*". Similarly, submissions raised by Connemara Forum that the lack of reasons furnished in the letter of notification rendered the decision irrational were dismissed as the Court found that, even applying a "clear error" test, no real case for such a finding was present.

All reliefs sought by Connemara Forum were refused.

Analysis

The case marks one of the first discussions of the duty to provide reasons following the *RPS v. Kildare County Council* case. The Court considered that the reason-giving obligation in Article 41 of Directive 2004/18/EU did not apply to Annex IIB service contracts and that the Committee went "*far beyond*" any general requirement to give reasons. The case also demonstrates the importance of initiating claims within the tight time limits under the Remedies Regulations as Forum Connemara's grounds were significantly curtailed following the Court of Appeal decision to strike out grounds relating to the initial decision to designate one SICAP service provider to the Co. Galway region. The case therefore primarily concerned the adequacy of the reasons provided by the Committee.

Forum Connemara Limited v Galway County Local Community Development Committee, judgment of Ryan J. of 21 December 2016

Summary

The High Court has refused an application made by Forum Connemara Limited (**Forum Connemara**) for a stay on the implementation of the decision made by Galway County Local Community Development Committee (the **Committee**) to award Galway Rural Development Company Limited (**GRDCL**) a contract for the implementation of the Social Inclusion and Community Activation Programme (**SIPAC**) in County Galway.

Procedural Background

On 23 March 2015, Forum Connemara obtained leave to seek judicial review of the decision by the Committee of 30 September 2014 to appoint only one SIPAC service provider for the county of Galway (the **First Decision**), and the decision by the Committee of 2 March 2015 to award the contract to GRDCL (the **Second Decision**). The proceedings concerning the First Decision were struck out by the Court of Appeal.

The challenge to the Second Decision was rejected by the High Court on 10 August 2016 and a perfected order was made on 15 September 2016. The High Court granted a stay on the implementation of that decision during the currency of the High Court proceedings and a further stay until 3 October 2016, stating that any further postponement of the decision would be a matter for the Court of Appeal. That deadline passed without an application. On 12 October 2016, Forum issued a notice of motion seeking a further stay until the determination of the appeal from the judgment of the High Court in relation to the Second Decision.

Ryan J. noted that although the motion sought an *extension* of the stay originally granted when leave was obtained, there was actually no stay in place. As the Committee had not proceeded to enter the contract, the question for the Court was whether to impose a stay.

Submissions by Forum

Forum Connemara submitted that the procedural provisions in the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 – S.I. 130 of 2010 (the "**2010 Regulations**") required that the original stay that came into effect with the grant of leave for judicial review should continue until the determination of the appeal. Alternatively, Forum submitted that justice requires that there be no appointment until its proceedings on appeal have been concluded.

Decision

Regulation 8(2) of the 2010 Regulations provides that if a person applies to the Court under paragraph (1), the contracting authority shall not conclude the contract until—

- a) *the Court has determined the matter, or*
- b) *the Court gives leave to lift any suspension of a procedure, or*
- c) *the proceedings are discontinued or otherwise disposed of.*

Ryan J. found that the provision in Regulation 8 (as amended) which provides that the contracting party shall not conclude the contract in question until the "court" has determined the matter must be considered to apply to the High Court and only to the High Court. The Court applied the normal rules of analysis of statutory provisions and based the decision on the fact that Regulation 2 of the 2010 Regulations defined "court" as the High Court. Ryan J. noted that the provision in question sought to balance the interests of the complaining party against the interests of the successful contender who is entitled to respect for its position. It is also difficult to define when the last stage of litigation in respect of an appeal has been reached.

This left the Court in the position of "*endeavouring to do justice between the parties*". Ryan J. stated that the relevant test was the balance of convenience and the Court considered whether it was more oppressive or onerous to impose a stay or to permit the execution of the contract.

Stay refused

The Court found that the balance of convenience was strongly in favour of resisting the stay. In reaching this conclusion, the Court noted that the contract was intended to operate for a 36 month period, of which 20 months had now elapsed. The successful tenderer had been excluded from providing this service during this period and instead Forum Connemara remained *in situ in effective occupation of the position that its rival has won*. In the Court's view, imposing a further stay would be seriously unfair to GRDCL. The Court stated that it was *more than unsatisfactory that a process designed to ensure fairness should in practice operate to frustrate the implementation of the result*.

Comment

The decision provides welcome certainty in relation to procurement litigation under the Remedies Regulations. Once the High Court has determined the matter there is no automatic bar on the contracting authority entering the contract with the successful bidder, even where an appeal is lodged. It is up to the appealing party to seek a stay and the High Court will consider the balance of convenience.

BAM PPP PGGM Infrastructure Cooperative U.a. v National Treasury Management Agency and Minister for Education and Skills, judgment of Haughton J. of 6 October 2016

Summary

In *BAM v the National Treasury Management Agency (NTMA)*, the High Court found that the NTMA had a power to accept and evaluate tender documents submitted after the tender deadline. This is the first case where the issue of late tenders has been considered in detail by an Irish court and the first case where an Irish court has ruled on the issue of late tenders in the context of a completely electronic tender procedure.

Background

The challenge by BAM relates to the procurement process for the design, finance, construction and maintenance of part of Dublin Institute of Technology's Grangegorman campus. The deadline for the submission of tenders via the electronic tendering portal was 17:00 on 28 November 2014. Of the three qualifying tenderers, only BAM met the deadline for submission. In February 2015, the NTMA notified BAM that it had identified Eriugena as the tenderer with the most economically advantageous tender. The letter to BAM also included the following paragraph:-

"The Authority wishes to note that at the time of submission of the Tender documents to Asite, the uploading of a small number of the Eriugena documents was not completed until shortly after the 5pm deadline on 28th November, 2014. Having investigated the matter, the Authority was fully satisfied that no unfair advantage was gained by Eriugena in the circumstances and the Authority exercised its discretion to accept the Eriugena Tender prior to the evaluation exercise commencing."

BAM initiated proceedings challenging the decision to accept the late submission and the appointment of Eriugena as Preferred Tenderer. The central assertion in the case was that the NTMA was not entitled under either the Invitation to Negotiate (ITN) or the relevant legal rules to accept a tender that was received in whole or in part after the expiration of the deadline for receipt of tenders.

Decision

The challenge by BAM was ultimately unsuccessful with the High Court finding for the NTMA on all six issues arising from the pleadings. We set out below the findings of the Court on some of the key issues.

Issue 1 - Did the NTMA have a discretion under the ITN to accept (a) a late tender or (b) a tender notwithstanding that some of its documents were received after the deadline or (c) the tender of Eriugena?

Of particular relevance to the NTMA's decision were the "Important Notice", Section 4 (headed "Submission Requirements") and Section 7 ("Tender Evaluation") of the ITN. The court applied the "reasonably well-informed and normally diligent tenderer" standard established in *SIAC v Mayo County Council* (Case C-19/00) in interpreting the provisions of the ITN. Section 7(d) was titled "Authority Discretion following Receipt of Tenders" and provided at paragraph (ii) that:-

A tender will not be deemed to be non-compliant, by reason only of the inclusion of any of the following: ... (ii) an error, which in the reasonable opinion of the Authority is clerical or administrative.

The Court concluded that the NTMA had a discretionary power under this section 7(d)(ii) to accept and evaluate documents submitted after the tender deadline where it was of the opinion that such omission/failure to submit was clerical or administrative. This interpretation was supported by the absolute discretion reserved by the NTMA in the "Importance Notice" of the ITN to ensure "*a healthy competition is maintained throughout all stages of the Tender Process*". The Court held that as the s.7.1 (d) power was expressed as a discretion it was not open-ended. The NTMA was obliged to consider the circumstances and form an opinion before it exercised this discretion.

Issue 2 - Did the NTMA misdirect itself in law or make a manifest error in considering that it had discretion?

In its letter notifying of the appointment of Eriugena as Preferred Tenderer, the NTMA did not cite any particular provision of the ITN as the source of its discretion. In its letter of 6 March 2015, the NTMA, wrote:- "*The ITN is quite clear in affording the Authority discretion in this regard (see for example, Sections 4.1(c), 4.1(b)(D), 4.1(d) and the Important Notice.*" BAM argued that the NTMA misdirected itself in law and made a manifest error as to the existence and basis for its alleged discretion.

While the Court agreed with BAM that insofar as the NTMA relied on section 4 of the ITN, it had misdirected itself in law, the Court held that it was clear that the NTMA was at all times relying more generally upon the terms of the ITN as the source of its discretion.

