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15 May 2020

Online at <https://mpra.ub.uni-muenchen.de/100477/>
MPRA Paper No. 100477, posted 19 May 2020 20:35 UTC

The Berendsen (Elis)/Kings Laundry Merger: Three Into Two Won't Go

By

Paul K. Gorecki

Abstract

The acquisition by Berendsen Ireland Limited of Kings Laundry Limited should have been prohibited by the Competition and Consumer Protection Commission, Ireland's competition agency. Instead the agency cleared the merger subject to the divestment of three of Berendsen's healthcare contracts. The Commission makes a compelling case for a finding that in the outsourced supply of flat linen rental and maintenance services to healthcare customers that the three to two merger would lead to a substantial lessening of competition. The divestment of Kings Laundry healthcare operations, an appropriate remedy to restore competition, was not feasible. The divestment of three healthcare contracts does not mitigate the anticompetitive effect of the merger: for customers that are the counterparties to the three contracts, the remedy will result in decline in the number of healthcare suppliers from three pre merger to two post merger. Neither of these two providers is likely to be an especially vigorous competitor. For all other healthcare customers, although the number of healthcare suppliers remains unchanged at three - pre and post merger, the evidence suggests that the purchaser of the three contracts is unlikely to replicate Kings Laundry as a significant competitive force in healthcare. The failure to implement the remedy within the nine month window deemed appropriate by the European Commission in its *Remedies Notice* raises concerns that Kings Laundry as a competitive force will become, in European Commission parlance, "degraded."

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Keywords: mergers; structural remedies; substantial lessening of competition; and, Competition Act 2002.
JEL Codes: D22; D44; K21; L41.

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Acknowledgments: The author was Adjunct Lecture at Trinity College Dublin between 2013 and 2019 and a member of the Competition Authority between 2000 and 2008, where he was responsible for merger control including the Kerry/Breeo merger assessment, but had no involvement in the subsequent High Court appeal. For the Berendsen (Elis)/Kings Laundry merger the author was not involved for the CCPC or the parties to the merger or for any third party. I should like to thank Francis O'Toole for helpful comments and discussions on an earlier version. The usual disclaimer applies. All links were valid as of 15 May 2020.

15 May 2020

I. Introduction

On 8 July 2019 the Competition and Consumer Protection Commission (CCPC), Ireland's competition agency,¹ cleared the acquisition by Berendsen Ireland Limited (Berendsen), ultimately controlled by Elis S. A. (Elis), of Kings Laundry Limited (Kings Laundry), subject to a divestment remedy.² It was determined that, given this remedy, the merger would not lead to a substantial lessening of competition (SLC), the competition test used by the CCPC. The transaction was notified to the CCPC on 7 August 2018, Phase II initiated on 9 January 2019. There was no appeal on the CCPC's decision.³

The CCPC's Berendsen (Elis)/Kings Laundry merger determination is a thorough, in-depth merger investigation. The determination itself contains 174 pages, while the CCPC also published, separately, a 69 page survey that it commissioned of linen laundry customers in healthcare and hospitality.⁴ Economic expert reports were also commissioned by the CCPC on: (i) aspects of market definition and the impact of the proposed transaction; and, (ii) on issues raised by the parties concerning bidding markets.⁵

In contrast to recent CCPC merger investigations, an Assessment (or a Statement of Objections in European Commission parlance) was issued in Berendsen (Elis)/Kings Laundry by the CCPC on 28 March 2019.⁶ The last time that the CCPC issued an Assessment was on 25 July 2008, almost eleven years previously, in the Kerry/Breeo merger investigation.⁷ However, the CCPC prohibited the latter merger, a decision subsequently overturned by the High Court.⁸ In contrast, in Berendsen (Elis)/Kings Laundry the merger was cleared by the CCPC subject to the divestment by Berendsen of three of its contracts with healthcare providers.

This paper explores whether the divestment remedy was sufficient to alleviate the CCPC's competition concerns. In other words, should the merger have been prohibited? This involves not only an assessment of the CCPC's compelling finding that, but for any acceptable proposals from the parties, that the Berendsen (Elis)/Kings Laundry would have resulted in an SLC, but also an examination of the efficacy of the merger remedy proposed by the parties and accepted by the CCPC, thus becoming a binding commitment. Since the finding of SLC and associated divestment was confined to the healthcare market, that is the focus of the paper.

¹ The CCPC was formed in October 2014 by the combination of the Competition Authority, Ireland's competition agency at the time, and the National Consumer Agency. Unless otherwise specified CCPC will refer to both the CCPC and Competition Authority.

² M/18/063 – *Berendsen (Elis)/Kings Laundry*. All CCPC merger determinations may be found on its website: www.ccpc.ie.

³ Only the parties to the merger can appeal under the Competition Act 2002, as amended. Merger control was assumed by the Competition Authority on 1 January 2003. Prior to that date merger control was the responsibility of the relevant Minister using a public interest test. For a discussion of the merger provisions of the 2002 Act see Andrews, Gorecki & McFadden (2015, pp. 247-378).

⁴ Amarach Research (2019).

⁵ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 1.44-1.45. The economic expert reports were prepared by PMCA Economic Consulting and DotEcon Ltd, respectively.

⁶ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 1.23.

⁷ M/08/009 – *Kerry/Breeo*, paragraph 1.41.

⁸ For a discussion of the High Court judgment and surrounding issues see Andrews, Gorecki & McFadden (2015, pp. 299-302); and, Gorecki (2009).

The paper is divided into seven sections. Details of the parties are set out in Section II, while Section III presents the main points of the CCPC’s extensive reasoned analysis of whether not the transaction would result in an SLC in one or more relevant markets, together with an overview of the divestment remedy. Attention then turns to a commentary of the CCPC’s reasoned merger determination: whether the redactions in the published determination are merited (Section IV); the strength and quality of the competitive assessment (Section V); and, the appropriateness of the divestment remedy (Section VI). Section VII concludes by addressing three issues/questions: does the divestment remedy resolve the competitive harm identified by the CCPC’s analysis; would the prohibition of the merger have been disproportionate; and, are there important differences with the CCPC’s Kerry/Breeo experience.

II. Background: the Parties⁹

Berendsen’s activities in the State consist of the rental and maintenance of workwear to customers in various sectors; flat linen to customers in the healthcare (e.g. bed blankets) and hospitality (e.g. double and king-sized bed linen items) sectors; mats; mops; and, cleanroom garments to organisations operating cleanrooms such as pharmaceutical and high-tech industries. Berendsen is also involved in the provision of washroom services. Berendsen operates eight facilities in the State. In 2017 it had a turnover of €33 million and employed 550 persons.¹⁰

Berendsen was included in the September 2017 purchase for £2.2 billion of Berendsen plc, “a focused European textile, hygiene and safety solution company.”¹¹ Berendsen plc’s acquisition was part of Elis’s wider strategy to “become a pan-European leader in the provision of textile, hygiene and facility solutions.”¹² In February 2020, for example, Elis acquired Textil Washing Co. in the Czech Republic.¹³

Kings Laundry provides rental and maintenance of flat linen to customers in the healthcare and hospitality sectors. It has two facilities – Dublin and Cork - in the State supplying these services. The firm was established in 2000, with the Cork facility opening in May 2016.¹⁴ In 2017 Kings Laundry had a turnover of €30 million and employed approximately 500 persons.¹⁵ It is reported that Elis paid between €22 million and €30 million for Kings Laundry.¹⁶

Berendsen and Kings Laundry overlap in the rental and maintenance of flat linen to customers in the healthcare and hospitality sectors. Maintenance is defined as “the collection and processing (i.e., sorting, washing, drying, ironing, folding and packing) of used and soiled items and the delivery of clean items.

⁹ Unless otherwise indicated this section is based on M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 1.3-1.9 and paragraph 3.33.

¹⁰ Employment and turnover were sourced from: <http://www.top1000.ie/berendsen-ireland>.

¹¹ <https://www.globenewswire.com/news-release/2017/09/12/1117793/0/en/Elis-Completion-of-acquisition-of-Berendsen.html>. The £2.2 billion estimate is sourced from: <https://www.ft.com/content/5a9b278c-4ba9-11e7-919a-1e14ce4af89b>. This merger was not notified in the State.

¹² <https://www.globenewswire.com/news-release/2017/09/12/1117793/0/en/Elis-Completion-of-acquisition-of-Berendsen.html>.

¹³ <https://uk.advn.com/stock-market/EURONEXT/ELIS/share-news/Elis-announces-the-acquisition-of-Textil-Washing-C/81649822>.

¹⁴ <https://www.kingslaundry.com/why-choose-kings-laundry/>.

¹⁵ <https://www.irishtimes.com/business/retail-and-services/irish-firm-kings-laundry-acquired-by-french-giant-1.3577371>. The source states that the firm employed between 450 and 550 depending on the season; 500 is the midpoint.

¹⁶ <https://bizplus.ie/kings-laundry-takeover-cleared/>.

