Competition and Regulation Update

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Ticketmaster Investigation

The Competition Authority has completed an investigation into alleged abuses of dominance by the Ticketshop Limited t/a Ticketmaster Ireland in the marketplace for ticketing services for events of national or international appeal in the island of Ireland. The decision was given on September 2005 and followed complaints by thousands of consumers in relation to the behaviour of Ticketmaster. This included a complaint and petition signed by in excess of 8,000 individuals, concerning the price or value of tickets sold by Ticketmaster Ireland, the level of Ticketmaster Ireland's booking fees and exclusive agreements between Ticketmaster Ireland Limited and the largest event promoters currently operating in Ireland (MCD Productions Limited and Aiken Promotions). The Authority concluded that Ticketmaster Ireland Limited's conduct did not constitute an abuse contrary to s 5 of the Competition Act 2002 and that the agreements between Ticketmaster Ireland and the two largest promoters do not prevent restrict or distort competition contrary to s 4 of the 2002 Act.

The Authority found that Ticketmaster Ireland currently accounted for 100% of the market for the outsourcing of ticketing services for events of national or international appeal, but that Ticketmaster were sufficiently restrained from exploiting this position. The constraints arose due to the market power of its customers MCD Promotions and Aiken Promotions. The Authority was of the view that MCD Promotions and Aiken Promotions had the incentive to minimise the booking fee charged by Ticketmaster Ireland to the end consumer. They also found that the two promoters had strong countervailing buying power vis-à-vis Ticketmaster Ireland. It was of the opinion that if Ticketmaster Ireland would not agree to booking fees demanded by the two major promoters, the two promoters could credibly threaten to either switch to another ticket service provider or set up their own ticketing facilities. Thus the Authority concluded that Ticketmaster was not able to exercise market power by behaving independently of its customers, an essential element of the test of dominance.[1]

The Authority was satisfied that there were credible firms which could enter the outsourced ticketing market if MCD Promotions and Aiken Promotions were to award them a multiyear contract on similar terms currently enjoyed by Ticketmaster Ireland. In regard to market entrants and potential competitors, the Authority referred to a recent example of a competitive tender process for outsource ticketing services held by the GAA. In that competitive tender, 11 companies tendered for the contract, and Ticketmaster Ireland was eventually awarded the contract. This in the view of the Authority demonstrated that there was potential for competition for individual ticketing contracts, which acted as a constraint on Ticketmaster.

The Competition Authority did highlight issues in relation to transparency of price. It found that there was an absence of transparency, however this did not constitute a breach of s 4 or s 5 of the 2002 Act. The Authority did bring the matter to the attention of the Office of the Director of Consumer Affairs and the National Consumer Agency, which in the view of the Authority were the appropriate offices to deal with transparency in respect of pricing, or the lack thereof.

Household Waste Collection Investigation

On the 30 August 2005 the Competition Authority issued a decision in respect of Green Star Recycling Holdings Limited a provider of household waste collection services in North East Wicklow. The decision emerged from an investigation into consumer allegations that Green Star had abused its dominant position by charging high or excessive prices for household waste collection. The Authority concluded that the conduct of Green Star, while possessing a dominant position in the relevant product market, did not constitute an abuse contrary to s 5 of the Competition Act 2002.

The relevant product market was found to be the market for the provision of household waste collection services. The geographic scope of the relevant market was North East Wicklow. Green Star were the only operator active in the market concerned, there were no new entries into the market since 2000 and there appeared to the Authority to be a lack of competition operating in adjacent areas. The lack of

[1] It would appear, that the Authority did find that Ticketmaster was dominant in the relevant market, (with a 100% market share).

competition resulted from a combination of economies of scale and density as well as regulatory delays in establishing sorting/recycling facilities that constituted a significant barrier to new entry and expansion in the market.

