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## ■ HIGH COURT OVERTURNS COMPETITION AUTHORITY IN LANDMARK IRISH MERGER CONTROL LAW RULING

### Summary

On 19 March 2009, the Irish High Court annulled the decision of the Irish Competition Authority (“the Authority”) to block Kerry Group’s proposed acquisition of one its major competitors, Breeo Foods<sup>1</sup>. The appeal was the first time that a party had appealed a negative Authority merger decision taken under the Irish Competition Act 2002. Crucial to the Court’s ruling was its finding that the Authority had failed to assess correctly the sufficiency of countervailing buyer power (“CVBP”) to deter an attempted price increase post merger by the merged entity.

This briefing note contrasts the Authority’s approach to CVBP in its decision on the proposed Kerry/Breeo merger and the Court’s approach to the same issue. This note also considers the implication of the High Court’s ruling for future mergers, particularly those in the grocery sector.

### Background

#### General

The proposed Kerry/Breeo merger concerned products in the breakfast meats, sliced cooked meats and spreads categories, and in particular, some very familiar Irish consumer brands, such as Denny, Galtee, Dairygold and Low-Low. The proposed merger was notified to the Authority in March 2008. Interestingly, not long after the Kerry/Breeo merger was notified, the Authority had to review the Irish aspects of the merger between Heineken and Scottish & Newcastle, which concerned the sale of alcohol products in the on- and off-trade markets. That merger also concerned very familiar

<sup>1</sup> The judge hearing the case was Mr Justice Cooke, who until recently had spent a number of years at the European Court of First Instance, where he heard numerous European competition and merger law related cases.

consumer brands in Ireland, such as Heineken, Murphy's and Beamish. There were other similarities between the two cases: both cases moved into a phase II investigation and both cases considered the concept of CVBP, however, the similarity between the two cases ends there. Kerry/Breeo was blocked on 29 August 2009<sup>2</sup>; Heineken/Scottish & Newcastle was approved less than five weeks later, on 3 October 2009. What is particularly noteworthy about the two cases is the difference in the approach the Authority took when considering whether, post-merger, any attempt at a price increase could be defeated by CVBP<sup>3</sup>. In Heineken/Scottish & Newcastle, the Authority asserted that based on previous experience, publicans were individually capable of disciplining a brewer if it attempted to raise prices. In other words, an individual publican had CVBP. As outlined in further detail below, in Kerry/Breeo, the Authority found that the four largest retailers in Ireland, which, included Tesco, did not have CVBP. This difference in approach between the two decisions has been brought into even sharper focus by Mr Justice Cooke's judgment in the appeal taken against the Kerry/Breeo decision.

#### Authority Determination

During the five month Authority review process of Kerry/Breeo, the notifying parties argued that despite the resulting market shares of the merged entity, particularly in the rashers and sliced cooked meats categories, if the merged entity tried to put up prices, customers buying the products would be able to de-list or de-range the merged entity's products, or facilitate expansion by other existing or new competitors by threatening to reduce purchases from the merged entity. In other words, the parties argued that the four largest retailers operating in Ireland, which accounted for approximately 80% of grocery sales in Ireland, had sufficient CVBP to defeat any attempted price rise. It is of course easy to

make such arguments, but it is a much more difficult exercise to produce convincing and compelling evidence to substantiate such claims. How did the parties approach this question?

In paragraphs 2.50 to 2.70 of the Kerry/Breeo determination, the Authority referred to some of the direct evidence that it had reviewed. According to the determination, the parties had provided to the Authority copies of e-mail correspondence between each of the notifying parties and a number of retailers over the period between 2003 and 2008. The correspondence included examples of refusals to accept price increases; delisting of products; demands for promotional activity and shelf-management issues. The Authority rejected this correspondence as evidence of CVBP.