Items may also be repaired as part of maintenance.”¹⁷ Flat linen is defined as “linen products including flat-ironed bed sheets, pillowcases and tablecloths.”¹⁸

III. Merger Analysis & Proposed Remedy

Market Definition¹⁹

The CCPC defined two product markets: “for the outsourced supply of flat linen rental and maintenance services to healthcare customers ... ;” and, “for the outsourced supply of flat linen to hospitality customers”²⁰ For both the healthcare and hospitality product markets the CCPC considered that the relevant geographic market was the State.

There was general agreement between the parties, customers, competitors and the CCPC that the healthcare and hospitality sectors constituted separate product markets. There are demand side differences between the customers in the two markets in terms of the type of linen items and hygiene standard specification. For example, on the latter, one respondent to a CCPC questionnaire stated:

“Hospitality customers have no hygiene requirements. Some private healthcare customers require a hygiene certification such as BS EN 14065, some have no hygiene certification requirements. Large public healthcare customers require hygiene certification such as BS EN 14065.”²¹

This was confirmed by responses to the CCPC’s survey of customers.²²

There was, however, a difference of view between the parties and the CCPC about whether or not the self-supply of flat linen and its maintenance by healthcare and/or hospitality customers should be included as part of the product definition. Self-supply is referred to as on-premises laundry or OPL. The parties argued for OPL’s inclusion in the product market on the grounds, inter alia, that some hospitals and hotels operate their own OPLs, that there is a ready market in the supply of laundry equipment, and that the costs of setting up an on-premise laundry are relatively low.²³ The CCPC rejected these arguments. The CCPC, for example, cited the fact that larger customers “*unanimously considered that setting up OPLs would not be a viable option in response to a 5% to 10% price increase.*”²⁴

There was general agreement that the relevant geographic market was the State, although the parties qualified this by stating that the geographic market was at least State-wide.²⁵ The CCPC considered whether or not Northern Ireland should be included in the geographic market definition, concluding that

¹⁷ M/18/063 – *Berendsen (Elis)/Kings Laundry*, footnote 4.

¹⁸ M/18/063 – *Berendsen (Elis)/Kings Laundry*, footnote 5.

¹⁹ Unless otherwise indicated this section is based on M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 3.1-3.112.

²⁰ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 3.112. Healthcare customers include hospitals and nursing homes; hospitality, hotels, bed & breakfasts.

²¹ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 3.13.

²² M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 3.15.

²³ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 3.5.

²⁴ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 3.17. This result is cited in paragraphs 3.61 and 3.74. Customers are defined in paragraph 10.2.

²⁵ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 3.9.

it “did not observe any significant evidence that would merit the inclusion of Northern Ireland.”²⁶ Nonetheless in the CCPC’s competitive assessment of the merger, attention was paid to suppliers in Northern Ireland acting as a competitive constraint on the merged entity’s ability to raise price post merger.

Market Structure²⁷

The CCPC estimated, based on information supplied by both the parties and competitors, the market shares for participants in the healthcare and hospitality markets, annually, for 2014 to 2018, together with the Herfindahl-Hirshman (HHI) summary measure of concentration. The results for the healthcare market are presented in Table 1.²⁸

Table 1
Outsourced Supply of Flat Linen Rental & Maintenance Services to Healthcare Customers, Market Share, Ireland, 2014-2018.

Undertaking	2014	2015	2016	2017	2018 ^a
	Market Share (%)^b				
Berendsen	[40-50]	[40-50]	[40-50]	[50-60]	[50-60]
Kings Laundry	[0-10]	[0-10]	[0-10]	[10-20]	[10-20]
<i>Combined</i>	<i>[50-60]</i>	<i>[50-60]</i>	<i>[50-60]</i>	<i>[60-70]</i>	<i>[60-70]</i>
<i>Increment</i>	<i>[0-10]</i>	<i>[0-10]</i>	<i>[0-10]</i>	<i>[10-20]</i>	<i>[10-20]</i>
Celtic Linen	[30-40]	[30-40]	[40-50]	[30-40]	[30-40]
Others	[10-20]	[0-10]	[0-10]	[0-10]	[0-10]
Total	100	100	100	100	100
	Herfindahl-Hirshman Index (HHI)				
Pre-merger	n.a.	n.a.	n.a.	n.a.	4249
Post-merger	n.a.	n.a.	n.a.	n.a.	5348
Delta	n.a.	n.a.	n.a.	n.a.	1249

a. January-June 2018.

b. Market share measured in terms of sales.

n.a. = not available.

Source: M/18/063 – *Berendsen (Elis)/Kings Laundry*, Table 12, p. 96; Table 13, p. 98.

The CCPC stated that “the merged entity will enjoy a very strong position in the healthcare market with a market share of over [60-70]% and a market share increment of approximately [10-20]% as a result of the Proposed Transaction.”²⁹ There were only three significant healthcare suppliers pre-merger; two post-merger. It is thus a three to two merger in the healthcare market.

²⁶ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 3.104.

²⁷ Unless otherwise indicated this section is based on M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.56-4.77 (hospitality), and 4.210-4.225 (healthcare).

²⁸ The corresponding information for the hospitality market can be found in M/18/063 – *Berendsen (Elis)/Kings Laundry*, Tables 3, p. 58 & 5, pp. 61-62. The combined market share of the parties in the hospitality market is lower than in the healthcare market ([40-50] per cent compared to [60-70] per cent), while there are several credible competitors beside Celtic Linen. The post merger HHI (3283) and delta (609) are also lower in the hospitality market.

²⁹ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.222.

Berendsen and Kings Laundry both gradually increased their market share over the period 2014-2018. The market share expansion of the parties was at the expense of Others and, after 2016, of Celtic Linen.

The HHI is a summary measure of concentration and is used as a screen by competition authorities worldwide. The CCPC is no exception.³⁰ The HHI in healthcare meets the CCPC's threshold for being considered "*highly concentrated*," greater than 2000, both pre and post merger. Furthermore, the delta – the change in the value of the HHI between pre and post merger – at 1249 substantially exceeds the CCPC threshold of 150 below which is "*unlikely to cause concern*."³¹

The Counterfactual³²

Typically, in merger assessments the pre merger situation is the counterfactual. In other words, it is assumed that absent the merger the parties to the merger would have continued to operate in competition with one another.³³ However, this is not always the ideal counterfactual. An obvious exception is the failing firm, where absent the merger one of the parties would have exited the market.³⁴

In the CCPC's assessment of Berendsen's acquisition of Kings Laundry the pre merger situation is also the counterfactual. The CCPC considers that absent the merger that Kings Laundry "*will continue to expand in both the hospitality and healthcare markets*."³⁵ The CCPC view is based on pre merger internal documents, statements and behaviour of both Berendsen and Kings Laundry. In contrast the parties argued that these pre merger internal documents, statements and behaviour should be discounted by the CCPC in view of the post merger notification claims by Kings Laundry that "*it does not intend to expand in healthcare ...*"³⁶ The CCPC, however, attached more weight to the pre (as opposed to post) announcement of merger internal documents, statements and behaviour consistent with its own *Merger Guidelines*³⁷ and the position of the International Competition Network.³⁸

The parties also claimed that the CCPC had not adequately addressed how Kings Laundry would overcome barriers to expansion in the healthcare market. In response to these claims the CCPC, for example, assessed, in some detail, whether Kings Laundry can upgrade its Cork facility for private healthcare customers. The CCPC concluded that this "*ability to upgrade within this timeframe, and with this level of investment would be considered as an ability to expand in a timely and sufficient manner*."³⁹

In sum the CCPC concluded that

"... the most plausible and relevant counterfactual is that, absent the merger, Berendsen and Kings Laundry will continue to compete for the supply of flat linen rental and maintenance

³⁰ For details see: CCPC (2014, paragraphs 3.9-3.13).

³¹ For details see: CCPC (2014, paragraph 3.11).

³² Unless otherwise stated this section is based on M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.1-4.26.

³³ CCPC (2014, paragraph 1.14).

³⁴ The failing firm defence for a merger is set out in CCPC (2014, paragraphs 9.1-9.12). One of the few instances where the failing firm was considered the appropriate counterfactual by the CCPC is M/15/026 – *Baxter Healthcare/Fannin Compounding*.

³⁵ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.3.

³⁶ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.11.

³⁷ CCPC (2014, paragraphs 1.15 & 7.11).

³⁸ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.10.

³⁹ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.16. The timeframe was redacted.

services to customers in both the hospitality and healthcare markets, and that Kings Laundry is likely to expand its activities in the healthcare market."⁴⁰

Competitive Assessment: Unilateral Effects Theory of Harm

Introduction

The CCPC approach to assessing the competitive effects of the merger was structured as follows: pre-competitive pressure exerted by Kings Laundry; closeness of competition between the two parties; competitor constraints; the impact of the merger on prices and/or quality; entry and/or expansion; and, countervailing buyer power (CBP). The CCPC uses the same approach for its competitive assessment for both the hospitality and healthcare markets.