Importantly for contracting authorities more generally, the Court held that even if it was wrong in its determination that the NTMA enjoyed discretion under the ITN, the NTMA had discretion under the general law to extend time for acceptance of tender documents/files in exceptional circumstances. This finding was based on a consideration of the general principle of proportionality under EU law. Haughton J also referred with approval to the decision in *J.B. Leadbitter & Co. v. Devon County Council [2010]* which was approved and followed in the Court of Appeal.

Issue 3 (a) - Did the circumstances relied on by the NTMA constitute valid reasons for exercising its discretion?

The NTMA provided detailed evidence on the justification for its decision. The Court found that the "exceptional circumstances" relied on by the NTMA were *prima facie* based on relevant considerations and that there was a "logical connection" between these circumstances and the decision reached. The central considerations identified as important by the court included the fact that that only 8 of Eriugena's 280 tender documents were submitted after the deadline, the fact that the technical difficulties experienced by Eriugena in the upload were not "wholly within its control", the fact that Eriugena had notified the NTMA of these difficulties at 17:14 and the fact that complete submission was achieved by 18:13. The Court found that the NTMA was entitled to conclude that Eriugena did not receive any unfair advantage over the applicant in the tender process as it had satisfied itself that none of the documents were created or modified after the deadline.

This finding of validity in relation to the reasons relied on was subject to the Court's consideration of whether the circumstances relied on by the NTMA infringed the principles of non-discrimination, equal treatment, transparency and proportionality (Issue 3(b)). The Court also considered whether the NTMA's conduct in waiving the tender deadline notwithstanding the provisions of the ITN breached the procurement regulations and the general principles of EU law (**General Principles**) (Issue 6).

Summary of law

The Court held that there was no persuasive or clear authority of the European courts which provided that a public procurement tender deadline could never be extended. Rather EU case law showed that the contracting authority must apply the General Principles when considering whether to accept late or omitted documents. The

Court helpfully summarised the situations where the European courts have been prepared to sanction a contracting authority granting some leeway to tenderers i.e. where -

- 1) discretion is afforded by the applicable tender rules, and/or
- 2) the irregularity - be it error, ambiguity, omission or late filing - is the fault of the contracting authority, or is not the fault of or within the control of the tenderer, and
- 3) the exercise of that discretion does not breach the principles of equality, proportionality and transparency (and in respect of these considerations there is no margin of appreciation), and
- 4) there has been no manifest error in the exercise of the discretion by the contracting authority - and in this respect the courts concede a “margin of appreciation” to the awarding authority in relation to matters of judgment or assessment.

On the evidence that was before it, the NTMA was entitled to treat the late submission of documents as an administrative error and to accept the late documents and to proceed to evaluate them. Further, and in the alternative, the NTMA was entitled to treat the circumstances giving rise to the late delivery of documents as “exceptional”.

Duty to allow late submission in exceptional circumstances

The Court also noted that in certain “exceptional circumstances” a contracting authority may be duty bound to extend a tender deadline. Haughton J considered that “exceptional circumstances” would encompass failure to achieve deadlines as a result of power failure, or force majeure, but was reluctant to define or limit the scope of what might be considered “exceptional”. He noted that what might not seem exceptional at first glance must be considered in the context of all relevant facts, and might then be seen to reach the threshold of “exceptional” when viewed objectively, particularly from a tenderer’s perspective.

Non-discrimination/Equal Treatment

The Court rejected the argument made by BAM that the NTMA breached the principles of non-discrimination and equal treatment in accepting the late documents. The Court quoted the decision of the Court of Justice of the European Union (CJEU) in *Fabricom SA v Belgium* [2005] ECR I-1559 where at paragraph 27 the CJEU stated:

Furthermore it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

The Court noted that while BAM and Eriugena had been treated differently, there was an objective basis for this different treatment and the Court accepted the submissions of the NTMA that no unfair advantage was obtained by Eriugena.

Proportionality

The Court also rejected the argument made by BAM that the decision to accept the late documents was disproportionate. The Court held that the NTMA was entitled to consider Eriugena’s predicament in the context of the lengthy 31 weeks process and the public interest in progressing the project rather than risking its abandonment. The Court also noted that the objective of maintaining “...a healthy competition is maintained throughout all stages of the Tender Process” as set out in the ITN could have been lost if the late documents had not been accepted with the distinct possibility that the competition would be abandoned with only one tender to evaluate and consequent delay in delivery of the project.

By the 17:00 deadline the vast majority of Eriugena's tender files had been uploaded and none were modified post-deadline. The difficulty encountered by Eriugena while not the fault of the Authority, was also not the fault of Eriugena. The Court was therefore satisfied that the decision taken was "*the least onerous*" option, and in accordance with the principle of proportionality.

Interestingly, the Court noted that any other decision would have been open to objection by Eriugena that it breached the principle of proportionality.

Breach of transparency

BAM sought to argue that the NTMA had failed to set out the powers relied on in the impugned decision in breach of the general principle of transparency. The NTMA successfully objected to this ground of challenge on the basis that it had not been included in the pleadings and was therefore time-barred.

The Court held that the transparency issue had not been the subject matter of a complaint in the correspondence prior to the commencement of proceedings. Accordingly, BAM failed to comply with Regulation 8(4) of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. 130 of 2010) (the **Remedies Regulations**). This was sufficient to deal with the matter however the Court also found that BAM had failed to comply with Order 84A, Rule 3, Rules of the Superior Court by failing to directly or adequately raise the issue in the statement of grounds.

Comment

The decision is noteworthy as it is the first time an Irish court has considered in detail the issue of how a contracting authority should deal with the late submissions of tender documents.

Although the Court found the existence of a general power to accept late submissions in certain circumstances, contracting authorities should consider including a specific power to do so in the tender documents. Where the tender documents expressly prohibit extensions of time, a contracting authority will have less room for manoeuvre.

The decision also highlights the importance for contracting authorities of following proper procedures and documenting decisions taken when faced with issues such as the submission of late documents. The NTMA sought legal advice and carried out a full investigation of the circumstances before taking a decision and this worked in their favour in defending the challenge. The Court noted that it was "*prudent*" that a particular individual within the NTMA with potential knowledge of the financial aspects of the tenders referred the decision to a higher authority within the NTMA. The Court noted that had one of the decision-makers been in possession of knowledge of the financial aspects of any of the tenders before deciding to accept Eriugena's late documents, this could have compromised their capacity to take part in the decision.

The case also serves as a reminder of the importance of including all grounds of challenge in the pre-litigation correspondence and in the pleadings.

Copymoore Limited and others v Commissioners for Public Works Ireland [2016] IEHC 709, judgment of McDermott J delivered on 11 November 2016

Background

On 31 January 2013, the respondents issued a Request for Tenders (**RFT**) through the National Procurement Service (**NPS**) for a multi-supplier framework agreement for the supply of "monochrome and colour multi-function devices" (the **Framework Agreement**). A number of contracting authorities in the public sector were listed as clients of the Framework Agreement. The Framework Agreement was divided into five separate lots with the service specifications for the devices varying slightly per lot. The NPS estimated that expenditure under the Framework Agreement would be €25 million over its initial two year term, divided evenly between the lots.

Locus Standi

The Framework Agreement was challenged by ten applicants, each of which constituted a small and medium sized enterprise (**SMEs**). Six of the applicants had not submitted a tender on the basis that they considered their chances of success were non-existent as a result of the nature of the qualification criteria. These six applicants were therefore eligible to bring proceedings. McDermott J. relied on the case of *Grossmann Air Services v Austria (C-230/02) [2004] 2 C.M.L.R. 2*, where it was held that a tenderer who has not submitted a tender will have standing where their "successful participation in the process was made impossible due to the conduct of the contracting authority". The remaining four applicants who had submitted tenders as part of consortia were not eligible to bring proceedings. Their argument that they were eligible as they had been precluded from submitting a tender as individual companies was rejected by the Court.

Challenge to Qualification Criteria

The applicants sought to set aside the Economic and Financial Standing qualification criteria and the Technical and Professional Ability qualification criteria (together "the **Qualification Criteria**") on grounds that they were disproportionate and discriminatory. The Economic and Financial Standing criteria required that tenderers demonstrate a minimum annual turnover of €2 million for each lot. To tender for more than one lot, tenderers had to demonstrate a cumulative turnover. The Technical and Professional Ability Criteria required that tenderers be able to demonstrate a history of successful delivery of specified quantities of devices covered by the Lot to clients within a designated period. For example in respect of Lot 1, tenderers were required to demonstrate three orders of at least 30 devices to a client in the previous three years or 250 devices in total to clients over the previous three years. The applicants claimed that in setting the Qualification Criteria, the NPS acted contrary to the provisions of Regulations 17, 33 and 52 of the European Communities (Award of Public Authorities Contracts) Regulations 2006 (S.I. 329 of 2006) ("the **Public Contracts Regulations 2006**") (since replaced by the European Union (Award of Public Authority Contracts) Regulations 2016).

