



DETERMINATION OF MERGER NOTIFICATION M/07/029 – NTL/CLANE

Section 21 of the Competition Act 2002

Proposed acquisition of Clane Cable Systems Limited by ntl Communications (Ireland) Limited

Dated 27/06/07

Introduction

1. On 1 June 2007, the Competition Authority, in accordance with Section 18(1)(b) of the Competition Act, 2002 ("the Act"), was notified on a mandatory basis of the proposed acquisition of certain of the business assets (principally the existing analogue network assets and customer contracts) of Clane Cable Systems Limited ("Clane") by ntl Communications (Ireland) Limited ("ntl").
2. As a result of the proposed transaction, ntl proposes to add Clane's retail customers to its business in areas not currently serviced by either the ntl or Chorus networks.
3. The Authority advised ntl and the Minister for Enterprise, Trade and Employment that it considered the proposed transaction to be a "media merger" within the meaning of Section 23 of the Act.
4. The agreement notified to the Authority was concluded on 20 April 2007. The notification was made on 1 June 2007. Consequently, the notification was not made "within one month after the conclusion of the agreement", as provided for by Section 18(1) of the Act, and was thus made out of time.
5. However, ntl satisfied the Authority that its failure to notify on time was not "knowingly and wilfully" authorised or permitted by the person(s) in control of ntl. The Authority therefore concluded that there was insufficient evidence to seek a criminal penalty under Section 18(9) of the Act.

The Undertakings Involved

6. ntl is a wholly-owned subsidiary¹ of UPC Broadband (Ireland) Limited ("UPC"), a holding company that does not trade. UPC's ultimate parent is Liberty Global Inc., an international broadband communications provider of video, voice, and broadband Internet access services, with consolidated broadband operations in various countries, primarily in Europe, Japan and Chile.
7. ntl is incorporated in the State and provides telecommunications services in the State, in particular retail analogue and digital pay-TV

¹ See Merger Determination M/05/024 – Proposed acquisition by UPC Ireland B.V of MS Irish Cable Holdings B.V.

services provided over cable and multipoint microwave distribution system ("MMDS") networks, along with broadband, VoIP and other electronic communications services.

8. The geographic scope of ntl's operations is mainly concentrated in Dublin, Galway and Waterford. ntl has approximately 390,808 customers. For the year ended 31 December 2006, ntl generated turnover of approximately €136,750,000, all of which was generated in the State.
9. UPC also owns another Irish telecommunications provider, Chorus Communications Limited ("Chorus"). Chorus' principal operations are in pay-TV and it offers pay-TV services for mostly residential customers in Ireland, excluding in Dublin, Galway, Waterford and some surrounding areas. Chorus has approximately 203,871 customers. For the year ended 31 December 2006, Chorus generated turnover of approximately €72,246,000, all of which was generated in the State.
10. Clane is owned by two individuals, Sean Phelan and William Beale. Clane provides retail analogue multi-channel pay-TV services to approximately 1,650 residential customers in Clane, Co. Kildare (out of 2,200 homes passed). It does so through individual agreements with homeowners. For the financial year ended 30 June 2006, Clane's turnover was approximately €330,000, all of which was generated in the State.

Analysis

Overlap

11. In the State, both parties procure channels. Both parties also provide retail analogue cable pay-TV services.
12. However, as the Authority has previously held, subsequent to the regional exclusivity conferred on the cable companies in the past, cable operators have not engaged in any "over build" on each others' networks.²
13. The parties have stated that the economics for cable overbuild are very weak, regardless of whether digital or analogue services are offered. The lower the penetration of the homes that the network passes, the lower the return. Furthermore, the parties stated that the cost of building over a cable network in an established area is prohibitively expensive and far greater than network build in green field development areas. The parties contended and the Authority accepts that this is the reason why no cable network has built over another in any part of the State. Furthermore, the parties argued that increasing demands of and obligations to local authorities (e.g. road opening licences, insurance, indemnities, planning issues) and lack of co-operation in terms of way leaves and access to private property make cabling in certain areas financially unattractive.
14. For the reasons outlined above, neither ntl nor Chorus competes with Clane for subscribers, nor do they own or own access to network where Clane is present. Thus, the areas in which these cable companies offer services are distinct.

