



DETERMINATION OF MERGER NOTIFICATION M/09/003- COMMUNICORP/BOXER Sweden/Boxer

Section 21 of the Competition Act 2002

Proposed creation of a full function joint venture by Communicorp Group Limited and Boxer TV-Access AB

Dated 13 February 2009

Introduction

1. On 16 January 2009, in accordance with section 18 of the Competition Act, 2002 ("the Act") the Competition Authority (the "Authority") received a notification of a proposed transaction to put into effect a joint venture between Communicorp Group Limited ("Communicorp") and Boxer TV-Access AB ("Boxer Sweden"). The joint venture is to be carried out by Boxer DTT Limited ("Boxer"). Boxer is owned 50:50 by Communicorp and Boxer Sweden.
2. On 19 January 2009, the Authority advised the parties and the Minister that it considered the proposed transaction to be a "media merger" within the meaning of section 23 of the Act.

The Undertakings Involved

The Joint Venture Partners

Communicorp

3. Communicorp is a media group with radio interests in the State and Eastern Europe. In the State, Communicorp controls Maypril Limited (Spin 103.8), Radio 2000 Limited (Dublin's 98), News 106 Limited (Newstalk 106-108 FM) and Radio Ireland Limited (Today FM). Communicorp also has a 45% shareholding in Spin South West Limited (Spin South West). All these radio stations are active in the sale of radio advertising slots. Radio 2000 Limited has a 15.2% interest in Independent Network News, a company that provides national news services to Ireland's regional and local radio stations.
4. Communicorp also owns 80% of ICAN Limited, a digital advertising and marketing agency located in the State.

Boxer Sweden

5. Boxer Sweden is the digital terrestrial television¹ ("DTT") operator in Sweden. Boxer Sweden is 100% owned by Teracom AB ("Teracom"),

¹ DTT is a broadcasting technology which is similar to traditional analogue terrestrial television in that the signals are transmitted over the air and are received through a rooftop aerial. The main difference between analogue and DTT is that more programme channels and other content can be

a Swedish company entirely owned by the Swedish Government². Boxer Sweden provides pay television channels to DTT subscribers in Sweden. Boxer Sweden's main activities include³:

- entering into distribution agreements with programme makers⁴;
 - testing and approving set-top boxes;
 - cooperating with television and radio specialist retailers on the sale and marketing of set-top boxes and subscriptions to Boxer Sweden's packages;
 - invoicing and collecting subscriptions from customers; and,
 - operating customer service centres.
6. Boxer Sweden recently won the competition to become the DTT operator in Denmark. It will commence operations in Denmark this year.
7. Boxer Sweden has no business activity in the State. Its 50% shareholding in Boxer will become its first business in the State.

The Joint Venture

8. As indicated in paragraph 11 below, Boxer was incorporated to compete for three DTT contracts advertised by the Broadcasting Commission of Ireland (the "BCI"). The BCI awarded, in principle, the DTT contracts to Boxer on 21 July 2008. Once the DTT contracts between Boxer and the BCI have been executed, Boxer will provide multi-channel pay television services to subscribers in the State⁵. Boxer will purchase television and radio content from third parties⁶ and then sell packaged channels to DTT subscribers.
9. Boxer's business plan in the State envisages the commercialisation of the Electronic Programme Guide⁷ and the provision of Internet and telephony based support services to DTT subscribers⁸. Boxer's business plan does not envisage the sale of Internet, telephony or other multi-media services. Boxer will have no involvement in the sale of radio or television advertising.

transmitted over a DTT network. The information received at the viewers' premises is decoded by a set-top box or a receiving device integrated in the television.

² Teracom owns the DTT broadcast network in Sweden and provides platform services to Boxer Sweden. Contractual arrangements are in place between Teracom and Boxer. In Sweden, Teracom also offers an open broadband network for telephony, broadband and television services and network services for data communication.

³ Page 4.8 of Boxer's written submission to the BCI.

⁴ Boxer Sweden is not involved in the production or television content.

⁵ It is anticipated that RTÉ Transmissions Network Limited ("RTÉ ") will provide DTT on a free-to-air basis.

⁶ It is not envisaged that Boxer will produce or commission its own programming for broadcast.

⁷ An Electronic Programme Guide is an on-screen guide to scheduled broadcast television programmes, allowing a viewer to navigate, select and discover content by time, title, channel, genre, etc, by use of their remote control, a keyboard or even a phone keypad.

⁸ To offer other significant 'two way' multi-media services apart from television programming, it would be necessary for Boxer to secure a separate 'return path' frequency allocation from ComReg.