Minimum Turnover Requirement

The applicants claimed that the minimum turnover level was manifestly disproportionate to the relevant market. In making this claim the applicants valued the relevant market (for the supply of printers and multi-functional devices in the State) at approximately €75 million. The market was distributed between 200-250 undertakings and the applicants claimed that only 7 to 8 undertakings would be capable of meeting the minimum turnover requirement of €2 million. The minimum turnover levels were disproportionate given that the average value of any contract likely to be made under the Framework Agreement was €26,000. The NPS rejected this claim arguing that that the turnover criteria had been set at a lower level than might otherwise have been set in accordance with official guidance and lower than previous framework agreements in the same area.

Applying the test of "manifest error", the Court concluded that the Economic and Financial Standing criteria were proportionate and reasonable. The NPS was entitled to seek to ensure continuity of supply and this was a legitimate, reasonable and proportionate reason for the Economic and Financial Standing Qualification Criteria. The spread of risk amongst seven tenderers reduced the risk of damage arising if one or more of the framework participants were unable to deliver.

SME Status

The applicants also argued that their status as SMEs was not given any consideration when setting the criteria contrary to guidelines issued by the Department of Finance set out in Circular 10/10 ("*Guidelines for Public Contract Authorities Facilitating the Participation of SMEs in Public Procurement*"). This circular was replaced on 16 April 2014, after the initiation of the proceedings, by Circular 10/14. The applicants submitted that the improved guidance set out in Circular 10/14 set out the proper procedure which should have been adopted by the respondents in framing the RFT. In particular the applicants claimed that there was:-

- No adequate market analysis as required by Circular 10/14 (Clause 4.1) and as required by "good procurement practice";

- No engagement with or consultation with SME's in advance;
- No consideration of alternatives other than turnover levels;
- No consideration as required by Circular 10/10 and 10/14 of the needs of the individual contracts under the framework rather than the overall estimated value of the Framework Agreement.

The Court accepted the evidence of Mr. Mulvey of the NPS who described how he estimated the value of the market in accordance with the guidance set out in Circular 10/10 following a survey of the market place. The steps taken by Mr. Mulvey were set out in detail in the judgment. The NPS accepted they had not had regard to the individual drawdown numbers when setting the €2 million turnover requirement and submitted that the proper value of the Framework Agreement was the value of all of the individual contracts that might be entered into.

The Court found that the NPS set the turnover requirement in accordance with then applicable guidelines in respect of SMEs. In relation to the value of the average contract price under the Framework Agreement, McDermott J. accepted the estimate of €26,000 for draw-down contracts but considered that this was "*not a figure which should bind or determine the estimate of the turnover criteria determined in accordance with the terms of the Directive*". He considered that a reduction in the qualification threshold to a figure dependent upon an average individual contract price would likely defeat the purpose of the Framework Agreement and undermine the reliability and security of the supply of goods and services required by the contracting authority.

In considering the substance of the applicant's arguments, the Court seemed to accept, without engaging in any analysis on the issue, that the SME Guidelines created legally enforceable justiciable obligations. However the Court's conclusion on the facts seems to ignore Clause 4.6 of Circular 10/14 which states that the turnover limit for Framework Agreements should be set in general vis-à-vis the likely size of individual contracts or drawdowns in the framework.

Technical and Professional Ability

McDermott J. was not satisfied that the setting of the technical and professional ability requirements was the subject of a "manifest error" when measured against the principles of proportionality or equality or that they could be regarded as irrational or unreasonable. The NPS gave evidence that they had been set with regard to previous similar contracts. The Court was not satisfied that there was any legal basis upon which to challenge the criteria set on the basis of proportionality or non-discrimination or otherwise for failure to comply with the terms of the Directive and the Regulations transposing it.

Competition Law Arguments

The applicants argued that the Framework Agreement (a) would limit competition to supply the relevant products to all public sector purchasers to the successful tenderers for a minimum of two and a maximum of four years; (b) prevent the applicants from bidding for one or more of the Framework Agreement Lots due to the qualification criteria; and (c) was likely to foreclose the entire market for the duration of the agreement resulting in higher prices for private sector purchasers.

Therefore it was claimed that the qualification criteria were contrary to the provisions of Section 4(1) of the Competition Act 2002 (the **Competition Act**) and that the Framework Agreement prevent, restricted or distorted competition in the market in breach of Regulation 33(6) of the Public Contracts Regulations 2006. It is worth noting that this provision prohibiting the use of framework agreements to prevent, restrict or distort competition is not explicitly included in the 2016 Regulations (although it is included in Recital 61 of the Directive 2014/24/EU).

Before considering the substance of the arguments the Court considered firstly whether NPS could be considered an "undertaking" for the purposes of the Competition Act. The Court cited the leading decision of the Court of Justice of the European Union in *FENIN v Commission* [1991] ECR I-1979 which held that an

organisation does not act as an undertaking simply because it is a purchaser in a given market. NPS provided a regulated scheme for the procurement of printers and consumables on behalf of the State with a view to maximising the purchasing power of the State. NPS were not engaged in procuring any goods or services. NPS were providing a public service with a public benefit and were not doing so as an undertaking. The provisions of the Competition Act therefore did not apply.

In relation to the argument of the perceived effects of the Framework Agreement on competition in the relevant market it was agreed that the relevant market was the market for the supply of printers and multi-functional devices in the State. The applicants produced an economist's report which concluded that as undertakings could not survive on the basis of sales to private customers alone, the Framework Agreement would lead to foreclosure of the *entire* market (not just in respect of public sector purchases).

Both economists for the applicant and for the respondent agreed that there would be grounds for competition concerns where the State element of the market reached between 20-30%. However they disagreed on the percentage of the market covered by the Framework Agreement in this case. Mr Massey, economist for the applicants, was of the view that the Framework Agreement covered between 20-40% of the entire market. This figure was reached on the basis of an estimate of €52 million for the market. Economist for the respondent, Dr. Bacon, submitted that the Framework Agreement covered 8-12% of the market (based on a total valuation of the market of €75 million). The Court preferred the evidence of the respondent's economist on this point. McDermott J. was not satisfied on the balance of probabilities to act on the figures submitted by Mr. Massey for the purpose of concluding that the Framework Agreement would exclude many of the 200 to 250 operators in the market or that the framework agreement was inherently anti-competitive under the Competition Act.

The applicants also alleged that the contracting authority was in a dominant position in the market. The Court rejected this argument without considering the issue of abuse finding that it had not been established that the public sector's share was large enough to result in the State assuming a dominant position as a result.

Consortia

The applicants claimed that it was not possible for them to form relationships with other SME's to meet the RFT criteria as this would be in violation of Section 4 of the Competition Act 2002. Mr Massey for the applicants stated that any arrangement between the applicants to jointly tender would by definition involve an agreement on the prices to be charged which constitutes a cartel and agreement on which of them would supply which customers which constitutes a market sharing agreement. Both experts were satisfied that there were risks under the Competition Act in becoming part of a consortium. The Court noted the guidance issued by the Competition and Consumer Protection Commission for SME's engaged in consortium bidding in tenders. The Court also noted that the applicants in this case were not competitors as they operated in different parts of the country. The Court found that there was no basis to conclude that participation in consortia under the terms of the Framework Agreement gave rise inexorably to a breach of the Competition Act. This was not to say there are not risks which attach to such participation which must be considered as a matter of course.

Additional Arguments

The additional grounds argued by the applicants were also rejected by the Court. The applicants' claim that clarifications issued by the NPS in advance of the tender deadline altered the terms of the RFT in an impermissible manner was rejected. The Court also rejected the argument that the NPS did not have the authority to conclude Framework Agreements on behalf of any third party public sector clients.

Comment

The decision demonstrates the high standard which applicants are required to meet in challenging qualification criteria. One of the key takeaways from the decision was that McDermott J seemed to accept that the guidelines for SME's (Circular 10/14) created enforceable obligations. However the effect of this finding was curtailed with the rejection of the applicant's arguments in relation to the respondent's market analysis. In addition, despite the fact that the Guidelines suggest turnover levels for framework agreements being set at levels proportionate to the value of draw-downs, the Court concluded that the value of individual drawdowns was not a figure which should bind the Court.

