Kluwer Competition Law Blog

Competition Clearance: An Update in Relation to Property Investment Transactions

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In every investment property transaction, investors and their advisers need to consider the potential requirement for approval of the Irish Competition and Consumer Protection Commission (the "**CCPC**") before the transaction can proceed. With recent changes to the notification thresholds, we highlight the questions to be asked and the issues to be aware of in navigating through the clearance process.

How does "merger control" legislation apply to the sale or purchase of real property?

Competition law aims to regulate competitive markets in the best interests of the economy and society as a whole. Towards the fulfilment of that aim, competition law focuses on preventing reductions in competition, for example by restricting the formation of monopolies or dominant firms through mergers and acquisitions. This aspect of competition law is known as "merger control" in that it involves the exercise of a right of approval or control by a competent authority over transactions which could potentially lessen competition in a particular market.

As a result of the Competition and Consumer Protection Act 2014, the relevant legislation now in force in Ireland applies to the "*acquisition of assets that constitute a business to which a turnover can be attributed*." The purchase of an investment property with at least one sitting tenant generating a rental income stream for the investor is the acquisition of an asset constituting a business to which turnover can be attributed for the purposes of the legislation, therefore attracting the requirement for clearance from the CCPC where certain financial thresholds are met.

How do I determine or anticipate whether a property transaction will trigger a requirement to apply for clearance?

Different considerations apply to different types of transactions but focussing, as we are here, on the purchase of a single asset by one party from another, there are a number of conditions to be fulfilled before the transaction will trigger a requirement for an application for clearance to the CCPC. Taking the ones that are most easily disposed of first makes most sense.

Q1: The first question is whether there is an acquisition of an asset or assets constituting a business to which turnover can be attributed?

In the property context, the question is typically whether the asset generates rental income. If the answer is no, then the transaction does not attract the application of the Irish merger control regime.

If yes, the amount of the rental income at the property needs to be considered to establish whether the transaction must be notified to the CCPC for approval.

Q2: Assuming that the answer to Q1 is yes, the next question is whether (a) the total annual rental income in the State[1] (b) generated at the property being sold (c) in the most recent financial year (d) is less than €10m[2]. We have broken this question into 4 constituent parts – it is really important in answering this question to address each constituent part precisely.

If the answer is yes, then the transaction does not attract the application of the Irish merger control regime.

If the answer is no, the aggregate of (i) the rental income at the property for sale and (ii) the turnover in the State of the group of companies of which the buyer is a part needs to be considered to establish whether the transaction must be notified to the CCPC for approval.

Q3: Assuming that the answer to Q2 is no, the next question to be addressed is whether when added together (i) the total annual rental income generated at the investment property the subject of the sale in the most recent financial year and (ii) the turnover in the State of the *group* of companies of which the buyer is a part in the most recent financial year together is equal to or greater than €60m[3]. It is important to appreciate that it is the turnover in the State of the buyer's *group* and not just the buyer itself that is relevant to this calculation and that all turnover in the State (irrespective of a group company having turnover from a completely different business) is counted.

If the €60m threshold for turnover in the State is not met, and so the answer to this question is no, then the transaction does not attract the application of the Irish merger control regime.

If the answer is yes, however then the transaction is notifiable to the CCPC and an application for clearance must be made.

Under the legislation a failure to notify a notifiable transaction renders the transaction void and so one challenge that arises for both sides at this stage, more immediately for the seller (but it is also important in the long term for the buyer in proving title to a future buyer), is how to be objectively satisfied that the €60m threshold is or is not met. The requirements of any particular transaction will depend on the positions adopted and the commercial negotiation but it stands to reason that the more objectively certified by the buy side the position can be, the more objectively satisfied the sell side can be (and, where the thresholds are not met, the easier for the buyer in any future sale of the property to prove to a future buyer that notification on the original purchase was not required).

Once it is determined that clearance is required, what are the implications for the proposed transaction?

On the basis that the transaction is notifiable, an application must be made with the accompanying fee, currently €8,000, before the transaction can complete. Under the legislation, the obligation to make the application is on both the buyer and the target business but how this obligation is in fact complied with and which party will lead the application process and pay the fee will be the subject of commercial agreement. As a matter of practice, the application is generally run by the buyer and the buyer typically pays the filing fee.

Once the transaction has been notified to the CCPC, there is a two phase review process. Ordinarily the CCPC's phase I review should take no longer than 30 working days from receipt of the notification. If a phase II review is initiated, this could take up to (and, depending on the completeness of the information provided with the application, may take longer than) 120 working days from receipt of the application.

Following its investigation, whether at the end of phase I or II the CCPC will decide whether the merger or acquisition may take effect or take effect subject to conditions or not take effect. If clearance issues or the CCPC does not make a determination within the timelines required in the legislation for the phase I or II determinations, the acquisition may proceed and must be put in to effect within 12 months of the determination (albeit that this time period is very slightly different where the CCPC has missed the relevant deadlines for issuing its determination).

There is a right of appeal to the High Court for each party to the transaction within 40 working days against a negative determination of the CCPC or any condition attaching to an approval.

What are the sanctions for failure to comply with the legislation?

Under the legislation a failure to notify a notifiable transaction is a criminal offence potentially attracting fines of up to €250,000 and, as mentioned above, renders the transaction itself void. In addition also to criminal sanction, the potential implication for the sell side of the transaction being void, is the potential for it to be required to repay the purchase monies. The potential implication for the buy side is an inability to prove title to a future purchaser. Careful compliance, appropriately evidenced, is therefore extremely important for both parties.

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[1] The "State" means Ireland.

[2] Increased from €3m effective 1 January 2019.

[3] Increased from €50m effective 1 January 2019.

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