The CCPC concluded that the merger: *"was not expected to result in significant unilateral effects in relation to the hospitality market,"*⁴¹ but that *"the merged entity will have an ability and incentive to increase prices/reduce service quality in the healthcare market, which will ultimately result in consumer harm."*⁴² Attention is confined here to the healthcare market.

It should be noted that the CCPC considered, briefly, the likelihood of coordinated effects for both the hospitality and healthcare markets. In both cases the CCPC found no evidence of such effects.⁴³

Nature of Competition⁴⁴

Prior to commencing its competitive assessment, the CCPC considers the nature of competition. The healthcare (and hospitality) markets were characterised as bidding markets⁴⁵ as opposed to customers selecting providers on the basis of posted prices. Under certain restrictive assumptions Bertrand competition in a bidding market with only two participants leads to a perfectly competitive outcome. However, the CCPC finds these assumptions such as homogeneous product, price transparency and no capacity constraints are not satisfied. The CCPC states at the conclusion of its analysis of the evidence on the nature of competition in the healthcare market that it *"is not consistent with the parties' view of bidding markets, where competition concerns around a 3-to-2 merger can be suspended in a belief that even two competitors will provide a good competitive outcome."*⁴⁶

The Competitive Pressure from Kings Laundry⁴⁷

The CCPC takes the view that Kings Laundry *"is an important and effective competitor in the healthcare market."*⁴⁸ As can be seen from Table 1, Kings Laundry increased its market share of the healthcare market over the period 2014 to 2018 from [0-10] per cent to [10-20] per cent. Kings Laundry differentiated itself

⁴⁰ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.26.

⁴¹ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.209.

⁴² M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.378.

⁴³ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.380-4.386.

⁴⁴ Unless otherwise stated this section is based on M/18/063 – Berendsen (Elis)/Kings Laundry, paragraphs 4.27-4.52.

⁴⁵ I.e., *"competition ... takes place for contracts (which may be formally tendered or informally negotiated on the basis of requests for proposals)."* M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.29.

⁴⁶ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.52.

⁴⁷ Unless otherwise stated this section is based on M/18/063 – Berendsen (Elis)/Kings Laundry, paragraphs 4.265-4.274.

⁴⁸ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.265.

by “providing high service quality via a dedicated linen system ...,” while customers “perceive Kings Laundry as innovative and as providing high quality service.”⁴⁹ Finally, Kings Laundry has demonstrated a willingness to invest in new equipment to achieve greater efficiencies.

Closeness of Competition⁵⁰

As the CCPC notes the degree to which the merging parties are close competitors with each other is important to establish. When merging parties are close competitors, then a merger by “removing a strong competitive constraint ... [will] be more likely to raise competition concerns than a merger between distant competitors.”⁵¹ The CCPC uses several sources of evidence to establish the degree to which Berendsen and Kings Laundry are close competitors: the views of the parties, competitors and customers; internal documents; analysis of tendering data and the parties customer loss data; and the Amarach survey (Research, 2019). The tendering data, for example, referred to the period 2014-2018 including for Kings Laundry (and Berendsen) the frequency with which they experienced rival bids from other healthcare providers.

Based on the analysis of these sources of evidence the CCPC concludes:

4.302 The evidence presented ... above suggests that the pre-merger healthcare market is a market with 3 significant players. Celtic Linen is the main competitive constraint on Berendsen’s probability of winning a tender, and Kings Laundry is a constraint on Berendsen’s probability of winning a tender in tenders where both Berendsen and Kings Laundry participated. Thus, the Proposed Transaction will result in the removal of an important and significant competitor to both Berendsen and Celtic Linen and reduce the number of important and significant competitors in the healthcare market from 3 to 2.

Competitive Constraints on the Merged Entity: Competitors⁵²

Not surprisingly, based on Table 1, Celtic Linen is the only significant competitor to the parties. Celtic Linen had a market share of the healthcare market in 2018 of [30-40] per cent unchanged from 2014, despite a brief increase to [40-50] per cent in 2016. While the CCPC considers that Celtic Linen, which recently emerged from examinership, will continue as a competitor in the healthcare market it “will not replace the loss of competitive pressure exerted by Kings Laundry pre-merger.”⁵³ Indeed, the CCPC is concerned that Celtic Linen will have the ability and incentive to raise prices in response to a post merger price increase by the merged entity (i.e. price accommodation).⁵⁴ No other healthcare suppliers appear to be able to act as a competitive constraint on the merged entity apart from Celtic Linen. This is consistent with the CCPC’s observation that “no linen laundry other than Berendsen, Kings Laundry and Celtic Linen have tendered for any of the hospital contracts which have been issued in the last 5 years.”⁵⁵

⁴⁹ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraphs 4.266, 4.268, respectively.

⁵⁰ Unless otherwise stated this section is based on M/18/063 – Berendsen (Elis)/Kings Laundry, paragraphs 4.275-4.304.

⁵¹ CCPC (2014, paragraph 4.19).

⁵² Unless otherwise stated this section is based on M/18/063 – Berendsen (Elis)/Kings Laundry, paragraphs 4.305-4.313.

⁵³ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.308.

⁵⁴ CCPC (2014, paragraph 4.11).

⁵⁵ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.310.

Competitive Constraints on the Merged Entity: Entry/Expansion⁵⁶

According to the CCPC's *Merger Guidelines*, for entry/expansion to be a credible constraint on the merged entity, it must be timely, likely and sufficient.⁵⁷ These three conditions are cumulative.

The CCPC identified a number of barriers to entry/expansion which are likely to reduce the importance of the threat of entry/expansion: substantial financial investment; adherence to certain hygiene quality standards evidenced through accreditation; demonstration of previous experience delivering healthcare contracts, which "96% of healthcare customers said ... was either essential or very important;"⁵⁸ and, contingency plans in place to ensure continuity of supply. The CCPC also examined the record of entry/expansion and the plans of various market participants as well as Berendsen's internal documents.

The CCPC concluded its discussion on entry/expansion as follows,

"4.352 The evidence provided to the Commission did not enable the Commission to conclude with sufficient confidence that any supplier will enter/expand to provide flat linen rental and maintenance services to healthcare customers in a timely, likely and sufficient manner to mitigate or prevent the identified SLC or prevent the loss of competitive pressure exerted by Kings Laundry pre-transaction. ... The Commission's view is that the barriers to entry/expansion are of sufficient magnitude to prevent timely market entry, and would not prevent the merged entity from increasing prices/reducing service quality following the implementation of the Proposed Transaction."

Competitive Constraints on the Merged Entity: Countervailing Buyer Power (CBP)⁵⁹

CBP can potentially offset and act as a competitive constraint on the merged entity. In examining CBP the CCPC's extensive assessment of the evidence refers to: customer switching from the merged entity; number, nature and viability of alternative options; size and significance of individual customers; and, the extent to which the CBP of some customers will benefit other customers. The CCPC concludes that the merger will remove a "key supplier and reduce healthcare customers' CBP... . The Commission's conclusion is therefore that customers do not have sufficient buyer power to prevent an SLC."⁶⁰

Assessment: Merger's Price &/or Quality Effects⁶¹

The CCPC examined the likely effects of the merger on price and/or quality. In doing so it notes that Celtic Linen will continue as a competitor to the merged entity and "the remaining [healthcare suppliers] ... are unlikely to offset the loss of Kings Laundry's competitive constraint, because their activity is extremely limited."⁶² Six of the eight customers identified by the parties as being most significant to their business

⁵⁶ Unless otherwise stated this section is based on M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.332-4.352.

⁵⁷ CCPC (2014, paragraph 6.1-6.22).

⁵⁸ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.339, based on the Amarach Research (2019).

⁵⁹ Unless otherwise stated this section is based on M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.353-4.377.

⁶⁰ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.377.

⁶¹ Unless otherwise stated this section is based on M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.314-4.331.

⁶² M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.317.

*“expressed a significant level of concern.”*⁶³ Celtic Linen is, according to the CCPC, likely to accommodate any price rise by the merged entity, in part because of its *“recent exit from examinership and the fact that it made a post-tax loss of approximately €1.6 million in 2017.”*⁶⁴ Although the CCPC did not estimate the price impact of the merger, it refer to estimates of the price effects of a three to two merger that suggested substantial loss of consumer surplus and price increases.⁶⁵ As a result, the CCPC concluded that the merger *“is likely to enable the merged entity to profitably raise price or reduce service quality.”*⁶⁶

Remedies⁶⁷

Introduction

Under the Competition Act 2002, the CCPC has three options at the conclusion of its Phase II investigation: clear the merger unconditionally; prohibit the merger; or clear the merger subject to conditions. Since the CCPC’s competition assessment led it to the conclusion that the merger will result in an SLC in the healthcare market unconditional clearance was not an option. In considering the choice between the two remaining options, the CCPC took the view that since Kings Laundry’s sales are skewed towards the hospitality sector⁶⁸ if *“the SLC concerns in the healthcare market are capable of being addressed either through proposals or specified conditions, it may not be proportionate to require that the merger may not be put into effect.”*

The Proposals

The *first set of proposals* put forward by Berendsen were rejected by the CCPC on the grounds that they were *“inappropriate and insufficient.”*⁶⁹ As a result, these proposals were not market tested. No information is provided in the CCPC’s merger determination concerning the content and nature of these proposals.