The decision confirms the position that most contracting authorities will not be considered "undertakings" for the purposes of competition law. The findings of the Court in relation to the competition law arguments are not surprising particularly given the Court's conclusion on the State's share of the market (i.e. 8-12%). It is clear that if the State had a higher share of the market, the Court would have been willing to probe whether there was market foreclosure arising from this centralised framework agreement.

Delayed Verification under the Irish Regulations Implementing the 2014 Directive

Introduction

The assessment of the capability and reliability of tenderers in any tender procedure is an important step – typically, the first step in the procedure under the 2004 Directives. However, with the introduction of the European Single Procurement Document (ESPD) and the objective under Directive 2014/24/EU on Public Procurement (the 2014 Directive) of reducing burdens on SMEs in the production of large quantities of pre-qualification documentation, the initial suitability assessment can now be relatively cursory. Indeed, under Article 56(2) of the 2014 Directive, contracting authorities may delay verification of suitability in an open procedure until after tenders have been evaluated.

Member States have the option in their implementing measures not to permit such delayed verification or at least to restrict it to certain types of procurement or specific circumstances.

The 2014 Directive introduced the ESPD which is effectively a self-declaration that the tenderer meets the exclusionary criteria and the selection criteria, and it fulfils any objective rules and criteria for shortlisting. When evaluating suitability of the tenderer on the basis of an ESPD, a contracting authority may only request all or part of the supporting documents underlying the self-declaration "where this is necessary to ensure the proper conduct of the procedure". Recital 84 of the 2014 Directive does appear to suggest that it would be good practice to request supporting documents at selection stage in a multi-stage procedure (ie, a restricted procedure, competitive procedure with negotiation, competitive dialogue and innovation partnership) so as not to deprive otherwise-qualified candidates from participating at the tender stage.

There are conceivably a number of consequences that may arise in practice from delaying verification of suitability until after a contract award decision has been made. These consequences are outlined in further detail below.

Delayed Verification under the Irish Regulations Implementing the 2014 Directive

Under the Irish implementing Regulations (European Union (Award of Public Authority Contracts) Regulations 2016, S.I. 284 of 2016), Ireland has opted to permit contracting authorities to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria.

The Office of Government Procurement (the entity responsible for centralised procurement of goods and services in Ireland) has indicated that:

the documents required by the Contracting Authority to provide evidence that the tenderer is not affected by any exclusion grounds... and that the bidder meets the selection criteria (eg, financial information, details of previous projects, references, etc) are not required to be provided with the tender and will normally be requested from the preferred bidder only prior to contract award.

This suggests that the ESPD will be taken at face value as initial confirmation of suitability and that tender evaluation will generally proceed without suitability verification. While from an SME perspective the policy is laudable and should assist in reducing documentary burdens on SMEs, it does raise potential issues.

Delayed Verification – Potential Issues

Unnecessary evaluation of unsuitable tenders?

Delaying verification of suitability until the end of the process potentially places a greater burden on contracting authorities to evaluate tenders that would otherwise have been excluded on grounds that the tenderer was unsuitable or lacks the necessary capability to meet the selection criteria. In particular, issues may arise where a tenderer provides a global confirmation by ticking a box in the ESPD that it satisfies the required selection criteria for the competition without having to provide any detail in relation to the basis for its self-declaration.

It may be the case, however, that the tenderer's view of comparable projects or references may not correspond with the contracting authority's view and yet the contracting authority will only become aware of this difference in opinion when it seeks the supporting documents at the end of the process.

Additional time at end of the process for suitability verification?

The decision not to seek supporting documents or carry out verification at the initial stage of a tender process may save time in the initial stages but is likely to extend time at the latter stage of the process. While this should not impact on the proper conduct of the process, it is often a factor for a contracting authority seeking to award a contract as soon as possible following conclusion of the evaluation. Moreover, contracting authorities are obliged to inform candidates and tenderers as soon as possible of decisions reached concerning the award of the contract and this, coupled with potential expiry of tender validity periods, may lead to some haste in progressing through the verification stage at the end of the procedure.

Greater potential to overlook issues in suitability check of most economically advantageous tenderer?

When verification is delayed until the end of the process, it is conducted in circumstances where the contracting authority has full knowledge of the content of all tenders. Assuming that it is only verifying the supporting documentation of the most economically advantageous tenderer, there may be a greater potential to exercise discretion not to exclude the most economically advantageous tender on tenderer suitability grounds. A contracting authority may be more willing to give the benefit of the doubt to the tenderer in relation to issues concerning selection criteria and comparable reference projects or experience particularly when it knows that that the second ranked tenderer is not as advantageous.

Greater potential for dispute on exclusion if tenderer knows it is the winning tenderer?

If the contracting authority has indicated (or tenderers are aware) that the contracting authority will only verify the suitability of the winning tenderer, there is a greater likelihood for a dispute if the contracting authority decides to exclude the winning tenderer on the basis of its suitability. The tenderer will be aware that but for its exclusion it would have been awarded the contract. This is likely to increase the incentive for a challenge to the contracting authority's decision that the tenderer does not satisfy the exclusionary or selection criteria.

Lack of suitability of the lowest priced tenderer who is not the winning tenderer

Many contracting authorities conduct their price evaluation on the basis of allocation of scores relative to the lowest-priced tenderer. The lowest-priced tenderer may not be the most economically advantageous tender (eg, while it may achieve top marks on price it may lose on the basis of the score obtained under the qualitative criteria).

If the contracting authority's decision is to only verify the suitability of the most economically advantageous tenderer, there is a potential that the lowest-priced tenderer is not a suitable tender and if its suitability had been checked it would have been excluded from the process.

In those circumstances, all of the price scores may have been allocated against a tender that should not have been part of the tender process in the first instance.

It is conceivable in those circumstances that the outcome of the tender process could have changed if the lowest-priced tenderer had been eliminated (particularly if the most economically advantageous tender is not the second-lowest priced tender).

Awarding Lots

The process for awarding lots is often a complex and iterative process, particularly in circumstances where the contracting authority has permitted tenderers to tender for combined lots or has limited the number of lots to be awarded. If the suitability check is delayed until after completion of the evaluation and the identification of the most economically advantageous tender for each lot, a contracting authority may be faced with the difficult task of having to exclude a tenderer for a particular lot (or combination of lots) and then having to redo its entire evaluation and lot allocation again.

Conclusions

For the reasons outlined above, there are conceivably several scenarios where the proper conduct of the process may in fact require the submission of supporting documents and verification of suitability at an early stage of the process. It should be a matter for each contracting authority to decide whether, in relation to a particular tender process, it requires supporting documents at an early stage to avoid these scenarios arising. In particular, it may be prudent to consider verifying the suitability of the lowest priced tenderer at an early stage of the evaluation procedure and to carry out suitability verification of all tenderers in an evaluation which involves a methodology for awarding lots.

PART 4: Irish merger control

Background to Irish Merger Control in 2016

The remit of the Competitions and Consumer Protection Commission (**CCPC**) is to determine whether a transaction notified to it under the Competition Act 2002 (as amended) (**Competition Act**) would “substantially lessen competition” (the SLC test) in any market for goods or services in Ireland.

2016 saw a decrease of over 14% in the number of transactions notified to the CCPC compared to 2015. The fall in merger notifications (from 78 in 2015 to 67 in 2016) may be indicative of a number of factors (including a possible reluctance on the part of certain businesses to engage in M&A activity at this stage following the decision of the UK to leave the EU).

A similar trend is evident in the context of media mergers, which must be notified to both the CCPC and the Minister for Communications, Climate Action and Environment (**Minister**). The number of media mergers which were notified to the CCPC decreased from 7 in 2015 to 5 in 2016.

Consistent with the approach it has taken in the vast majority of all notified transactions to the CCPC since 2003, the CCPC did not prohibit any transaction in 2016. Only two acquisitions (Independent News & Media Holdings Ireland Ltd/CMNL Ltd and Bon Secours Health System/Barringtons Hospital) were the subject of an extended Phase 1 assessment, while only one transaction (PandaGreen/Greenstar) was the subject of a Phase 2 investigation. This compares with five transactions which were the subject of an extended Phase 1 assessment in 2015 and two transactions which were the subject of a Phase 2 investigation in 2015.