It is of interest that the Authority found that an area one quarter the size of a county, namely North East Wicklow, was the relevant geographic market. In respect of demand side substitution, the Competition Authority concluded that customers would switch to the service collection of nearby operational areas (e.g. South Wicklow, West Wicklow, Dublin, Wexford UDC) in response to a small but permanent price increase in a focal area, if conditions of supply permitted. However, in respect of supply, the Authority was satisfied that there were significant barriers to the entry and supply of services in the relevant product market area by providers in adjacent areas. There were no regulatory restrictions on operators already active in South East Wicklow from also servicing North East Wicklow at relatively short notice.[2] Notwithstanding the regulatory freedoms, the Authority was satisfied for a number of reasons that there were significant barriers to adjacent providers providing services in North East Wicklow. These included the fact that collection firms tend to operate within a specific radius of their base, typically a local landfill or sorting/recycling facilities. This enables the firm to get as many lifts as possible in one truck in any one day. The Authority was of the view that an operator active in South East Wicklow was unlikely to be able to service the North East Wicklow area from its existing base and that an operator active in South East Wicklow would likely incur some time delays in building customer density sufficient to compete with the hypothetical monopolist in that area and would likely face costs of integrating the necessary billing and other administrative matters. The Authority was also of the view that an operator would be likely to be reluctant to stop supplying one area in favour of North East Wicklow as presumably this would damage the company's commercial reputation. Similar barriers arose in respect of providers in Dublin or Wexford entering the market, in addition these providers would require a license for a separate collection permit for County Wicklow.[3] In relation to service providers from West Wicklow, the Competition Authority also noted that the Wicklow Mountains acted as a natural barrier between the east and west of the county.

In relation to abuse of dominance, the Authority was satisfied that there was no evidence of abuse by Green Star. It found no evidence of the charging of excessive prices, the Authority found that the prices were related to the social value of, and the cost involved in providing, the service in question. It found that in comparison to other private operators operating within the State the prices were not significantly higher and in some cases were cheaper than those charged by other operators.

The Authority also made comments in relation to the relevant market in general. It appeared to the Authority that the market for household waste collection was not working well for consumers. It discussed the possibility of a waste regulator, which would amongst other things examine the possibility of price regulation in the market. The Authority noted the difficulties with this solution. It was of the view that there were better alternatives than a regulator to set prices for household waste collections. It reviewed other countries were household waste collection markets were considered more competitive. In the countries reviewed, the predominant competitive factor in the provision of household waste collection was the awarding of contracts via competitive tendering. The Competition Authority was of the view that competitive tendering was the best method of ensuring that household waste collection providers delivered consumers quality services at competitive prices.

Law Society v Competition Authority

On 28 July 2004 the Competition Authority adopted a "Notice in respect of legal representation of persons attending before the Competition Authority". The Authority in the Notice expressed the view that in general, the integrity of its investigative processes would be, or was likely to be, compromised if the same lawyer represented more than one person in any particular matter, be the parties the subject of an investigation or a party to an investigation and a witness relevant to the investigation.[4] The Notice purported to regulate how and who could represent which persons and bodies summoned to appear before it. The Notice at its most controversial stated that the Authority would in general refuse to deal with lawyers representing more than one person in the same matter before it, though the Notice allowed for exception to be made on application to the Authority and were it was satisfied that that the integrity of its process would not be compromised. It would appear that the purpose behind this rule was to preserve the integrity of the process and ensure that it was not compromised, and to ensure that conflicts of interest did not arise where different parties, for example to agreements that may have fallen foul of s 4, would be in a position to have an advisory/information link between them.

The Law Society submitted that the Notice in effect sought to regulate and limit a person's constitutional right to select their own legal representation and to choose which lawyer, or firm of lawyers, would represent them. It further submitted that the Competition Authority had no statutory basis for the issuing of such a notice.