The *second set of proposals*, which consisted of the merged entity disposing of a package of healthcare contracts, were considered acceptable to the CCPC apart from some unspecified implementations risks. The CCPC market tested, through phone interviews, the second set of proposals with five competitors and five customers.⁷⁰

All of the customers expressed concerns about the *“reduction in the number of significant suppliers in the healthcare market from 3 to 2”* and *“expressed a preference for having more than 2 potential bidders in*

⁶³ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.318.

⁶⁴ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.320.

⁶⁵ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.329. Although not referred to by the CCPC, an ex post analysis of four firm to three firm mergers in the mobile phone market in Austria, Ireland and Germany found that there were merged induced price increases. For details see: BERE (2018).

⁶⁶ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 4.331.

⁶⁷ Unless otherwise stated this section is based on M/18/063 – Berendsen (Elis)/Kings Laundry, paragraphs 1.30-1.38 & 5.1-5.20; Section 9, “Berendsen’s Proposals,” pp. 146-155.

⁶⁸ This is the author’s inference from M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 5.2. All the relevant data are completely redacted.

⁶⁹ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 5.5.

⁷⁰ Given that the only other significant competitor to the merging parties was Celtic Linen this raises the question of the identity of the other four competitors. On this the CCPC states: *“For the purposes of the market testing, competitors included laundries not currently active in the healthcare market, but with some potential to enter.”* (M/18/063 – Berendsen (Elis)/Kings Laundry, footnote 636, p. 140).

the market.”⁷¹ Two customers thought that the package was insufficient for the establishment of a new competitor; two that the package was sufficient. All customers listed the key criteria that a new supplier would be expected to meet including: “(i) adherence to infection control/prevention guidelines; (ii) service reliability; (iii) customer service; (iv) experience of providing flat linen rental and maintenance services to healthcare customers of a similar size; and (v) demonstrable ability to plan for contingencies and emergencies.”⁷²

In terms of competitors, “Four of the five ... thought that the divestment of contracts could be an effective remedy, but this was subject to the scope and nature of the divested contracts (e.g., size and location of customers).” Three of the five competitors “expressed interest in principle in purchasing healthcare contracts. All of these [competitors] noted that more information about nature of the contracts to be divested ... would be required before they could fully confirm interest.”⁷³

The third set of proposals were deemed acceptable to the CCPC. These were summarised by the CCPC as follows:

- “Divest three [...] healthcare contracts, [...] to a [single] third party purchaser approved by the Commission;
- Divest such additional healthcare contracts of an aggregate value (by reference to 2018 revenue figures), which, when aggregated with the value of the [...] healthcare contracts referred to above, have a total value of [...]; and
- Divest the rights and title in ancillary items such as linen stock (but excluding, for the avoidance of doubt, any facilities or fixed assets (e.g., washers, dryers, or trucks)) as required by a Third Party Purchaser and to otherwise assist the Third Party Purchaser to enable it to provide the services in respect of the relevant Healthcare Contracts.
or
- If it became apparent to Berendsen that it was unable to divest the three [...] healthcare contracts in the manner described above, it would enter into discussions with the Commission to identify an alternative package of healthcare contracts that could be divested to an approved third party purchaser(s) and that would address the Commission’s competition concerns.”⁷⁴

Reference to the three contract divestment package refers to the first three bullet points, while the fourth bullet point is referred to as the alternative package.⁷⁵

The transaction cannot be implemented “unless and until”⁷⁶ the CCPC confirmed that the proposals had been complied with (i.e. Kings Laundry continues to operate under its pre merger ownership and management until the CCPC’s confirmation). The necessity of an upfront buyer appears to have satisfied

⁷¹ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 5.9.

⁷² M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 5.11.

⁷³ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 5.13. This wording, as well as that in paragraph 5.10, suggests that the precise nature of the three contracts to be divested was not specified in (e.g., length, nature of customer, active vs passive sales etc) which limits the value of the market testing.

⁷⁴ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 5.17.

⁷⁵ In M/18/063 – Berendsen (Elis)/Kings Laundry, they are referred to as Package A and package B, respectively.

⁷⁶ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 5.18.

the CCPC's concerns over implementation risks. If the commitments are not complied with by Berendsen, then Berendsen "*will terminate the Share Purchase Agreement.*"⁷⁷

In Section 9 of the CCPC's merger determination, "Berendsen's Proposals," the commitments are outlined in some detail including the administrative mechanisms to oversee the implementation of the divestment package. Suffice to say that a Monitoring Trustee provides monthly reports to the CCPC on the implementation of the proposals outlined above. Berendsen agreed to the appointment of the Berendsen Manager with responsibility for operating the three contracts that are to be divested "*with a view to ensuring their continued economic viability, marketability, and competitiveness.*"⁷⁸

IV. Commentary: Redactions - Too Much Pruning?

It is important for reasons of accountability and transparency that the published Berendsen (Elis)/Kings Laundry merger determination provide enough information such that the reader can assess the basis on which the CCPC made its decision, including proposals/commitments. Competition legislation provides some constraints, however, on the discretion of the CCPC in this regard. Under s 22(4) of the Competition Act 2002, the CCPC "*shall reduce the determination to writing ... and ... publish the determination with due regard for commercial confidentiality ...*" In practice this means that the CCPC sends the unredacted merger determination to the parties for their suggested redactions and then, depending on the nature and extent, either accepting the proposed changes or arguing for fewer, less extensive redactions.⁷⁹

The CCPC's Berendsen (Elis)/Kings Laundry merger determination market share figures within 10 percentage point ranges and the actual estimate HHI index for suppliers in the healthcare and hospitality markets are published.⁸⁰ In contrast, the data on tender participation, frequency of tender success and diversion ratios, presented in six tables for healthcare, are completely redacted.⁸¹ It could be argued that this is consistent with earlier CCPC practice in M/06/027 – *Tetra Laval/Carlisle*,⁸² but that in that merger this analysis was far less extensive. On the other hand, a more appropriate and timely comparison might be with the comprehensive analysis of bidding in Annex I of the European Commission's 2015 M.7278 – *General Electric/Alstom (Thermal-Renewable Power Grid Business)* where, although a certain amount of bidding data was redacted, nevertheless tender participation rates and win rates were published albeit within 10 percentage point ranges, consistent with the publication of market share data by both the CCPC and the European Commission.

A vitally important aspect of the CCPC's merger determination is the remedy. In this regard, however, there is at least one vitally important piece of information that is completely redacted. As shown in Table 1 above, Kings Laundry's healthcare market share was [10-20] per cent. The three contracts that are to be divested by Berendsen are designed to replicate the competitive presence of Kings Laundry. Since Kings

⁷⁷ M/18/063 – *Berendsen (Elis)/Kings Laundry*, Section 9, Clause 16.

⁷⁸ M/18/063 – *Berendsen (Elis)/Kings Laundry*, Section 9, Clause 27.

⁷⁹ This approach is consistent with: CCPC, "Merger and Acquisitions Procedures," 31 October 2014, paragraph 4.3; and the author's experience as a Member of the Competition Authority responsible for merger control. Businesses varied considerably in what they regarded as commercially confidential. While often there are concerns over market share data being published, this was not always the case. In M/08/011 – *Heineken/Scottish & Newcastle*, Section 5, for example, individual brand market shares are published to one decimal place.

⁸⁰ See Table 1 above for details with respect to the healthcare market.

⁸¹ M/18/063 – *Berendsen (Elis)/Kings Laundry*, Tables 14-19, pp. 111-116.

⁸² M/06/027 – *Tetra Laval/Carlisle*, Tables 3 & 4, pp. 19-20.

Laundry, in the CCPC's counterfactual analysis, is expected to grow market share absent the merger, then this suggests that the three divested contracts should be in the upper part of the [10-20] per cent range if not in the low 20s. However, without information on the market share of the three contracts, even in the form of a percentage range, there is no way of judging – in terms of market share – the adequacy of the three divested contracts.⁸³

In sum, it appears that even within the legislative constraints to which the CCPC is subject, more information for healthcare on tendering and on the market share of the three Berendsen contracts to be divested could have been published.

V. Commentary: Merger Analysis - Is the Finding of SLC Justified?

The CCPC's merger analysis is impressive. The CCPC's *Merger Guidelines* are carefully followed. The examination of tendering and diversion ratios is probably more thorough and extensive than in any other previous CCPC merger determination. The issues raised by the parties in response to the CCPC's Assessment are stated and addressed. The CCPC's finding of SLC in the healthcare market is persuasive, even if the remedy – discussed below – is not. Nevertheless, there is one albeit minor issue that is perhaps worth raising.