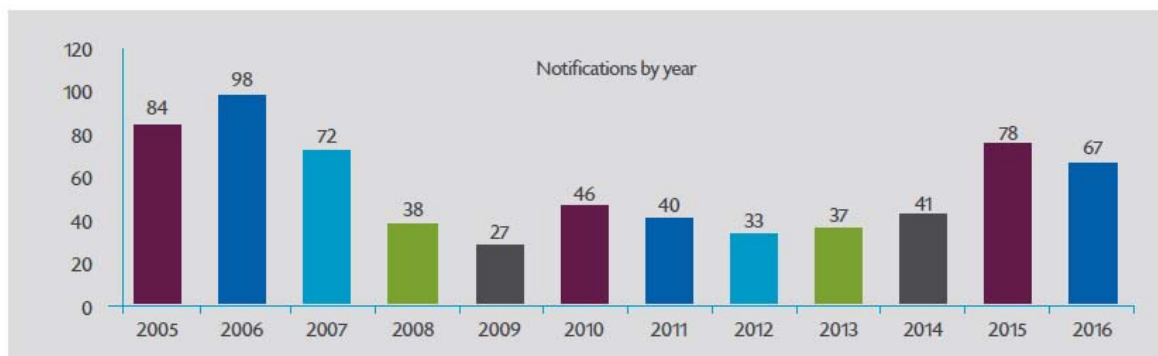
In 2016, the notifications submitted to the CCPC suggest that the most active sectors for M&A deals have been the commercial property, hotel and food and beverage sectors. Conversely, there has been a slight reduction in the number of transactions notified to the CCPC in the financial services, betting, energy/oil/fuel and healthcare/pharma/pharmacy/medical device industries.

Trends in Irish merger control during 2016

Notifications to and Determinations of the CCPC

- There were 67 notifications made to the CCPC in 2016, 11 fewer than were made to the CCPC in 2015 (i.e. 78). This represents a decrease of 14.1% in the number of notifications made to the CCPC in 2016 compared to 2015;
- The CCPC approved 59 of the transactions which were notified to it in 2016, compared with 67 in 2015 (1 notification was withdrawn and the balance of the notifications were carried over into 2017 for on-going assessment). Accordingly, 88% of the transactions which were notified to the CCPC in 2016 were approved compared to 85.9% in 2015;
- The CCPC started into 2017 with 7 notifications awaiting determination. By comparison, the CCPC started 2016 with 11 notifications awaiting determination. This represents a decrease of 36.36% in the number of notifications awaiting determination at the start of 2017 compared to 2016;
- There were fewer Phase 1 (or extended Phase 1) clearances in 2016 (58 compared with 65 in 2015, representing a decrease of 10.77%) and fewer Phase 2 clearances (1 compared with 2 in 2015, representing a decrease of 50%);
- No notification was prohibited in 2016 (the same as in 2015);
- There was a decrease in the number of extended Phase 1 assessments carried out in respect of transactions notified in 2016 (2 compared with 5 in 2015);
- There was one Phase 1 clearance with commitments accepted by the CCPC in 2016 (compared to none in 2015);
- There was one Phase 2 clearance with commitments given by the notifying parties (PandaGreen/Greenstar) (the same as in 2015);
- There were no Phase 2 clearances with conditions imposed by the CCPC in 2016 (the same as in 2015);
- The CCPC made 3 Requests for Further Information in respect of transactions notified in 2016 (PandaGreen/Greenstar, Bon Secours Health System/Barringtons Hospital and Independent News & Media Holdings Ireland Ltd/CMNL Ltd) (compared to 7 in 2015);
- There were no voluntary notifications to the CCPC in 2016 (compared to one in 2015); and
- One notification was made and then withdrawn before determination in 2016 (Joint Venture: Marino Point Port Company, Port of Cork et al) (compared to none in 2015).

Number of Merger Notifications (2005-2016)



Note: The figure for 2014 represents the total number of notifications made in the 2014 calendar year to the Competition Authority (which existed until 31 October 2014) and the 10 notifications made to the CCPC under the new regime (which commenced operation on 31 October 2014).

Key time periods

- The average duration of a no-issues Phase 1 determination in 2016 in calendar days was 37.13, compared with 34.13 calendar days in 2015 (the average length of time in working days was 25.98 in 2016 compared to 23.77 in 2015);
- The average duration of an extended Phase 1 determination in calendar days in 2016 was 93.5 compared to 93.33 in 2015 (the average length of time in working days was 66.5 in 2016 compared to 64.67 in 2015);
- The average duration of a Phase 2 determination in calendar days was 190 compared to 160 in 2015 (the average length of time in working days was 131 (compared to 113 in 2015));
- The quickest Phase 1 approval in 2016 was given in 17 calendar days (12 working days) compared to 11 calendar days (7 working days) in 2015; and
- The slowest no-issues Phase 1 approval in 2016 took 30 working days (i.e. the statutory time limit), as was also the case in 2015.

Average time-periods for decision-making by the CCPC (2006 – 2016):



Notifications by sector

- Commercial property – 8 notifications in 2016 (the same as in 2015);
- Hotels – 7 notifications in 2016 compared to 8 in 2015;
- Sport/betting – 1 notification in 2016 compared to 4 in 2015;
- Food/Drink – 9 notifications in 2016 (the same as in 2015);
- Energy/Oil/Fuel – 4 notifications compared to 6 in 2015;
- Healthcare/Pharmacy/Pharma/Medical Devices – 7 notifications compared to 9 in 2015;
- Financial services (including insurance, accountancy and funds) – 2 in 2016 compared to 4 in 2015;
- Media/telecoms/broadcasting – 6 in 2016 compared to 8 in 2015; and
- Others in 2016 (including asset management, education, aircraft leasing, agri-business, distribution and re-selling of IT products, paper and packaging, advertising, taxi services, outsourcing, waste management, water and waste water treatment, motor sales and service, furniture, building materials and equipment manufacturing) – 23 notifications in 2016 compared to 18 in 2015.

Transactions Notified to the European Commission relating to Ireland

- A number of transactions involving Ireland as an important jurisdiction for analysis were notified to the European Commission in 2016 including: M.7930 ABP Group / Fane Valley Group / Slaney Foods; M.8010 Irish Life / Aviva Health / GloHealth; M.7905 Hammerson / Allianz Group / Dundrum Town Centre; M.8229 Hammerson / Irish Life / ILAC Shopping Centre; M.7986 Sysco / Brakes; M.7746 Teva / Allergan Generics; M.7818;
- McKesson / UDG Healthcare (Pharmaceutical Wholesale and Associated Businesses); M.7919 Sanofi / Boehringer Ingelheim Consumer Healthcare Business; and M.7975 Mylan / Meda. All of the above transactions were cleared, either conditionally or unconditionally; and
- No transactions falling within the jurisdiction of the European Commission were referred back to the CCPC for assessment in 2016. Nor were any cases referred by the CCPC to the European Commission for review in 2016.

Media mergers

A look at the CCPC determinations in 2016 for media mergers compared to the determinations by the CCPC in the 12 months to 31 December 2015 shows the following trends:

- There was a decrease in the number of media mergers notified in 2016 with 5 media mergers notified to the CCPC in 2016 (compared to 7 in 2015);
- There were 4 Phase 1 approval determinations by the CCPC in respect of media mergers notified in 2016 (compared to 5 in 2015);
- There was the same number of extended Phase 1 assessments (1 in 2016 – Independent News & Media Holdings Ireland Ltd/CMNL Ltd) as in 2015;
- There were no Phase 1 clearances with commitments given by the notifying parties in media mergers (the same as in 2015);
- There were no Phase 2 determinations in respect of media mergers in 2016 (the same as in 2015);
- There was 1 Request for Further Information in a media merger (Independent News & Media Holdings Ireland Ltd/CMNL Ltd) (the same as in 2015);
- The average duration of a Phase 1 no-issues media merger determination by the CCPC in calendar days was 35.67 (up from 29.7 in 2015) (in working days 24.33 compared to 21.5 in 2015);
- The average duration of an extended Phase 1 media merger determination by the CCPC in calendar days was 67 compared to 74 in 2015 (in working days 48 compared to 53 in 2015);
- The quickest Phase 1 approval by the CCPC for a media merger was 32 calendar days (22 working days) compared to 15 calendar days (11 working days) in 2015; and
- The slowest no-issues Phase 1 approval by the CCPC for a media merger was 41 calendar days (28 working days) compared to 39 calendar days (28 working days) in 2015.

The Minister and media mergers in 2016 - list of notifications determined by the Minister in 2016

There have been 6 media merger determinations by the Minister in 2016 (including Trinity Mirror/Local World Holdings, which was notified to the Minister in 2015); and

The Minister took on average 39.4 calendar days (28 working days) in 2016 to issue an approval determination compared to 38.75 calendar days (26.5 working days) in 2015.