The High Court upheld the Law Society's challenge to the notice. While it was satisfied that the authority had the statutory power to issue such a notice as part of its administrative functions, the conditions of the Notice in respect of legal representation had been too broadly drafted. The High Court expressed the view that the Notice was a disproportionate infringement of a party's Constitutional right to freely select its legal representation. On this basis, it was

[2] The licenses provided by Wicklow County Council operate on a countywide basis. Any firm licensed to provide such services in Wicklow were also licensed to provide them in North East Wicklow.
[3] Wicklow County Council reported that such permits could be obtained within a six to seven week timeframe.
[4] In respect of merger and acquisition procedures, the same lawyer was permitted to act for more than one person in the course of the review of a merger or acquisition, unless the Authority was of the opinion in any particular case such representation had the potential to compromise the integrity of the procedure.

unlawful for the Authority to issue a general refusal to deal with lawyers representing multiple clients.

However, the High Court in some ways left the matter open in that it was of the view that the Authority could in certain circumstances deny free choice of legal representation in specific cases where such a choice would frustrate or impede it in discharging its lawful functions. The Law Society, being the statutory body for the regulation and discipline of solicitors, submitted that its own disciplinary scheme could be used, and was the appropriate method, to control conflicts of interest. The High Court was not satisfied that this precluded the Authority from also taking steps to ensure the effectiveness of its own procedures and the effectiveness of its ability to carry out and achieve its own statutory objectives. The High Court was of the view that the Law Society's disciplinary procedures could result in lengthy delays and thus would not adequately preserve the effectiveness of the Authority's investigative process.

Meteor Acquisition

On 18 November 2005 in accordance with s 18(1)(b) of the Competition Act 2002 (hereinafter "the 2002 Act") the competition Authority approved the proposed acquisition by Eircom Group PLC of Meteor Mobile Communications Limited pursuant to its statutory obligations under s 21 of the 2002 Act the Authority examined the proposed acquisition from a competition perspective. The 2002 Act mergers and acquisition procedure potentially contains two phases. In the first phase the Competition Authority may form the opinion that the result of the proposed merger or acquisition will not be to substantially lessen competition in markets for goods or services in the State and accordingly the merger or acquisition may be put into effect. The alternative finding in phase one is that the Competition Authority has concerns and intends to carry out a full investigation under s 22 in relation to the proposed merger or acquisition. In the Meteor acquisition, the Authority determined that, in its opinion, the proposed transaction would not substantially lessen competition in the relevant product markets in the State, which it had previously identified in the determinations, and accordingly the proposed transaction was permitted, subject to certain "commitments" specified in its determination. Thus the proposed acquisition was dealt with, without the need for a full (or further) investigation into the competition issues raised by the proposed acquisition.

A number of third parties made submissions in relation to the proposed acquisition and a number of concerns were raised by a number of these third parties. The concerns included pricing concerns, the potential for cross subsidisation through cost allocation, the potential for discriminatory treatment in interconnection charges, the potential for cross-subsidisation of other services from fixed line profits, bundling, the potential for foreclosing the emerging market for fixed mobile conversion products. Notwithstanding these concerns and having examined each of them, the Authority concluded that the proposed acquisition would have largely pro-competitive effects on the relevant telecommunications markets. The Authority was of the view that Eircom Group would bring many assets to the transaction that would help it increase Meteor's market share and increase competition in the mobile markets, particularly in the pre-paid market segment, where Vodafone and O2 have significant market power.[5] The Authority also expressed the view that there would be a benefit to consumers by the increased and speedy introduction of bundled of fixed line and mobile products. The Authority was of the view that Eircom's ability to bundle mobile and fixed line telecommunications services would not substantially lessen competition in mobile and fixed line markets as other operators would be able to offer competing bundles. It was also of the view that Eircom was unlikely to be able to foreclose the emerging market for fixed mobile conversion services because other operators would be able to offer similar products.