In considering the impact of the merger the market shares of the parties are added together to derive the merged entity's market share. In the healthcare market it is a three to two merger. Customers, it is argued by the CCPC, like to have two sources of supply.⁸⁴ Hence if pre merger a customer achieved this by sourcing from Berendsen and Kings Laundry, post merger it might achieve this by dual sourcing from the merged entity and Celtic Laundry. In other words, the merged entity might experience some loss of market share as some customers switched to ensure two sources of supply. However, to the extent that dual sourcing reflects the "*importance of reliability and continuity of supply*"⁸⁵ then the merged entity with multiple facilities in the same geographic area, might be able to provide the assurance of reliability and continuity of supply by supplying the customer from both facilities.

VI. Commentary: Remedy - Does it Cure the Competitive Harm?

Introduction

In considering the adequacy of the remedy in the Berendsen (Elis)/Kings Laundry merger the European Commission's *Remedies Notice* standard is followed:⁸⁶

9. ... The commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of

⁸³ The Berendsen (Elis)/Kings Laundry merger determination redacts virtually all quantitative information on the importance of customers in accounting for the business of the merged entity or the healthcare market more widely. (See, for example, M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.367). If the CCPC can publish the market shares of the leading suppliers in the healthcare market it is not clear why similar information cannot also be published with respect to healthcare customers.

⁸⁴ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.312, 4.369 & 4.376.

⁸⁵ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.312.

⁸⁶ EC (2008).

competition on the market will not be maintained until the commitments have been fulfilled.”

The European Commission’s guidance is used in the absence of CCPC remedy guidance. The CCPC cites European Commission cases and guidance, including on remedies, in its merger determinations.⁸⁷

Drawing on the European Commission’s *Remedies Notice* three cumulative criteria need to be satisfied in order for a remedy to be considered successful: a viable/competitive divestment package; a suitable purchaser; and, little or no implementation risk. These three criteria are, of course, interrelated. If the divested business is viable and competitive and there are several suitable purchasers, then it is likely that there will be few, if any, implementation risks. Each criterion is considered in turn.

The Divestment Package

The European Commission considers that *“Divestment commitments are the best way to eliminate competition problems resulting from horizontal overlaps ... ,”*⁸⁸ a position also held by the CCPC.⁸⁹ By divestment the European Commission (and the CCPC) mean a viable and competitive business that can compete with the merged entity. In some instances, the divested business may be confined to the horizontal overlap where the competitive concerns arise,⁹⁰ in others, for various reasons such as establishing a viable business, the divestment package might extend beyond the horizontal overlap to include activities where competition concerns were not identified.⁹¹

The European Commission also considers that the merged entity should not be able to reacquire the divested business. The reasoning of the European Commission is:

“43. In order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business. The commitments will normally have to foresee that no reacquisition of material influence is possible for a significant period, generally of 10 years. However, the commitments can also provide for a waiver allowing the Commission to relieve the parties from this obligation if it subsequently finds that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the common market. Even in the absence of an explicit clause, a reacquisition of the business would violate an implicit obligation on the parties under the commitments as this would affect the effectiveness of the remedies.”

In the Berendsen (Elis)/Kings Laundry merger a divestment remedy confined to the area of overlap where SLC was identified would have been restricted to the healthcare market. If this option was selected then the merged entity would have had to divest itself of a healthcare business capable of replicating Kings

⁸⁷ See, for example: M/07/040 – *Communicorp/SRH*, paragraphs 7.3, 7.4; M/15/020 – *Topaz/Esso Ireland*, paragraphs 94, 95, 107, 152, 153; and, M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.2, 4.49.

⁸⁸ EC, (2008, paragraph 17).

⁸⁹ Andrews, Gorecki & McFadden (2015, pp. 353-354); and, OECD (2012, p. 109).

⁹⁰ See, for example, M/07/040 – *Communicorp/SRH*, where Communicorp divested itself of FM104, a radio station.

⁹¹ See, for example, M/06/098 – *Premier Foods/RHM*, where Premier Foods divested the complete range of products sold under the *Erin* brand, even though competition concerns only applied to a subset of products sold under the *Erin* brand.

Laundry as a competitive force and thus preserving pre merger competition. The divested business might have been, for example, Kings Laundry’s healthcare business. The merged entity would thus have consolidated only the hospitality market operations of Berendsen and Kings Laundry.

There would, however, appear to be difficulties associated with such a divestment package. As the CCPC notes, the

“2.3 ... linen maintenance process is similar in both healthcare and hospitality sectors with the same techniques and equipment used to wash, dry and iron soiled linen returned to customers in both sectors. Thus, linen laundries catering for customers in both sectors tend to process linen in the same facility.”

In the State although there are standalone hospitality facilities, there are no standalone healthcare facilities.⁹² The latter are always combined with a facility that maintains hospitality linen, suggesting that there are economies of scope. It also appears that linen laundries operate a fleet of collection vehicles that collect linen from both sectors.⁹³

A divestment remedy confined to healthcare does not seem feasible.⁹⁴ However, a divestment package that covered more than Kings Laundry’s healthcare operations would appear to involve the divestment of Kings Laundry itself, rather than a subset of its activities. Such a divestment package would raise questions over the practicality of the merger in the first place.

The divestment package in Berendsen (Elis)/Kings Laundry is not the sale of business unit but rather the disposal of three Berendsen healthcare contracts to a third party purchaser approved by the CCPC. These three contracts have to reach a certain – albeit redacted – aggregate value. Should they fail to do so, then additional contracts will need to be divested until the value is reached.

While the divestment package in Berendsen (Elis)/Kings Laundry is not the sale of a business unit as per the European Commission’s preferred option, it is nevertheless worth noting that the European Commission states that *“Other structural commitments may be suitable to resolve all types of concerns if those remedies are equivalent in their effects ...”*.⁹⁵ The issue thus becomes whether or not the disposal of the three Berendsen healthcare contracts is equivalent, in its effects, to the divestment of Kings Laundry’s healthcare operations.

⁹² *“Currently, there are five linen laundries providing outsourced flat linen rental and maintenance services to both healthcare and hospitality sectors in the State. There is no linen laundry focusing on the provision of outsourced flat linen rental and maintenance services to the healthcare sector only. In comparison, in addition to linen laundries operating in both sectors, there are six linen laundries currently focusing on the hospitality sector only in the State.”* M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 3.39.

⁹³ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 2.5.

⁹⁴ There might also be problems in that the Kings Laundry brand would be jointly owned by the divested business and the merged entity. This could lead to difficulties in that if the divested business (or the merged entity) undertook conduct that damaged (enhanced) the Kings Laundry brand that would impact not only on the divested business but also the merged entity. It was because of such externalities, which might be both positive and negative, that in M/06/098 – Premier Foods/RHM the entire range of products sold under the Erin brand were divested rather than the subset where competitive problems were identified.

⁹⁵ EC (2008, paragraph 17).

In making such a judgment there is an inevitable degree of uncertainty reflecting the redactions in the CCPC merger determination concerning the remedy. The aggregate value of the three contracts and the period for which the merged entity will not compete for those contracts are both redacted. Neither the purchaser/three divestment contract period(s) nor the parameters of the alternative package are specified. Furthermore, the CCPC does not report on compliance with merger determination commitments, unlike the UK's Competition and Markets Authority,⁹⁶ so there is (or will be) no record of which package was finally implemented. However, notwithstanding these limitations, there are a number of valid comments that can be made about the three contract divestment remedy.

First, the counterparties to the three contracts are likely to be large well informed healthcare customers, well able to evaluate the state of competition on the healthcare market and pre merger play one healthcare supplier off against another. This inference is based on the fact that the three contracts are likely to be of substantial importance if they are to be the basis of the purchaser replicating Kings Laundry as one of the three significant competitors in the healthcare market.

Second, the purchaser of the three contracts is given a period post merger when the merged entity has agreed that *"it shall not actively solicit healthcare linen business from a customer"* whose contract was divested for a period that is redacted in the CCPC's merger determination.⁹⁷ This is essentially a non-compete clause by the merged entity. The merged entity has undertaken not to actively compete for the divested contracts. Hence for these three customers when procuring healthcare contracts there will be only two bidders: Celtic Laundry and the supplier that purchased the three Berendsen contracts. All other healthcare customers will have the benefit of a third bidder: the merged entity.

Third, typically in divestment remedies the merged entity does not need the permission or sanction of a third party when it disposes of the divestment package, except, of course, the competition agency that is usually required to approve the purchaser. In the Berendsen (Elis)/Kings Laundry merger remedy that is unlikely to be the case. The three contracts that are to be disposed of by the merged entity to a third party almost certainly require the permission of the healthcare customer with whom Berendsen has the existing contract.⁹⁸ Assuming, as seems reasonable, the customer is satisfied with Berendsen's existing service, why would it want to move to another healthcare supplier, especially since this would involve a reduction in their choice of healthcare suppliers from three (pre merger) to two (post merger)?