Rather dramatically, however, only two weeks before the Authority's deadline, Tesco wrote to both parties threatening to de-list products if each of the parties did not improve the financial terms on offer to the retailer. The Authority accepted that this was evidence of CVBP but decided that the evidence was unreliable. In particular, the Authority said that any evidence about marketplace behaviour occurring after a merger is announced should be carefully scrutinised as to whether the behaviour has been influenced by the announcement of the merger. The Authority concluded that "little weight can be given to such evidence". Finally, the Authority decided that the parties' CVBP arguments were not supported by retailer responses to its own customer survey.

#### High Court Judgment

Following a hearing of eight days in February 2009 the Court issued its judgment within a remarkable four weeks. The High Court first set out the appropriate standard of review of the decision of an expert body such as the Authority. In this regard, the Court endorsed the standard of review applied by the European Courts when reviewing merger decisions

<sup>2</sup> Determination M/08/009 of 28 August 2008.

<sup>3</sup> Paragraphs 5.149, 5.150 and 5.178 of Determination M/08/011 (Heineken/Scottish & Newcastle) of 3 October 2008.

taken by the European Commission, indicating that this approach is also consistent with Irish precedents concerning appeals against decisions taken by specialist statutory bodies. Mr Justice Cooke stated that before overturning an Authority merger decision, the Court would have to find that the decision was “incorrect because it is unsupported by or inconsistent with the clear effect of the evidence, information or data upon which it was based”.

Having set out the appropriate standard, the Court then considered whether the Authority had satisfied that standard when reviewing the Kerry/Breeo proposal. Mr Justice Cooke’s critique of the Authority’s treatment of the evidence of CVBP was hugely significant to the outcome of the appeal. First, he held that the Authority’s approach to the assessment of the direct evidence of Tesco’s August 2008 demands was “unwarranted”. Furthermore,

*“The significance of the example is that it is direct evidence of pre-acquisition exercise of buyer power and if such a tactic can be employed pre-acquisition in order to obtain an improvement in margin by a retailer there is no reason for supposing that it might not be equally exercised post-merger in order to deter a price increase.”*

He continued by saying that the email exchanges between each of the parties and the multiples over the previous five year period was:

*“...direct evidence which contradicts the proposition that the retailers cannot credibly de-list brands such as Denny or Galtee because of their “must have” character. If retailers consider these to be “must have” brands post-acquisition they must be “must have” brands before it as well. The Court therefore considers that the examples extracted from this evidence...for the purpose of dismissing the evidence are selective and unrepresentative of the probative force of [the evidence] taken as a whole.”*

The Court also reviewed the conclusion the Authority drew from its survey of retailers,

and in particular the statement that the survey evidence “on balance ... shows retailers will have difficulty resisting such a price rise”. The Court held that it “cannot agree that this is a justifiable conclusion to draw from the evidence”.

The Court held that these errors were material and vitiated the Authority’s determination that the merger would lead to a substantial lessening of competition in the rashers and non-poultry sliced cooked meats markets<sup>4</sup>.

### Comment

The judgment is a landmark ruling and will have implications for businesses and legal advisers contemplating mergers or acquisitions between competitors in all sectors. Direct evidence is of critical importance to the judiciary, and therefore the Authority, in considering any prospective merger analysis. The ruling is particularly relevant for any merger contemplated between suppliers in the grocery retailing sector given the CVBP feature that Mr Justice Cooke found to exist in the rashers and sliced cooked meats markets. It will not be enough, however, for parties simply to assert that the retailers have CVBP on the basis of this ruling. Parties to a proposal will need to be in a position to submit real evidence of retailers exercising CVBP and credible theories why implementation of a proposal will not eliminate such CVBP.

Finally, the Court has demonstrated that it is prepared to overturn the decision of an expert body, such as the Authority, where it can be demonstrated that the decision was incorrect because it was unsupported or inconsistent with the clear evidence available to the Authority.

<sup>4</sup> The court also overturned the Authority’s decision in respect of processed cheese, on the basis that the market definition was “inadequate and unsound”.

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