As part of its determination and determination process Eircom and Meteor agreed to eight commitments. These commitments are enforced pursuant to s 26 of 2002 Act. Pursuant to s 26(2) a Court may grant an injunction on motion of the Authority or of any other person to ensure compliance with the terms of the commitments given in the Determination. Section 26(4) of the 2002 Act also makes a breach of a commitment of the type given in the Determination, to be offences which on summary conviction are subject to a fine not exceeding Ä3,000 and/or imprisonment for a period of 6 months or on indictment to a fine not exceeding Ä10,000 and/or a term not exceeding 2 years. The Authority took into account proposals and commitments made by Eircom PLC in accordance with s 20(3) of the 2002 Act, including commitments in respect of creating and maintaining separated accounts. The Authority expressed the view that the proposed separated accounts by Eircom in respect of Meteor would allow the Commission for Communications Regulation to monitor for any misallocation, cost or discriminatory practices and would resolve any concerns regarding Eircom's ability to cross-subsidise successfully fixed and mobile lines or to apply discriminatory treatment to operators other than Eircom.

Cityjet v Irish Aviation Authority

Judgement was handed down by Mr Justice Kelly on the 30 June 2005 in the above named case. Cityjet, by way of judicial review proceedings, complained that the respondent had wrongly failed to issue to it a certificate of airworthiness in respect of an aircraft leased and operated by it. The respondent authority is the entity responsible for safety regulation of civil aviation. Its functions include the registration of aircraft and the issue of certificates of airworthiness for individual aircraft. Registration of an aircraft determines its nationality, and the law of the State of registration is the law that applies on board the aircraft.

[5] The view that O2 and Vodafone have SMP would appear to be predicated on a decision by Comreg that Vodafone and O2, which designated the operators as having SMP and being jointly dominant in the relevant market, there being no independent analysis of the O2 and Vodafone in the Authority decision. A determination which was in place at the time but which was subsequently appealed and quashed on appeal. See Dodd, Competition and Regualation update, IBLQ, Vol 1, (2), 25.

The particular circumstances of the case, where that the aircraft in question possessed a certificate of airworthiness issued by the UK Civil Aviation Authority. Cityjet argued, with reference to a number of European Regulations that the respondent authority had no entitlement to rely upon national legislation as a basis for refusing the Certificate of airworthiness granted by another Member State. By failing to do so, it argued that the respondent authority had failed to recognise the supremacy of EU Law. Mr Justice Kelly rejected the applicant's submissions.

In respect of Council Regulation 1592/2002[6] the first ground of review, Mr Justice Kelly was satisfied that this regulation dealt solely with type certification. Type certification deals with the designation of particular types of aircraft that should be recognisable as suitable for the issue of an airworthiness certificate, but that this regulation did not deal with the necessity for an individual certificate of airworthiness for a particular plane.

Secondly the applicant relied on Commission Regulation 1702/2003.[7] Mr Justice Kelly was satisfied that this regulation did not apply on the basis that the impugned decision had been made in March 2004, whereas the regulation in question did not come into force until the 28th of September of that year. Mr Justice Kelly was also not satisfied that the certificate in question had in fact been issued pursuant to Regulation 1592/2002, but found that it had been issued pursuant to the Chicago Convention and UK domestic Legislation. Thus he held that no legitimate complaint could be made. Mr Justice Kelly acknowledged that if the case concerned a UK certificate of airworthiness issued pursuant to Regulation 1592/2002 subsequent to the 28th of September 2004, the submissions and authorities might well hold true.

Mr Justice Kelly also held that the fact that the Civil Aviation Authority in the UK appeared to have given effect to Regulation 1592/2002 in advance of the date on which that Regulation was to be implemented, could not create a corresponding obligation on the part of other Member States to recognise that certificate in advance of the date upon which the regulation was due to come into force. He held that it could not be possible that the applicability of the Regulation could be determined by one Member State's advanced effecting of the regulation. Rather for the preservation of consistency and harmonisation it was important that the application of the Regulation be determined by the express date contained within it.