Fourth, the prospective purchaser of the healthcare contracts may not have a very secure title to these contracts once they expire. As noted above, the merged entity undertakes not to *"actively"* compete for these contracts once they have been divested. Active sales although not defined in the Berendsen (Elis)/Kings Laundry merger determination, are defined by the European Commission as *"actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits."*⁹⁹

⁹⁶ <https://www.gov.uk/government/publications/mergers-orders-and-undertakings>.

⁹⁷ M/18/063 – Berendsen (Elis)/Kings Laundry, Section 9, Clause 8.

⁹⁸ M/18/063 – Berendsen (Elis)/Kings Laundry, Section 9, Clause 5, reads: *"In assessing the suitability of a Third Party Purchaser, the Commission shall accept the decision of a Relevant Customer that its Healthcare Contract can be divested by Berendsen to the relevant Third Party Purchaser"* Note the use of the word *"can."* The CCPC were not prepared to clarify the issue since the divestment process was ongoing. Email exchange 11 May 2020.

⁹⁹ EC (2010, paragraph 51).

Passive sales by the merged entity, however, are not prohibited under the commitments. Passive sales are defined by the European Commission as “*responding to unsolicited requests from individual customers including delivery of goods or services to such customers.*”¹⁰⁰ In other words, there is nothing to prevent the three customers whose contracts have been divested from Berendsen approaching the merged entity for healthcare supplies, once a contract has expired.

Fifth, the European Commission *Remedies Notice* states, as noted above, that the “*commitments will normally have to foresee that no reacquisition of material influence is possible for a significant period, generally of 10 years.*” The CCPC has redacted the non-compete period, but it seems unlikely to be for as long as 10 years. Among healthcare providers 86 per cent of their customer contracts were three years or less, while if attention is confined to large providers, across both the hospitality and health markets, then 90 per cent if customer contracts are three years or less.¹⁰¹ Since the customers whose contracts are to be divested are likely to be larger the latter percentage is relevant.

The upshot of this discussion is that the three contract divestment option is a very poor substitute for the divestment of Kings Laundry’s healthcare business. The counterparties to these contracts have little incentive to switch from Berendsen. Indeed, these three customers have a positive disincentive to switch since post merger their choice of healthcare suppliers will be reduced from three to two. The non-compete clause of the remedy before which the merged entity can actively attempt to reacquire the three divested contracts is unlikely to be the 10 years specified by the European Commission before reacquisition is permitted. In any even if the non-compete clause was 10 years this only refers to active sales. Hence the merged entity is not prohibited from passive sales once the initial contract – typically three years or less - between the purchaser and the customer has expired.

Suitable Purchaser

Three conditions are identified for a suitable purchaser in the European Commission’s *Remedies Notice*:

“48.independent and unconnected to the parties, ... must possess the financial resources, proven relevant expertise and have the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties and other competitors; and ... [not] give rise to a risk that the implementation of the commitments will be delayed.”

Attention will be confined to the second condition.

Based on the CCPC’s detailed and careful analysis of existing competitors to Berendsen, Kings Laundry and Celtic Linen as well as whether or not entry and/or expansion is likely timely or sufficient, there does not appear to be any suitable purchaser – actual or potential - with, for example, “*proven relevant expertise.*” In discussing the merger remedies the CCPC never addresses the stark fact that based on its own analysis there are grave doubts as to the existence of a suitable purchaser.

A critical factor mentioned in the CCPC’s analysis of entry and expansion is the lack of experience in providing healthcare services by the firms surveyed as possible entrants.¹⁰² The three contract divestment

¹⁰⁰ EC (2010, paragraph 51).

¹⁰¹ Amarach Research (2019, Slide 26).

¹⁰² M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.347-4.351.

package does nothing directly to rectify that deficit. While, as noted above, Berendsen offers to furnish some ancillary items such as linen stock as part of the three contract divestment package, no facilities or physical assets (e.g. washers, dryers or trucks) are included, nor is there is any mention of the transfer of key personnel with experience in providing healthcare services.¹⁰³ It is the case that the proposals commit Berendsen to “otherwise assist the Third Party Purchaser [of the three contracts] to enable it to provide the services in respect of the” three contracts.¹⁰⁴ Whether that includes personnel is not specified.¹⁰⁵

Implementation Risks

Once the remedy has been agreed and approved by the CCPC and memorialised as binding commitments the remedy has to be implemented. The risks associated with implementation can be divided into two categories: the remedy is not implemented “within short period of time;”¹⁰⁶ and, the remedy is implemented, but there are ongoing monitoring problems.

But what precisely does timely implementation mean? For the European Commission its *Remedies Notice* provides the answer:

“97. The divestiture has to be completed within a fixed time period agreed between the parties and the Commission. In the Commission’s practice, the total time period is divided into a period for entering into a final agreement and a further period for the closing, the transfer of legal title, of the transaction. The period for entering into a binding agreement is further normally divided into a first period in which the parties can look for a suitable purchaser (the “first divestiture period”) and, if the parties do not succeed to divest the business, a second period in which a divestiture trustee obtains the mandate to divest the business at no minimum price (the “trustee divestiture period”).

98. The Commission’s experience has shown that short divestiture periods contribute largely to the success of the divestiture as, otherwise, the business to be divested will be exposed to an extended period of uncertainty. The time periods should therefore be as short as feasible. The Commission will normally consider a period of around six months for the first divestiture period and an additional period of three months for the trustee divestiture period as appropriate. A period of further three months is normally foreseen for closing the transaction. These periods may be modified on a case-by-case basis. In particular, they may have to be shortened if there is a high risk of degradation of the business’ viability in the interim period.”

In other words, at the end of nine months, one way or another, the implementation of the remedy package should have been agreed.

¹⁰³ The European Commission in its *Remedies Notice* stresses the importance of key personnel in this context (EC, 2008, paragraphs 25 to 27).

¹⁰⁴ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 6(ii).

¹⁰⁵ The CCPC were not prepared to clarify the issue since the divestment process was ongoing. Email exchange with CCPC, 11 May 2020. The obvious key employee is the Berendsen Manager. (M/18/063 – *Berendsen (Elis)/Kings Laundry*, Section 9, Clause 27).

¹⁰⁶ EC (2008, paragraph 9).

The Berendsen (Elis)/Kings Laundry transaction cannot be completed “*unless and until*” the remedy is implemented. Since Kings Laundry anticipates that it will be controlled by Berendsen once the remedy has been implemented, in the meantime it may compete less vigorously against its future owner. Investment decisions might be put on hold. Unless guarantees have been given to key Kings Laundry staff some may switch to other employment opportunities. In European Commission parlance the asset becomes “*degraded.*”¹⁰⁷

As noted above, the CCPC was clearly concerned about implementation risks.¹⁰⁸ Indeed, the CCPC rejected the parties second set of proposals due to such risks. To mitigate the implementation risks the CCPC accepted what the European Commission classifies, in its *Remedies Notice*, as an “*Up-front Buyer:*”

“53. There are cases where only the proposal of an up-front buyer will allow the Commission to conclude with the requisite degree of certainty that the business will be effectively divested to a suitable purchaser. The parties therefore have to undertake in the commitments that they are not going to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business, approved by the Commission.

54. First, this concerns cases where there are considerable obstacles for a divestiture, such as third party rights, or uncertainties as to finding a suitable purchaser. In such cases, an up-front buyer will allow the Commission to conclude with the requisite degree of certainty that the commitments will be implemented, as such a commitment creates greater incentives for the parties to close the divestiture in order to be able to complete their own concentration. In these circumstances, parties may choose between proposing an up-front buyer and an alternative divestiture commitment,”

There can be little doubt that, based on the discussion above concerning the adequacy of the divestment package and the difficulties of finding a suitable purchaser, that the CCPC was right to be concerned about implementation risks. The CCPC followed best practice by accepting the proposal of an up-front buyer as a way to mitigate implementation risks.

The timelines for completion of the process of finding an upfront buyer satisfactory to the CCPC are redacted from the Berendsen (Elis)/Kings Laundry merger determination. The merger determination is dated 8 July 2019. Notwithstanding these redactions, on 8 April 2020, nine months later, the divestment process is still ongoing according to the CCPC.¹⁰⁹ Under the European Commission *Remedies Notice* nine months is at the outer time limit for the timely acceptance of a remedy package.

The European Commission in its *Remedies Notice* also argued that after the initial six months that the divestment package should be sold at no minimum price. The Berendsen (Elis)/Kings Laundry remedy package contains no such clause. Instead, as noted above, if Berendsen is unable to find a buyer for the three healthcare contracts then “*it would enter into discussions with the Commission to identify an alternative package of healthcare contracts that could be divested to an approved third party purchaser(s)*

¹⁰⁷ EC (2008, paragraph 11). It is not possible to assess whether this has occurred, but it is an important general concern expressed by the European Commission in its guidance.

¹⁰⁸ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 1.30-1.38; 5.15-5.18.