- **M/16/001** LAM / KLA
- **M/16/002** Dunnes / Whelan / Tipperary
- **M/16/003** Musgrave / C.J. O'Loughlin & Sons
- **M/16/004** Deka Immobilien (DekaBank) / The Whitewater Development
- **M/16/005** Dalata / Clarion Sligo
- **M/16/006** Dalata / Cavernford / Vizmol
- **M/16/007** Ladbrokes / Gala Coral
- **M/16/008** PandaGreen / Greenstar
- **M/16/009** Tedcastles Oil Products (TOP) / Sirio Retail & Property
- **M/16/010** Halstonville / Diminuto
- **M/16/011** Heineken / Comans
- **M/16/012** HPC Management / Saint Gobain
- **M/16/013** INM / Greer Publications
- **M/16/014** Frank Keane Group / MSL Grange Motors & Ballsbridge Volkswagen and MSL Service Centre (South Dublin)
- **M/16/015** Uniphar / Riverchem
- **M/16/016** Allianz Global / Rogge Global
- **M/16/017** Molson Coors / Miller
- **M/16/018** Amber Real Estate / Grove Turkeys t/a Grove Farm
- **M/16/019** NAC Turbo Ltd / Aldus Aviation Ltd
- **M/16/020** Jaguar / Synexus
- **M/16/021** Maxol Ltd / certain assets of Topaz Bull Fuels & Retail
- **M/16/022** HNA / Lenlyn Holdings
- **M/16/023** Murphy / AECOM Design Build Ireland Ltd
- **M/16/024** Sedgwick (KKR) / OSG Outsource Services Group
- **M/16/025** NAUS S.p.A. / Registro Italiano Navale - RINA S.p.A.
- **M/16/026** Amundi Asset Management / Kleinwort Benson Investors Dublin
- **M/16/027** Maxol / Topaz Ballindine
- **M/16/028** Standard Life / Block B Elm Park
- **M/16/029** ELQ Investors II (Goldman Sachs) / Bridgewater Shopping Centre and Brunel House

- **M/16/030** Blackstone Group / Blanchardstown Shopping Centre
- **M/16/031** Thermo Fisher / FEI
- **M/16/032** DCU / SPD, MDI, CICE
- **M/16/033** News Corp / Wireless
- **M/16/034** Carlyle / AA Ireland
- **M/16/035** Fence / Stradbrook
- **M/16/036** Sun Capital / O&S Doors
- **M/16/037** mytaxi / Hailo
- **M/16/038** Liberty Global / UTV Ireland
- **M/16/039** Goldcrop / Croplink
- **M/16/040** Bon Secours Health System / Barringtons Hospital
- **M/16/042** Molex (Koch Industries) / Phillips-Medisize Corporation
- **M/16/043** Petrogas (Applegreen) / certain assets of M.K.M.H. Ltd
- **M/16/044** Independent News & Media Holdings Ireland Ltd / CMNL Ltd
- **M/16/045** Mondelez International, Inc. / Speedy Assetco Ltd
- **M/16/046** Deka Immobilien (DekaBank) / Assets: DoubleTree by Hilton Hotel Dublin-Burlington Road
- **M/16/047** Dalata Hotel Group / Double Tree by Hilton Hotel Dublin Business
- **M/16/048** Irish Property QIAIF / Three Hotels
- **M/16/049** University College Cork / Irish Management Institute
- **M/16/050** Freshgrass / Freshmills
- **M/16/051** SAICA / Ridgmont / Americk
- **M/16/052** Mollydale (Halstonville) / Smorgs (Travelodge)
- **M/16/053** Anchorage Capital / Eircom
- **M/16/054** Exertis (DCC) / T.O.S.
- **M/16/055** Joint venture UPMC (Ireland) & Bon Secours Health System
- **M/16/056** ESB Pension Fund / Ulysses Properties
- **M/16/057** Universal Investment / Liffey Valley Shopping Centre
- **M/16/058** OTPP & USS / Westerleigh Group
- **M/16/059** Madison / Mubadala/Christie
- **M/16/060** Kepak / John Kelly Meats

Notifications withdrawn before determination by the CCPC in 2016:

- **M/16/041** Joint Venture: Marino Point Port Company, Port of Cork et al

Notifications yet to be determined by the CCPC (at 31 December 2016):

- **M/16/061** IPUT plc / Wilton Park House
- **M/16/062** Counterpoint / East Coast / Knockton
- **M/16/063** Fannin Ltd (DCC plc) / Medisource Ireland Ltd
- **M/16/064** BritBox Joint Venture BBC & ITV
- **M/16/065** Ward & Burke / Response
- **M/16/066** Kepcar (JV Kepak & Oliver Carty) / Green Farm Foods
- **M/16/067** Fujifilm Corporation / Wako Pure Chemical Industries Ltd

The Kerry Group/Breeo Merger Case is settled

On 21 April 2016, the CCPC announced that it was settling, and therefore not proceeding with, its appeal to the Irish Supreme Court of the CCPC's appeal against the High Court's annulment of the CCPC's prohibition decision regarding the purchase by Kerry Group of Breeo Foods Limited and Breeo Brands Limited.

The CCPC (and previously, the Competition Authority) has always had the power to review and approve (absolutely or conditionally) or prohibit certain mergers, acquisitions and related transactions which fall within the scope of Part 3 of the Competition Act.

On 28 August 2008, the then-Competition Authority prohibited the proposed acquisition of Breeo Foods Limited and Breeo Brands Limited (suppliers of certain foodstuffs) by Rye Investments Limited (an indirect, wholly-owned subsidiary of Kerry Group plc). The Competition Authority's 148 page decision (**Prohibition Determination**) found that if the transaction proceeded then it would "substantially lessen competition in the markets for rashers, non-poultry cooked meats and processed cheese in the State". The Prohibition Determination is a very interesting and useful read because it is a very detailed account of how to conduct market definition and how to assess competition in different markets – the case considered potential markets such as sausages, rashers, puddings, spreads and cheeses. The Prohibition Determination is a case study in market definition and analysis.

On 26 September 2008, Rye Investments Limited appealed the Prohibition Determination to the High Court under Section 24 of the Competition Act.

On 19 March 2009, in a very detailed judgment by Cooke J, the High Court quashed the Prohibition Determination. It is the only judgment to date on appeals against Competition Authority/CCPC merger prohibition determinations. The learned judge found that the Prohibition Determination was "vitiating by material error in two respects. The Authority has erred in its determination of the product market for cheese...and has erred in finding that there will be substantial lessening of competition resulting from the acquisition in the markets for rashers and for non-poultry cooked meats in that it has failed to assess correctly the post-acquisition existence of sufficient countervailing buyer power on the part of the retailers such as will deter a price increase imposed by the merged entity."

After the High Court gave judgment quashing the Prohibition Determination, the parties completed the transaction and proceeded to integrate the businesses.

Despite the transaction closing, the Competition Authority appealed the High Court judgment to the Supreme Court. The appeal was due to be heard in late April 2016 – seven years after the appeal was lodged.

On 21 April 2016, the CCPC announced that it was not proceeding with the appeal to the Supreme Court of the High Court judgment annulling the Prohibition Determination. In a statement on its website, the CCPC stated that it had "decided not to proceed with its appeal to the Supreme Court and has agreed satisfactory settlement terms with Rye Investments Limited relating to the costs of the High Court and Supreme Court proceedings." The CCPC also stated that following "the latest review of the case, taking all the circumstances of this case into account, particularly the passage of time since the High Court judgment, the CCPC has decided not to proceed with the appeal to the Supreme Court."

The settlement of the case may well have been satisfactory for the parties but it leaves a number of questions unanswered. One can see the merits of settling the appeal from the perspective of the acquirer. It is a reasonable inference from the CCPC's statement that the CCPC "has agreed satisfactory settlement terms with Rye Investments Limited relating to the costs of the High Court and Supreme Court proceedings" that the acquirer has, by settling, avoided the risk of having to potentially unwind the transaction seven years on were it to transpire that the Supreme Court upheld the Competition Authority Prohibition Determination but had to pay something towards the CCPC's costs. One can also see the merits from the CCPC's perspective that it did not risk losing a court case (it has not had a very lucky run of cases in the courts – typically settling or losing) and

avoiding costs were it to lose the appeal. However, the law is now no clearer. There have been around 700 merger determinations decided by the Competition Authority and the CCPC since 1 January 2003 (when the old Mergers Acts regime was replaced) with only three prohibitions and only one of those was appealed (in this case) and, ironically, the prohibition was annulled, the High Court judgment remains in place but there has been no appeal so the law is still unclear to some extent.