UK Decision: Abuse of Dominance by British Horseracing Board

On 21 December 2005 the High Court of Justice of England and Wales (Chancery Division), gave an important judgment in *At the Races Limited v the British Horseracing Board* that will have an impact on similar types of businesses in Ireland.

The Plaintiff was in the business of running websites, television channels and other audiovisual media in relation to British horseracing. The Plaintiff had obtained rights in respect of certain British racecourses which entitled it to produce audio and visual coverage of horse races at those courses, which it then used on its website, its branded television channel and other audiovisual services and broadcasting services. The website and the channel allowed viewers to place bets on those races through the internet or interactive services offered on satellite television.

The defendant[8] maintained and operated a computerised database of information that contained a large quantity of data relating to British racing. This included pre-race data, such as the place and date in which the race meeting was to be held; the distance over which it was to be run; the criteria for eligibility to enter the race; the date by which entries for the race were to be received; the entry fee payable; the name of the race; a list of horses entered; the owners and trainers; the weight each horse was allotted to carry; the list of runners and their jockeys; and each horse's number and the stall from which each horse would start. The plaintiff provided pre-race data to customers that it obtained from the defendant's database.

The plaintiff claimed that the defendant had effectively a monopoly in respect of the supply of pre-race data to those in British racing that required such data. The plaintiff claimed that the defendant's behaviour, including threats to terminate the supply of such data amounted to an abuse by the defendant of its dominant position contrary to Art 82 of the treaty and s 18 of the Competition Act 1998, (the equivalent of Ireland's s 5 of the 2002 Act). The plaintiff alleged excessive unfair and discriminatory pricing by the defendant. The defendant lodged a counterclaim in respect of breaches of copyright material in the database and it sought an injunction and an enquiry into damages in relation to an alleged infringement by the plaintiff of those rights.

The Court heard that the relevant product/service market was in the market of the supply of UK pre-race data to those in the horseracing industry that require such information for the services they provide to their customers. The geographic scope of the market was, for the purpose of the proceedings was the world. The defendant was said to be dominant in that market. The defendant was held to abuse its market dominance in a number of ways: -

1. By threatening to terminate the supply of pre-race data to the Plaintiff in circumstances where the Plaintiff was an existing customer and the pre-race data was an essential facility controlled by the Defendant without which the Plaintiff would be eliminated from the market, there being no objective explanation for such conduct. It was held to be irrelevant that the plaintiff and the defendant were not competing on any market

[6] Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of cilvil aviation and establishing a European Aviation Safety Agency.
[7] Commission Regulation (EC) No 1702/2003 of 24 September 2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations.
[8] There were in fact two defendants, but these for all intents and purposes were treated as one. The First Defendant, The British Horse Racing Board Limited, which was a company limited by guarantee, played a central policy, promotional and administrative role in British racing. The Second Defendant was its wholly owned subsidiary that was established to be its commercial arm.

2. The prices specified from time to time by the defendant to the plaintiff prior to the commencement of the proceedings were excessive and unfair. They were significantly in excess of the economic value of the pre-race data and not otherwise justified. The economic value of the data was measured, in this case, by the cost to defendant of producing its database (about £5m) together with a reasonable return on that cost. The court held that the defendant's proposed charges to the plaintiff were so far in excess of any justifiable allocation to the Plaintiff of that amount as to be plainly excessive.
3. The court held that the prices specified from time to time prior to the commencement of the proceedings were an abuse of market dominance because they were substantially in excess of normal charge for broadcasters, and also because they differed from, and would have had more onerous consequences than, the pricing mechanism for the Defendant's direct competitor, without any justifiable reason and so unfairly discriminating against the Plaintiff.