¹⁰⁹ The CCPC provided this information to the author in an email dated 8 April 2020.

and that would address the Commission's competition concerns."¹¹⁰ This is likely to prolong the period between the date of the merger determination and completion of the transaction.¹¹¹

Turning next to monitoring there is an issue concerning the distinction between active and passive sales. Assume that a purchaser is found for these three contracts. Since the possession of these three contracts is supposed to turn the buyer into a credible competitor to the merged entity and replicate Kings Laundry in the healthcare market, it seems reasonable to assume that the contracts will be of substantial value. The merged entity is likely to want to reacquire these customer contracts, but is prohibited from active sales.

Suppose the merged entity met a representative of one (or more) of the three divested customer contracts. This could be at an industry trade association meeting or a social gathering. The conversation turns to industry developments. The customer asks the merged entity how business is going, perhaps inviting them to tender for future healthcare contracts. The merged entity is likely to respond by extolling its business success and agreeing to submit a tender. Is this passive or active sales? Will the CCPC be in a position to monitor such behaviour?

Approval of Purchaser

The CCPC, like the European Commission, ensures that the conditions specified in the commitments are complied with before allowing the transaction to be completed. In Berendsen (Elis)/Kings Laundry that means that the CCPC is required to approve the purchaser of the three contracts. The CCPC, in assessing the suitability of the purchaser,

*"may have regard to factors such as its financial resources, expertise in the rental and maintenance of flat linen, contingency planning and whether such Third Party Purchaser is committed to maintaining and developing the Healthcare Contracts (and the healthcare contracts, as the case may be) and being an active competitive force in the healthcare market."*¹¹²

The language is redolent of the European Commission's *Remedy Notice* (paragraph 48). While the list of factors is clearly relevant in view of the CCPC's competitive assessment and the response of customers to the market testing of the second set of proposals, the use of "*may*" rather than "*shall*" is problematic.

No information is provided on a systematic basis by the CCPC concerning whether or not the commitments entered into in a merger determination are satisfied and/or whether or not they are still extant. In the Berendsen (Elis)/Kings Laundry this might mean that the CCPC would publish a reasoned decision as to why the purchaser of the three contracts satisfied the conditions specified above for a suitable purchaser. Such a decision is particularly important when – as is the case in the Berendsen (Elis)/Kings Laundry – the merger remedies are complex and legitimate questions can be raised concerning whether or not they cure the competitive harm identified by the CCPC in the healthcare market.

¹¹⁰ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 5.17.

¹¹¹ The alternative package is not specified in the merger determination nor, not surprisingly, was this package market tested.

¹¹² M/18/063 – *Berendsen (Elis)/Kings Laundry*, Section 9, Clause 4.

The European Commission, in its *Remedies Notice*, sets out the procedural steps and requirements in order for the approval of the purchaser.¹¹³ The European Commission publishes, on occasion, a “*Decision on the Implementation of Remedies – Purchaser Approval*.” This decision uses the framework set out above under “Suitable Purchaser” in approving a purchaser. In clearing General Electric’s purchaser of Alstom (Thermal-Renewable Power Grid Business), for example, certain assets had to be divested and Ansaldo Energia S. pA. (Ansaldo) was considered a suitable purchaser.¹¹⁴ However, it was only after a Reasoned Opinion from a Monitoring Trustee that the European Commission approved Ansaldo as the purchaser. The European Commission’s reasoned decision approving Ansaldo published. It ran to 85 paragraphs.¹¹⁵

The publication of a CCPC reasoned decision on the viability of the purchaser lessens the possibility of a Type II error (i.e., a finding that there was no SLC whereas in fact there was an SLC). It ensures an extra layer of transparency and accountability. Unlike merger reviews by European Commission, those by the CCPC are not subject to third party appeal. The publication by the CCPC of reasoned decisions on the suitability of the purchaser should not impose a significant additional administrative burden on the agency. The CCPC would no doubt draw heavily on the Monitoring Trustee’s report setting out how the CCPC’s “*requirements as to suitability*” had been satisfied.¹¹⁶

Remedy Package: Overview

Having considered all the relevant aspects of the remedy the question of whether or not the divestment of three healthcare contracts is likely to cure the competitive harm occasioned by the transaction can be addressed. The discussion is summarised in Table 2.

Pre merger all healthcare customers benefit from competition between Berendsen, Kings Laundry and Celtic Linen. The Ideal Remedy is that Kings Laundry’s healthcare business is sold to a suitable purchaser. Such a remedy would likely cure the competitive harm. Post merger there would be still be three significant choices for healthcare customers.

The Ideal Remedy is not, however, a feasible option for reasons set out above and need not be rehearsed here. Instead, the Proposed Remedy is the sale of three Berendsen healthcare contracts to a suitable purchaser. In evaluating the Proposed Remedy customers are divided into two groups: the three customers that are the counterparties to the three divested contracts; and, all other healthcare customers. Each group is considered separately.

The number of healthcare suppliers that the three customers have to chose from has been reduced from three to two, since recall the merged entity has undertaken not to actively compete for their business. Typically, healthcare customers like to source from two suppliers for security of supply reasons.¹¹⁷ The reduction in the number of healthcare providers from three to two thus reduces the bargaining power of the three customers. This is likely to lead to an SLC for these three customers, particularly in view of the

¹¹³ EC (2008, paragraphs 101-106).

¹¹⁴ This is a so-called “*Fix-it-first*” remedy by the European Commission (EC, 2008, paragraphs 56-57).

¹¹⁵ https://ec.europa.eu/competition/mergers/cases/decisions/m7278_6893_3.pdf.

¹¹⁶ M/18/063 – *Berendsen (Elis)/Kings Laundry*, Section 9, Clause 23.

¹¹⁷ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.40 (a), 4.369.

CCPC’s view that “*Celtic Linen would have an ability and incentive to raise its prices in response to a price rise by the merged entity.*”¹¹⁸

The extent of the post merger price rise for these three customers will depend on: the length of the non-compete clause entered into by the merged entity as part of the remedy; the initial contract length between these three customers and the purchaser of the contracts from Berendsen; and, the importance of passive sales by the merged entity in reacquiring the divested contracts before the non-compete clause expires. The longer the non-compete clause, other things being equal, the greater the impact on these three customers. However, the shorter the contract the less attractive acquiring the three contracts is likely to be to any would be purchaser.

Table 2
Outsourced Supply of Flat Linen Rental & Maintenance Services to Healthcare Customers, Pre & Post Merger, A Comparison of the Ideal & Proposed Remedies, Ireland.

	Healthcare Providers	
Pre Merger	Berendsen, Celtic Linen, Kings Laundry	
Post Merger	Healthcare Providers/SLC	
<u>Ideal Remedy:</u> Kings Laundry (Healthcare) ^a business divested	Merged Entity, ^a Celtic Linen, Kings Laundry (Healthcare)/No SLC	
	All Customers (Less the Three Divested Customer Contracts)	The Three Divested Customer Contracts
<u>Proposed Remedy:</u> Three Berendsen healthcare contracts divested/not a viable competitor	Merged Entity, ^b Celtic Linen, Purchaser of the Three Contracts/SLC	Celtic Linen, Purchaser of the Three Contracts/SLC

- a. Kings Laundry (Healthcare) is the healthcare business of Kings Laundry, all Kings Laundry’s other activities are merged with Berendsen to form a merged entity.
- b. Merged entity is Berendsen plus the entire Kings Laundry business, less the three Berendsen healthcare contracts which are to be divested under the commitments in M/18/063 – *Berendsen (Elis)/Kings Laundry*.

Source: See text.

Post merger all the other healthcare customers will be able to avail of the services of three healthcare providers: the merged entity; Celtic Linen; and, the firm that purchases the three contracts. If the latter firm is a credible competitor and is able to replace Kings Laundry as a significant force in the healthcare market, then it is likely that these customers will not experience a price rise post merger; if, however, the purchaser of the three contracts is not a credible competitor/replacement for Kings Laundry then a prices will rise. The analysis above suggests that, based on the available evidence, a competitor replicating Kings Laundry is unlikely to emerge, leading to an SLC for this subset of customers.

¹¹⁸ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraph 4.307.

VII. Conclusion

A Merger Determination at War with Itself?

The CCPC has made a compelling case that the three to two Berendsen (Elis)/Kings Laundry merger in the healthcare market will result in an SLC. However, the divestment package of three contracts, based on the available information, will not be sufficient to ameliorate the competitive concerns raised in the CCPC's analysis. Indeed, the remedy package is likely to lead an SLC rather than its mitigation:

- for customers that are the counterparties to the three Berendsen contracts, the remedy will result in a decline in the number of healthcare providers from three pre merger to two post merger. Neither provider is likely to be an especially vigorous competitor;
- for all other healthcare customers, although the number of healthcare providers remains unchanged at three pre and post merger, the evidence suggests that the purchaser of the three contracts is unlikely to replace Kings Laundry as a significant competitive force in the healthcare market; and,
- the failure to implement the remedy within the nine month window deemed appropriate by the European Commission raises concerns that Kings Laundry as a competitive force in the hospitality and healthcare markets will become, in European Commission parlance, “degraded.”