PandaGreen / Greenstar – the CCPC's two-phase investigation in 2016

Introduction

- The PandaGreen and Greenstar merger involved the only two-phase "full investigation" carried out by the CCPC in 2016.
- The CCPC's investigation took 190 calendar days (131 working days) from the date of notification (9 February 2016), to the date of the CCPC's clearance decision (16 August 2016).
- The CCPC cleared the merger subject to legally binding commitments requiring PandaGreen to sell Greenstar's domestic waste collection business in the local authority areas of Fingal and Dun Laoghaire-Rathdown.
- The sector involved in the merger was the waste management sector.

The Merger

On 16 August 2016, the CCPC cleared, subject to legally binding commitments, the acquisition by PandaGreen Limited (**PandaGreen**) of Starrus Eco Holdings Limited, trading as Greenstar (**Greenstar**) (collectively **the Parties**).

The Parties

At the time of the investigation, Sretaw Unlimited Company was the ultimate owner of both PandaGreen and Nurendale Unlimited Company, trading as Panda Waste. Panda Waste was involved in waste management activities in the Greater Dublin Area and the counties of Dublin, Kildare, Meath and Wicklow. These included: i) domestic household waste collection; ii) commercial and industrial waste collection; and iii) waste recycling.

Greenstar was also involved in waste management activities in the Greater Dublin Area and in the counties of Carlow, Cork, Kilkenny, Limerick, Sligo, Waterford and Wexford. Like Panda Waste, Greenstar's waste management activities included: i) domestic household waste collection; ii) commercial and industrial waste collection; and iii) waste recycling.

The CCPC's Investigation Process

On 9 February 2016, the Parties notified the CCPC of the proposed merger pursuant to section 18(1) of the Competition Act. Under the Competition Act, the CCPC is generally allowed 30 working days (but this is extendable) after the date of notification within which to decide how to proceed (e.g. clear the merger, proceed to a two-phase "full investigation" etc.).

On 21 March 2016, the CCPC requested that the Parties provide them with further information (pursuant to section 20(2) of the Competition Act) to assist them in making their determination. The effect of this section, in conjunction with other sections of the Act, is to allow the CCPC an extra 30 working days to make their determination *from the date of receipt of the further information requested* from relevant parties. The CCPC received the further information requested from the Parties on 8 April 2016.

On 16 May 2016, the Parties submitted proposals to the CCPC, which they are permitted to do under section 20(3) of the Competition Act. The aim of submitting proposals under this section is to attempt to satisfy the CCPC as to the manner in which the merger may be put into effect, or to identify measures that would

ameliorate any concerns the CCPC had as to the effect of the merger. The effect of the submission of proposals **in this case**, in conjunction with other sections of the Competition Act, meant that the CCPC had an extra 15 working days, in addition to the 30 working days it had from the date of receipt of the further information, to decide how to proceed.

On 9 June 2016, following the preliminary investigation (detailed above), the CCPC announced that it had determined to undertake a Phase 2 "full investigation" under section 22 of the Competition Act. In this case, this meant that the CCPC had approximately 120 working days from the date of receipt of the further information (noted above) within which to come to a determination. While it did not occur here, this 120 working days is extendable under the Act.

On 16 August 2016, the CCPC cleared the merger subject to legally binding commitments requiring PandaGreen to sell Greenstar's domestic waste collection business in Fingal and Dun Laoghaire-Rathdown.

The CCPC's Competition Concerns

The CCPC's investigation involved consideration of detailed submissions from the Parties, consultations with competitors and third parties, and in-depth economic analysis of the affected markets.

The competition concerns identified by the CCPC during the course of their investigation were that the merger would result in a substantial lessening of competition in the market for domestic waste collection services in the Fingal and Dun Laoghaire-Rathdown local authority areas.

The Legally Binding Commitments

To address the CCPC's concerns, PandaGreen gave legally binding commitments to the CCPC to sell Greenstar's domestic waste collection services in these two local authority areas to Greyhound Household (with which PandaGreen had already signed a non-binding Heads of Agreement), or, in the event that the sale to Greyhound did not proceed, to an alternative purchaser(s) to be approved by the CCPC. The sale to Greyhound Household would mean that consumers in the affected areas had the same amount of choice as they did prior to the merger.

Comments

For the second year running, a complex merger control transaction was resolved with the merging parties committing to the CCPC to divest businesses so as to secure a Phase 2 approval. Offering divestiture commitments can have a material commercial impact on merging parties but also offers a solution where the CCPC is unable to resolve concerns with a transaction under the Irish merger control rules.

PART 5: EU Merger Control and Irish M&A transactions in 2016

Background to EU merger control

The European Commission (the **Commission**) is tasked with assessing whether a notified concentration would significantly impede effective competition in the common market or in a substantial part of it. A concentration is: (i) a merger; (ii) the acquisition of direct or indirect control of the whole or part of an undertaking; or (iii) a full function joint venture. Turnover thresholds are applied to establish whether a concentration has an EU dimension, and any concentration that has an EU dimension must be notified to the Commission. Generally, if a proposed transaction has an EU dimension, it must be notified to the Commission only and not to Member State competition authorities. There are two alternative tests in which the turnover thresholds for an EU dimension can be reached.

The first test requires:

- a) the merging parties (excluding the seller) to have a combined aggregate worldwide turnover of over €5000m; and
- b) for at least two of the merging parties to have an aggregate EU-wide turnover of over €250m each.

The second test requires:

- a) the merging parties (excluding the seller) to have a combined aggregate worldwide turnover of over €2500m;
- b) for the merging parties to have a combined aggregate turnover of over €100m in each of at least three Member States;
- c) for at least two of the merging parties to have an aggregate turnover of over €25m each in each of those three Member States included in (b); and
- d) for the aggregate EU-wide turnover of each of at least two of the merging parties to be more than €100m.

Finally, in both alternatives, an EU dimension will only exist if each of the merging parties does not achieve more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

EU merger control in 2016

A total of 362 deals were notified to the Commission in 2016 including five Irish mergers-and-acquisitions transactions. This shows an increase of 7.4% from 2015 when 337 deals were notified to the Commission, and an increase of 19.5% from 2014 when 303 deals were notified.

Agri-Food Sector Acquisition- ABP Group/Fane Valley Group / Slaney Foods

The acquisition by ABP Food Group of a 50% controlling interest in Slaney Foods was cleared by the Commission in Phase 1 without conditions.

All three companies (ABP, Fane Valley and the Slaney JV) are active in the purchase and slaughter of live cattle, sheep and lambs and the processing of meat. ABP operates eight meat processing plants on the island of Ireland while the Slaney JV (previously a 50/50 joint venture between Fane Valley and a non-affiliated third party company) operates three. The transaction was notified to the Commission on 2 September 2016 and cleared on 7 October 2016. During its Phase 1 review, the Commission conducted an in-depth market investigation and considered a submission from the Irish Farmers Association.

In conducting its assessment, the Commission looked at the overlap between the parties in the purchase of live cattle for slaughter. The Commission also assessed for the first time an overlap in relation to the purchase of live lambs and sheep for slaughter. In assessing the potential impact on **markets for the purchasing of live animals**, the Commission considered any potential increase of the slaughterhouses' buyer power as a result of the transaction. The Commission found that suppliers of live animals in Ireland tended to sell within a rather broad geographic radius and that there were no significant hurdles to switching between slaughterhouses which happens frequently. The Commission also noted the spare capacity of competing slaughterhouses which applied equally to slaughterhouses located near that of the Slaney JV. The Commission therefore found that suppliers of live animals would continue to have alternative buyers post-transaction. The Commission also assessed the potential impact on competition downstream in relation to the sale of fresh meat. Noting the number of remaining strong competitors, the Commission concluded that the parties would not be in a position to increase prices or impose detrimental conditions on retailers and industrial meat processors and ultimately on consumers.

Finally, the Commission assessed the vertical overlaps between ABP and the Slaney JV in relation to the collection and processing of animal by-products generated by the parties slaughtering activities in Ireland. The Commission found that the transaction was unlikely to have a negative impact on slaughterhouses in relation to their disposal of animal by-products. The investigation also showed that, after the acquisition, rendering plants would continue to have sufficient access to animal by-products.

Property Transactions – Dundrum and ILAC shopping centres

Two significant property transactions were (separately) notified to the European Commission during 2016.

The acquisition of Dundrum Town Centre together with the Dundrum Phase II & Village projects was notified to the Commission using the simplified procedure on 8 January 2016. The assets were acquired by Hammerson (a UK company) and Allianz (Germany) by way of share purchase in a newly created joint venture company.