The court rejected the submission that a decision against the defendant in the present case would have serious consequences for the proposals and plans of the Government and the defendant to modernise, as having any bearing on the decision, in the absence of a public interests defence under Art 86. It was held that such factors could not make any difference to the proper application of Art 82 and s 18 of the 1998 Act, nor was it relevant that defendant was motivated, in its proposals to the plaintiff, by the wider interests of British racing as opposed to private profit.

Mergers and Acquisition Procedures

The Competition Authority, in February 2006, published revised procedures for the review of mergers and acquisitions. The exercise of the Authority of its statutory powers in relation to mergers and acquisitions, is potentially a two-phase process. In the first phase the Authority may form the opinion that the result of a proposed merger or acquisition will not be to substantially lessen competition in markets for goods or services in the State and accordingly the merger or acquisition may be put into effect. The alternative finding in phase one is that the Authority has concerns and that it intends to carry out a full investigation under s 22 of the 2002 Act in relation to the proposed merger or acquisition. The new procedures regulate both phase one and phase two. The new procedures in relation to phase one provide for such things as preliminary assessments, publication, the acceptance of submissions, the requirements to provide further information at the request of the Authority, proposals relating to how the merger or acquisition may come into effect, which measures may reduce the effect of the merger or acquisition on competition, determinations that the merger or acquisition may be put into effect and special procedure in respect of media mergers. The new procedures set down timelines for the achievement of matters relating to those aspects of phase one. The new procedures also set out in detail how phase two investigations are to be carried out. It provides procedural rules in respect of such things as the determination to carry out a full investigation, publication, the entry of submissions, oral submissions, the early determination of a full investigation, and other related matters.

Bupa Injunction

Bupa is currently engaged in litigation arising from the decision of the Minister for Health, following a second recommendation by the Health Insurance Authority (HIA), to commence a controversial risk equalisation Scheme (RES). In essence, the scheme provides payments by health insurers, the customers of which have a significantly healthier profile, to insurers with customers with a less healthy profile. In practice, in the current market this would mean payment transfers from Bupa to the VHI, administered by the HIA. The objective of the scheme is to preserve community rating and the universal provision of health insurance services, and to prevent 'cherry-picking' by insurance providers of statistically healthier segments of the market (for example younger customers) while allowing providers compete on such things as efficiency, costs and quality of service provided.

As part of the proceedings, in addition to an existing injunction, the applicant sought a further injunction seeking to terminate the date of commencement of the RES, 1 January 2006. The Minister and the HIA opposed the application on a number of grounds. It was their view, that the nature of the Order sought was highly unusual and that it was not in the usual form of a temporary interlocutory order in proceedings pending the ultimate determination of the Court which seeks to preserve a state of affairs pending trial. However, it was submitted that it was now rather a final determination that 1 January 2006 should never be the risk equalisation commencement date regardless of the outcome of these Proceedings.

This submission was accepted b Finlay-Geoghegan J., who was of the view that what was being sought by the Applicant went far beyond what would normally be granted in interlocutory injunctive relief the aim of which was to preserve the status quo. The substance of the declaration sought by Bupa was that the risk equalisation commencement date should be permanently postponed until a date after the trial in the High Court of the proceedings. Finlay-Geoghegan J., stated that it was clear from the Affidavits and submissions that the declaration would secure for Bupa a position that even if it was unsuccessful in its challenge in the proceedings to the risk equalisation scheme and the relevant enabling legislation then Bupa would not carry during the period of the litigation the risk of ultimately being required to make payments under the scheme with effect from 1 January 2006. In effect, it would avoid retrospective payments in the event that Bupa was unsuccessful in the proceedings. She concluded that there were no highly exceptional circumstances that would warrant the making of an Order of the type sought, but left open the possibility that in very highly exceptional circumstances such an Order might in fact be made. She gave a number of reasons for her decision in addition to the fact that there were no highly exceptional circumstances. She emphasised amongst other things that legislation providing for the risk equalisation scheme had been in existence since 1994 before Bupa's entry into the market and that the precise legislation and scheme being challenged had been in existence since July 2003.