



DETERMINATION OF MERGER NOTIFICATION M/06/040 – KEN PETERSON/ LEAP

Section 21 of the Competition Act 2002

Proposed acquisition by Ken Peterson of European Access Providers

Dated 24/07/06

Introduction

1. On 30 June 2006 the Competition Authority (“the Authority”), in accordance with Section 18 (1) of the Competition Act, 2002 (“the Act”) was notified, on a mandatory basis, of a proposal whereby Mr. Ken Peterson would acquire European Access Providers (“Leap”). The acquisition of Leap by Mr. Ken Peterson in May 2005 was not notified to the Authority and was subsequently put into effect.
2. The Authority forwarded a copy of the notification to the Minister and notified the undertakings involved that it considers the acquisition to be a media merger, in accordance with section 23(1) of the Act.

The Undertakings Involved

3. Ken Peterson, the acquirer, has a 100% shareholding in Columbia Ventures Corporation (“CVC”), a United States-based international entrepreneurial investment company that owns and operates a portfolio of telecommunication and manufacturing businesses world-wide. Two of the companies wholly-owned and operated by CVC are Hibernia Atlantic (“Hibernia”) and (“Magnet Networks Limited”) both of which are active in the State.
4. Hibernia is a Dublin-based company which operates a transatlantic submarine fibre optic cable system linking North America to Europe through Ireland and the United Kingdom. It is the only direct fibre-optic link between Ireland and North America and links Ireland with the United States, Canada and the United Kingdom.
5. Magnet is active in the provision of multi-play digital telephony, multi-channel digital television and high-speed broadband with ancillary services in Ireland. Magnet is a limited liability company incorporated in the State and is wholly-owned by CVC Icelandic Holdings which is itself wholly-owned by CVC.
6. At the time of the non-notified and subsequently effected acquisition in May 2005, Leap, the target, was Ireland’s first broadband wireless specialist service provider to the business market serving customers and businesses pursuant to licences held by it in Dublin, Galway, Cork, and Limerick.

Failure to notify on time in breach of Section 18 (1) of the Act

7. The undertakings involved failed to notify the transaction within the time period set out in section 18 (1) of the Act, thus contravening that section.
8. On 05 May 2005, the acquirer entered into an agreement with the target to acquire the entire issued share capital of Leap. Neither on or before 05 June 2005, had either the target or the acquirer notified the transaction to the Authority.
9. The Authority, having fully considered the matter, found insufficient evidence to seek a criminal penalty, as it was not apparent that either Mr. Petersen or any officer of the target knowingly and willfully authorised or permitted the contravention, as required by section 18(11) of the Act

Implementation of the acquisition in breach of Section 19 (1) (a) of the Act

10. Section 19 (1) (a) of the Act states that a merger or acquisition to which section 18 (1) (a) or (b) applies shall not be put into effect until the Authority has so determined. Section 19(2) of the Act states that any such merger or acquisition which purports to be put into effect, where that putting into effect contravenes subsection (1), is void.
11. The Authority is of the view that the acquisition of control by Mr. Ken Petersen from Leap has already been put into effect in contravention of Section 19(1)(a) of the Act. In forming this view, the Authority relies on discussions with and submissions of the undertakings involved both in oral and documented form that the transaction had been put into effect prior to its notification.
12. Section 19(2) does not state whether a merger or acquisition which contravenes section 19 (1)(a), is rendered void for all time, or merely until such time as the Authority makes a determination. Based on a reading of all the pertinent provisions, the Authority is of the view that the section is designed to protect the Authority's right of review and is not intended to render a merger or acquisition void indefinitely.
13. In particular, the Authority notes that section 19(1)(a) does not provide that a clearance determination of the Authority should be subject to section 19(2), giving rise to the inference that the Authority's determination would allow the merger to be implemented, notwithstanding that the prior purported implementation was void.
14. The Authority takes the view that any other interpretation would result in an absurdity: namely, that a completed merger would be void for all time. Therefore, the Authority considers that it can make a determination under section 21 of the Act despite its view that there has been a contravention of section 19(1)(a) and that the notified transaction is thus void. This position is consistent with international best practice.
15. Consequently the Authority considers that in this case the acquisition, which has been put into effect prior to a clearance determination from the Authority, remains void until such time as the Authority issues a clearance determination. The Authority's analysis on competition grounds, leading to its determination, is set out below.

Analysis

16. Both the acquirer's and target's activities overlap in the provision of broadband connection.
17. Magnet's broadband connection is mainly targeted at residential/household customers, while Leap's broadband connection offerings are targeted at Small and Medium Sized Enterprises ("SMEs") and corporate institutions.
18. The undertakings involved have submitted that the combined market share of Magnet and Leap, was less than [...] % at the time of the acquisition.
19. Post-merger, the undertakings involved faced competition from the incumbent operator, Eircom, which had an estimated share of broadband connection to residential/household customers of more than [...] % and more than [...] % for broadband connection for SMEs and corporate institutions respectively.
20. Moreover, there were a range of other providers of broadband connection including Chorus, ntl, MCI, BT Ireland, Irish Broadband and Smart Telecom.
21. Given the number of competitors, the structure of the market and the likely future growth of the market in Ireland the proposed transaction does not give rise to competition concerns.

Determination

The Competition Authority, in accordance with Section 21(2) of the Competition Act, 2002, has determined that, in its opinion, the result of the proposed acquisition by Ken Peterson of European Access Providers will not be to substantially lessen competition in markets for goods and services in the State and, accordingly, that the acquisition may be put into effect.

For the Competition Authority

Dr. Paul K. Gorecki
Member of the Competition Authority