In sum, the commitments do not meet the sensible criteria set out by the European Commission: that they should result in the *“elimination of the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.”*

Is the Remedy Proportionate?

The CCPC prefaces its discussion of remedies by raising the issue of proportionately. It states,

“Kings Laundry accounts for just under [...] % of the healthcare market and so is a significant supplier. However, the Commission notes that Kings Laundry’s healthcare business accounts for less than [...] % of its revenue, while the remaining [...] % of its revenue is generated from its hospitality business. The Commission, therefore, considers that, if the SLC concerns in the healthcare market are capable of being addressed either through proposals or specified conditions, it may not be proportionate to require that the merger may not be put into effect.”¹¹⁹

Of course, the CCPC is correct if the competition concerns expressed in its determination can be successfully resolved through proposals or specified conditions then prohibition would be disproportionate. However, the specified conditions as embodied in the divestment of three contracts in

¹¹⁹ M/18/063 – Berendsen (Elis)/Kings Laundry, paragraph 5.2.

the healthcare market do not address the SLC concerns for reasons set out above. Nonetheless, the issue of proportionality is worth considering.

It could be argued that it would be disproportionate for the merger remedy to cover more than the horizontal overlap in the healthcare market. In other words, any proposals should not include the hospitality operations of Kings Laundry or Berendsen. This is not a sustainable argument.

The European Commission's *Remedies Notice* specifically addresses this issue:

*23. The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. For the business to be viable, it may also be necessary to include activities which are related to markets where the Commission did not identify competition concerns if this is required to create an effective competitor in the affected markets.*¹²⁰

The CCPC has consistently followed the *Remedies Notice* approach. In M/06/098 – *Premier Foods/RHM* the CCPC accepted a remedy that extended beyond the area of concern precisely for the reasons set out by the European Commission.¹²¹ In M/08/009 – *Kerry/Breeo* the CCPC prohibited the merger on the grounds that there was an SLC in three of the nine markets where there was an overlap between the parties.¹²²

Proportionality might also refer to the fact that there may be offsetting efficiencies to a merger which should be set against the anticompetitive harm. The CCPC's *Merger Guidelines* specifically discuss the conditions under which such efficiencies can lead to an otherwise anticompetitive merger being cleared. However, in the Berendsen (Elis)/Kings Laundry merger no arguments were put forward by the parties concerning efficiencies that might flow from the merger.¹²³

Whether or not a merger will lead to an SLC requires a careful evaluation and weighing of the evidence. In some instances, the preponderance of evidence is much stronger for finding an SLC than in other instances. When the evidence is less strong, it could be argued, that it is disproportionate to prohibit the merger. While not commenting on the validity of the argument, in this author's view the evidential base in the Berendsen (Elis)/Kings Laundry merger determination points very strongly to an SLC in the healthcare market.¹²⁴

¹²⁰ The International Competition Network (2016, Section 2.2, p.3) adopts the same approach in its *Merger Remedies Guide*.

¹²¹ See footnotes 91 and 94 above.

¹²² In the successful High Court appeal against the CCPC's prohibition of the Kerry/Breeo merger, the issue of proportionality and prohibition was not argued by the parties. *Rye Investments Ltd v Competition Authority* [2009] IEHC 140.

¹²³ M/18/063 – *Berendsen (Elis)/Kings Laundry*, paragraphs 4.388-4.389. The onus is on the parties to furnish such a case to the CCPC.

¹²⁴ Using market share and the HHI index suggests the greater restriction in competition in Berendsen (Elis)/Kings Laundry than, for example, in Kerry/Breeo. In the former the merged entity would account for [60-70] per cent of the healthcare market, with a post-merger HHI of 5348 and a delta of 1249 (Table 1). The corresponding values in the Kerry/Breeo merger for non-poultry cooked meats were: [45-50] per cent; 2682; and, 979 (M/08/009 – *Kerry/Breeo*, paragraph 6.86 & Table 6.6, p. 88); and, for rashers: [40-50] per cent; 2550; and, 1093 (M/08/009 – *Kerry/Breeo*, Tables 5.1, p. 55 & Table 5.4, p. 57).

Is This Time Different?

As noted in the Introduction the last time that the CCPC issued an Assessment prior to Berendsen (Elis)/Kings Laundry was in the Kerry/Breeo merger more than a decade ago. However, in the latter case the CCPC prohibited the merger. The burden of this paper is that the CCPC should have also prohibited the Berendsen (Elis)/Kings Laundry merger. This raises the issue of whether or not there are any lessons or considerations in the Kerry/Breeo experience that might be relevant in influencing current merger decisional practice of the CCPC.

In Kerry/Breeo although the CCPC prohibited the merger on 28 August 2008, on appeal the High Court overturned the CCPC's prohibition in judgment dated 19 March 2009. The grounds related, inter alia, to the weight that should be given to evidence generated after the merger announcement as compared to before. In April 2016 the CCPC abandoned its appeal to the Supreme Court in part because of the delay (the Supreme Court refused the CCPC's application for a priority hearing) and in part because the CCPC *"agreed satisfactory settlement terms ... relating to the costs of the High Court and Supreme Court proceedings."*¹²⁵

The present case is distinguishable from the Kerry/Breeo case in several important respects that mean it may not be a reliable precedent were the CCPC to have prohibited the Berendsen (Elis)/Kings Laundry merger. First, the CCPC's *Merger Guidelines* were updated in 2013. The guidance that was extant at the time of Kerry/Breeo made no mention of the relative merits of evidence dated before and after the transaction had been announced.¹²⁶ However, the updated guidance states that the *"Commission will give much greater weight to evidence that pre-dates the announcement of the merger under review in comparison to post-merger announcement evidence."*¹²⁷ In the Kerry/Breeo High Court judgment the Court acknowledged the importance of the CCPC's guidance as a framework for merger analysis.¹²⁸ Hence the fact that the *Merger Guidelines* have been updated should give the CCPC much firmer grounds for favouring pre as opposed to post merger announcement evidence as it did in its discussion of the counterfactual in Berendsen (Elis)/Kings Laundry.

Second, in the Kerry/Breeo case some critical evidence was presented late in the merger review period by the parties and the CCPC did not have time to properly investigate and assess the value of the evidence. Some of this evidence was generated after the announcement of the merger. The High Court saw no reason not to accept such evidence at face value.¹²⁹ In Berendsen (Elis)/Kings Laundry the CCPC appears to have been able to evaluate all the evidence put forward by the parties and the arguments made in the Assessment. The difference reflects, amongst other things, the 2014 amendments to the Competition Act 2002 that extended the maximum time that the CCPC had to assess mergers, in part by converting calendar days into working days but without changing the nominal number of days. Hence having insufficient time to review the evidence is much less likely to arise in Berendsen (Elis)/Kings Laundry.

Third, although the High Court dealt reasonably expeditiously with the Kerry/Breeo appeal from the CCPC's determination, there were considerable delays in obtaining a hearing before the Supreme Court.

¹²⁵ For details see: Competition Authority (2013, p. 31); and, CCPC (2016). The quotation is from the latter source.

¹²⁶ Competition Authority (2002).

¹²⁷ CCPC (2014, paragraph 7.11).

¹²⁸ *Rye Investments Ltd v Competition Authority* [2009] IEHC 140, paragraphs 3.10 – 3.12.

¹²⁹ For discussion see Gorecki (2009).

These delays accounted for, in part at least, the CCPC abandoning its appeal from the High Court judgment to the Supreme Court. However, since the Kerry/Breeo merger the Court of Appeal has been created so that appeals from the High Court no longer go directly to the Supreme Court. The Court of Appeal was established on 28 October 2014. The Court was designed in part to reduce the workload on the Supreme Court and thus speed the dispensation of justice. Hence it seems reasonable to assume that any appeal from a High Court decision will be heard more quickly than in Kerry/Breeo. In the Director of Public Prosecutions' appeal from the Central Criminal Court's sentencing in the commercial flooring bid-rigging cartel case to the Court of Appeal judgement was thirteen months.¹³⁰

In sum, the CCPC should have prohibited the Berendsen (Elis)/Kings Laundry merger. The Kerry/Breeo precedent suggests that several of the difficulties experienced the last time that the CCPC prohibited a merger are no longer present.

¹³⁰ The Central Criminal Court is the criminal division of the High Court. The sentencing in the commercial flooring bid-rigging cartel was delivered on 31 May 2017, the Court of Appeal judgment 20 June 2018. While the Court of Appeal dealt with the commercial flooring bid-rigging cartel reasonably expeditiously, the Court's competitive assessment and sentencing methodology are not reassuring. For details see: Gorecki (2019). On the broader issue of the Courts and competition policy in Ireland see Gorecki (forthcoming).

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