



The Competition Authority

Notice in respect of the review of non-notifiable mergers and acquisitions

Decision No. N/03/001

Date: 30 September 2003

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Article 1

Introduction

This Notice is published by the Competition Authority, 14 Parnell Square, Dublin 1 (“the Authority”), pursuant to the function conferred on it by section 30(1)(d) of the Competition Act, 2002 (“the Act”). Its purpose is to give guidance to businesses and legal practitioners on the Authority’s policies and procedures in relation to the review of mergers and acquisitions that do not meet the statutory reporting thresholds (“non-notifiable mergers”) and that may raise competition issues.

Article 2

Statutory background

Section 18 of the Act requires undertakings to notify mergers and acquisitions that come above certain thresholds.¹ Section 18 also allows mergers and acquisitions below these thresholds to notify voluntarily. Sections 4(8) and 5(3) of the Act exempt mergers notified to and cleared by the Authority from prohibition under Sections 4 or 5, respectively. Where a merger or acquisition has not been notified, Sections 4 and 5 of the Act apply.

¹ Proposed mergers must be notified where the worldwide turnover of each of two or more of the undertakings involved, and the turnover within the State of one of them, is not less than €40,000,000. In addition, each of two or more of those undertakings must carry on business in the island of Ireland. (c.f. section 18(1) of the Act)

Article 3

The Authority's policy

Most mergers do not give rise to any competition concerns. However, a small number, including some that do not meet the notification thresholds, may have the potential to substantially lessen competition in the relevant market or markets.

It is the Authority's policy to seek to prevent implementation of any unnotified merger that would substantially lessen competition in any market in the State. Where such a merger has already been implemented, the Authority may seek to have it reversed.

Article 4

Voluntary notification

Section 18(3) of the Act allows undertakings that do not meet the thresholds for mandatory merger notifications to voluntarily notify proposed mergers and acquisitions, thus giving the undertakings concerned clarity and legal certainty. Parties to any proposed non-notifiable merger and their legal advisers are urged to consider carefully the likely effects upon competition of the proposed transaction and, if concerns are raised, to consider the benefits of notifying it to the Authority. Guidance for assessment will be found in the Authority's Guidelines for Merger Analysis (N/02/004)

Two advantages are derived from notification in doubtful cases:

- The comfort of legal certainty. A notified merger that has been cleared by the Authority is statutorily excluded from the prohibitions in section 4 and section 5 of the Act.
- A decision within a fixed time limit.²

² In straightforward cases, this would be a month. In complicated cases, it can be up to five months

Article 5

Non-notifiable mergers or acquisitions which raise competition concerns

If a non-notifiable merger does not raise competition concerns, failure to notify will not have any consequences for the parties. The Authority considers that notification is undesirable in a case where there are clearly no competition concerns. But where the Authority learns of a proposed merger which in the Authority's view gives rise to *prima facie* competition concerns and which has not been notified, it will contact the parties to enquire whether they intend to notify voluntarily. If the parties intend to notify upon conclusion of the agreement, the Authority will ask for confirmation in writing. The matter will then rest in abeyance until the transaction has been notified. The parties may avail themselves of the Authority's pre-notification service to assist them in preparing their notification.

Article 6

Section 4 and section 5 investigations

If, having been contacted by the Authority, the parties to a non-notifiable merger which raises competition concerns inform the Authority that they do not intend to notify, the Authority will carry out a preliminary inquiry to ascertain whether the opening of a section 4 or 5 investigation ("the investigation") is warranted, followed where appropriate by the investigation itself. At any stage during either the preliminary inquiry or the investigation, the Authority may seek notice of any intention to implement the merger, or an undertaking not to implement it for a certain period. Where necessary, the Authority may issue proceedings seeking an injunction to restrain implementation of the merger. The parties, for their part, may opt to notify the transaction, or undertake that they will notify on completion, at any time during this procedure.³ Such a notification will cause the investigation to cease, and

³ Provided that they have a concluded agreement – see section 18(1) of the Act.

the transaction will be analysed from that point onwards in accordance with the provisions of Part 3 of the Act.

Article 7

Implemented mergers

Where in the Authority's opinion a non-notifiable merger that has already been implemented raises competition concerns, it will conduct an investigation and in appropriate cases invoke the courts' equitable jurisdiction in order to restore the *status quo ante*. This may result in the merger being reversed.

For the Competition Authority

Dr John Fingleton

Chairperson

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