The acquisition of joint control over the ILAC Shopping Centre by Hammerson (a UK company) and its current owner, Irish Life Assurance plc (Ireland) was notified on 15 November 2016 using the normal review procedure. Hammerson will acquire joint control by purchasing a 50% interest in ILAC. The transaction was cleared in Phase 1 on 14 December 2016 although the full clearance decision has not yet been published. The Commission indicated in its press release that the proposed acquisition would not raise competition concerns because of its limited impact on the market structure.

Acquisitions of numbers 3 and 4 in Irish health insurance market - Irish Life/Aviva/Glo Health

The acquisition by Irish Life Ireland of Aviva and Glo Health, numbers three and four in the Irish health insurance market, was notified to the Commission on 28 April 2016 and cleared on 8 June 2016.

Irish Life is a provider of life insurance, pensions, retirement savings and asset management services in Ireland. The Commission found there was a horizontal overlap between the activities of Aviva Health and GloHealth in relation to the provision of health insurance to consumer and business customers in Ireland. The combined share of the parties following the transaction was between 10% and 20%. The Commission noted that the merged entity would face strong competition from "former monopolist" VHI as well as Laya Healthcare (recently acquired by AIG Insurance).

The parties submitted that the Irish health insurance market presented distinct characteristics due to the specific regulatory framework governed by the Health Insurance Act. The Commission concluded that, taking into account the specificities of the Irish health insurance market as well as the presence of strong players on the market, no competition concerns arose.

CCPC involvement in European Commission's investigations

During 2016, the CCPC was actively involved in several Commission merger investigations.

Merger notifications under the EUMR must be transmitted to the competent authorities of Member States. Article 19 of the EUMR requires the Commission to carry out its review in "close and constant liaison with the competent authorities of the Member States" which must be able to express their views on the Commission's treatment of cases.

During 2016, the CCPC was actively involved in several Commission merger investigations. In addition to *ABP/ Fane Valley / Slaney Foods* and *Irish Life/Aviva/Glo Health* (considered above), the CCPC was also involved in:-

- Orange/Jazztel;
- Staples/Office Depot;
- Hutchison 3 G UK/Telefonica; and
- Sysco/Brakes

European Commission approves acquisition of Topaz, RPIF and Esso Ireland by Alimentation Couche-Tard

On 25 January 2016, the Commission approved the acquisition of Topaz Energy Group Limited, Resource Property Investment Fund Plc (**RPIF**) and Esso Ireland Limited by Alimentation Couche-Tard Inc (**ACT**).

The Commission examined the transaction under the simplified merger review procedure.

ACT is a Canadian company which has a fuel station network in Norway, Sweden, Denmark, Poland, Latvia, Lithuania and Estonia. Topaz supplies motor fuels, lubricants, heating oil and aviation fuel to retail and wholesale clients in Ireland and in Northern Ireland. RPIF holds investments in a number of Topaz's properties including service stations and depots. Esso Ireland Limited is active in the retail and wholesale supply of fuel products in Ireland.

The Commission found that the parties' activities overlapped only in the wholesale supply of lubricants in the EEA. The Commission therefore found that the proposed acquisition would raise no competition concerns given the companies' moderate positions on this market.

PART 6: Other EU law developments

European Commission Imposes Juggernaut Fines of Almost €3 Billion on Truck Companies

On 19 July 2016, the Commission imposed record fines for breaching competition law.

The fines totalled €2.93 billion smashing all previous records.

The Commission found that MAN, Volvo/Renault, Daimler, Iveco, and DAF had colluded for 14 years on pricing of trucks and on passing on the price of compliance with strict emission rules. These companies represent 90% of the medium (6-16 tons) and heavy (16 tons+) trucks produced in Europe. The cartel lasted from 1997 to 2011.

The Commission alleged there were three key practices which breached the rules:

- "coordinating prices at "gross list" level for medium and heavy trucks in the EEA. The "gross list" price level relates to the factory price of trucks, as set by each manufacturer. Generally, these gross list prices are the basis for pricing in the trucks industry. The final price paid by buyers is then based on further adjustments, done at national and local level, to these gross list prices.
- the timing for the introduction of emission technologies for medium and heavy trucks to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI)
- the passing on to customers of the costs for the emissions technologies required to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI)."

Proceedings are still pending against Scania.

Arising out of this case, the key points for business executives are:

1. Companies can be involved in long-running cartels so it is important for executives and directors to be vigilant and verify that their businesses are not involved in cartels.
2. A company which makes the decision to approach the competition agencies and seek leniency/immunity spares itself the fines (it may not spare itself the civil damages actions but the fines are typically not imposed) – in this case, MAN revealed the existence of the cartel to the European Commission so it saved itself a fine of at least hundreds of millions of euro.
3. Fines can be enormous: Daimler has been fined €1,008,766,000.
4. Co-operation by businesses other than the one seeking leniency/immunity with the competition agencies usually does pay off – Volvo/Renault had its fine reduced by 40%, Daimler had its fine reduced by 30% and Iveco was saved 10% by co-operating.
5. Many of the meetings were at the margins of trade fairs and other events so compliance officers should be very cautious about such events.
6. Businesses which suffered losses because of these activities might well sue the truck companies now for the higher prices – including Irish companies.

European Commission published useful Statistics on Competition Cartel Cases

The Commission's Directorate General for Competition has published a very useful document setting out statistics on EU cartel investigations.

The document includes the 2016 *Trucks* case which involved the highest ever individual fines (on Daimler and DAF).

Key highlights include:

- As at 12 December 2016, there had been cartel competition decisions taken against 16 "undertakings" (i.e., economic operators or businesses) in 2016.
- Total fines on cartels imposed between 2012 and 2016 is €9,321,507,000.
- The document sets out the total fines imposed in each year since 2012 (both adjusted and non-adjusted for European Court judgments).
- The document lists the ten highest total and individual cartel fines since 1969 - all of which have been since 2001 which is consistent with the notion that "fine inflation" has increased recently.
- The cases with three of the four highest level of fines have all be in the last four years (see table 1 below).
- The undertakings which had the highest fines are outlined in table 2 below.

1. Cartel Cases with the Highest Fines

Year	Case	Fine (€)
2016	Trucks	2,926,499,000
2012	TV and Computer Monitor Tubes	1,409,588,000
2013/2016	Euro Interest Rate Derivatives (EIRD)	1,310,039,000
2008	Carglass	1,185,500,000
2014	Automotive Bearings	953,306,000
2007	Elevators and Escalators	832,422,250
2001	Vitamins	790,515,000
2013-2015	Yen Interest Rate Derivatives (YIRD)	684,679,000
2007-2012	Gas Insulated Switchgear (Including RE-adoption)	675,445,000
2009	E.On/GDF Collusion	640,000,000

2. Fines on individuals undertakings

Year	Case	Fine (€)
2016	Daimler	1,008,766,000
2016	DAF	752,679,000
2008	Saint Gobain Car Glass	715,000,000
2012	Phillips TV and Computer Monitor Tubes (of this fine, €391,940,000 jointly and severally with LG Electronics)	705,296,000
2012	LG Electronics TV and Computer Monitor Tubes (of this fine, €391,940,000 jointly and severally with Phillips)	687,537,000
2016	Volvo/Renault Trucks	670,448,000
2016	Iveco Trucks	496,606,000
2013	Deutsche Bank Euro Interest Rate Derivatives (EIRD)	465,861,000
2001	F, Hoffmann-La Roche Vitamins	462,000,000
2007	Siemens Gas Insulated Switchgear	396,562,000

Some of the more recent fines may be adjusted in due course on appeal to the General Court/EU Court of Justice but it is clear that more recent fines are clearly much higher than earlier fines.

DUBLIN

IFSC,
North Wall Quay,
Dublin 1
E: dublin@algoodbody.com
T: +353 1 649 2000
F: +353 1 649 2649

BELFAST

42/46 Fountain Street,
Belfast BT1 5EF
E: belfast@algoodbody.com
T: +44 28 9031 4466
F: +44 28 9031 4477

LONDON

Augustine House,
Austin Friars,
London EC2N 2HA
E: london@algoodbody.com
T: +44 20 7382 0800
F: +44 20 7382 0810

NEW YORK

The Chrysler Building,
405 Lexington Avenue,
New York, NY 10174
E: newyork@algoodbody.com
T: +1 212 582 4499
F: +1 212 333 5126

SAN FRANCISCO

The Shell Building,
100 Bush Street,
San Francisco, CA 94104
E: sanfrancisco@algoodbody.com
T: +1 650 922 2074
F: +1 415 830 5925

PALO ALTO

228 Hamilton Avenue
Palo Alto, CA 94301
E: paloalto@algoodbody.com
T: +1 650 798-5183
F: +1 650 798-5001

www.algoodbody.com

A&L Goodbody