² *Ibid.*

Product and Geographic Markets

15. In a previous Determination, after conducting a market investigation, the Authority defined the following markets:³
 - i. the procurement of content (channels) for multi-channel pay-TV services ("procurement of channels"). This market can be divided into three segments - the procurement of premium content; the procurement of non-premium content comprising free-to-air terrestrial channels and the procurement of non-premium content comprising UK terrestrial channels and other channels; and
 - ii. the provision of multi-channel pay-TV services, comprising cable, satellite and fibre-to-the-home broadcasting modes. The provision of free-to-air services is not part of this market.
16. In the present case, the parties overlap in the procurement of channels. They also overlap in the provision of analogue cable multi-channel pay-TV services, which is part of the market comprising the provision of multi-channel pay-TV services.
17. The Authority has previously held that both of the markets outlined above should be assessed both on a regional and a national level. Its previous Determination (relating to the acquisition of ntl by Liberty Global) found that there were two separate regional markets, with each of ntl and Chorus competing regionally with BSkyB for both wholesale content and retail pay-TV. Post-consummation of that transaction, the Authority considered that nationally there would be two-player markets in each of wholesale content and retail pay-TV, with the merged entity competing with BSkyB, which offers a national pricing structure and national channel packaging.
18. In the present case, the acquisition affects customers whose homes are not passed by either the ntl or Chorus networks. These customers are outside the regions of both ntl and Chorus. Clane's main competitor in its area is therefore BSkyB.

Competitive Effects – Procurement of Content

19. Clane contracts or has arrangements (mainly informal/undocumented) with channel providers and aggregates this content to offer its channel packages. Clane's procurement activities are therefore extremely limited. These contracts do not form part of the proposed acquisition and post-transaction ntl intends to supply most of Clane's current channels (with minor channel variations) to Clane's customers under its own agreements, until it makes the ntl suite of products available.
20. Due to the limited size and nature of Clane's activities, the Authority considers that the proposed transaction does not raise competition concerns in relation to the procurement of content (channels) for multi-channel pay-TV services in the State.

Competitive Effects – Provision of Multi-channel Pay-TV Services

21. As outlined above, there is no direct competitive overlap between Clane and ntl. Following the proposed acquisition, Clane's customers

³ *Ibid.*

would still have a choice between two pay-TV competitors, ntl and BSKyB (as opposed to Clane and BSKyB).

22. In addition, the proposed acquisition would allow improved and additional services, such as digital, to be made available to Clane's customers in the near future, should they so wish, as part of the ntl/Chorus national upgrade plan. ntl intends to continue the Clane analogue service until it can make the ntl suite of products available to Clane's customers. This is scheduled for September 2007. The Clane analogue service would then be replaced by the ntl analogue package, with additional digital products and services being made available at the same time.
23. This would result in an improved quality of service for Clane's customers and would also allow more effective competition with BSKyB for these households.
24. Thus, due to the lack of overlap between the activities of the parties, the maintenance of current market structure, the competitive conditions that exist in that market and the improved quality of service that would be made available to Clane's customers, the Authority considers that the proposed transaction does not raise competition concerns in relation to the provision of multi-channel pay-TV services in the State.

Ancillary Restraint Issue

25. ntl has acknowledged that Clause 5.3 of the Agreement for the Sale and Purchase of Certain Assets of the Vendor, entitled "Covenant Not to Compete", contains restrictions that are not "directly related and necessary" to the implementation of the proposed acquisition.⁴ As a result, this Clause does not benefit from the protection offered by Sections 4(8) and 5(3) of the Act.

Determination

26. The Competition Authority, in accordance with Section 21(2)(a) of the Act, has determined that, in its opinion, the result of the proposed acquisition of certain assets of Clane Cable Systems Limited by ntl Communications (Ireland) Limited will not be to substantially lessen competition in markets for goods or 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

⁴ See Sections 4(8) and 5(3) of the Act.