The Joint Venture

10. On 7 March 2008, the BCI advertised a competition for the award of three DTT contracts in the State.
11. Boxer was incorporated in Ireland on 15 April 2008 to apply for the DTT contracts.
12. On 21 July 2008 the BCI awarded, in principle, the DTT contracts to Boxer. Once the DTT contracts have been executed between Boxer and the BCI, Boxer will provide multi-channel pay television services to subscribers in the State⁹. The DTT contracts are currently being negotiated between Boxer and the BCI and have yet to be executed
13. Boxer will purchase television and radio contents from third parties¹⁰ and then sell packaged channels to DTT subscribers. Boxer's business plan in the State envisages the commercialisation of the Electronic Programme Guide¹¹ and the provision of Internet and telephony based support services to DTT subscribers¹². Boxer's business plan does not envisage the sale of Internet, telephony or other multi-media services. Boxer will have no involvement in the sale of radio or television advertising.

The Trigger Event for Notification

14. On 28 July 2008, one week after Boxer was awarded the DTT contracts by BCI, Communicorp and Boxer Sweden contacted the Authority concerning the appropriate trigger date and timing for notifying the proposed joint venture.
15. The proposed transaction raises the question as to when it was notifiable under the Act. Section 18(1) provides, *inter alia*, that a notification shall be made within 1 month "after the conclusion of the agreement" of a proposal to put a merger or acquisition into effect.
16. Section 16(1)(4) provides that the "creation of a joint venture to perform, on an indefinite basis, all functions of an autonomous economic activity" shall constitute a merger (as defined in Section 16(1)(b)).
17. For the purposes of deciding when the 1 month under Section 18(1) runs, a key question is when was an agreement concluded for the purposes of Section 18(1). The answer depends on another key question, namely, whether the agreement in issue creates a full-function joint venture under section 16(1)(4).
18. The Act does not define what is "a full-function joint venture" for the purposes of Section 16(1)(4). The Authority has not issued any guidance on this issue. Nonetheless, on its website (www.tca.ie) the

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¹² To offer other significant 'two way' multi-media services apart from television programming, it would be necessary for Boxer to secure a separate 'return path' frequency allocation from ComReg.

Authority has stated that in respect of certain matters of interpretation which are not covered by the Authority's *Guidance for Merger Analysis* (N/02/004) or *Notice in respect of certain terms used in Part 3 of the Competition Act 2002* (N/02/003 as amended), guidance can be sought from the *Commission Consolidated Jurisdictional Notice* under Council Regulation (EC) No 139/2004 (European Community Merger Regulation ("ECMR")) on the control of concentrations between undertakings (the "Consolidated Notice").

19. Paragraph 105 of the Consolidated Notice is relevant to the facts in the current case:

A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity. Only decisions that go beyond mere formalities and the award of which is typically uncertain qualify for these scenarios. Examples are the award of a contract (e.g., in public tenders), licences (e.g., in the telecoms sector) or access rights to property (e.g., exploration rights for oil and gas). Pending the decision on such factors, it is unclear whether the joint venture will become operational at all. Thus, at that stage the joint venture cannot be considered to perform economic functions on a lasting basis and consequently does not qualify as full function. However, once a decision has been taken in favour of the joint venture in question, this criterion is fulfilled and a concentration arises.

20. Applying Paragraph 105 to the facts of the present case, it is clear that the creation of a full-function joint venture was conditional upon a decision of a third party, namely, the BCI. The question arose as to whether the relevant decision was the decision of the BCI to award in principle the DTT contracts which was made on 20 July 2008, or the execution of the DTT contracts, which as noted above has not taken place. However, given the differences between the merger notification regime under the ECMR and Part 3 of the Act, the consequences of choosing one decision over the other decision are more severe under the Act.
21. By letter dated 4 December 2008, the Authority informed the parties that in its view, the date (21 July 2008) of the BCI decision to award, in principle, the DTT contracts to Boxer was the appropriate trigger date for notification of the full-function joint venture. Therefore, the proposed transaction ought to have been notified to the Authority as a "media merger" under Section 18(1)(b) by no later than 20 August 2008.
22. The Authority acknowledges that there is a genuine question of interpretation of the meaning of Section 16(1)(4) as to when a full-function of a joint venture is created, particularly in circumstances such as those in the instant case, where a decision of a third party was outstanding, and it was not immediately clear what date that decision was made. In the circumstances, the fact that the notification was made outside the prescribed time limit is excusable having regard to the following circumstances:

- The timely contact with the Authority which the parties initiated by raising the interpretation issue almost immediately after they were awarded the DTT contracts;
- The cooperation and helpfulness of the parties in the ensuing discussions with the Authority following the initial contact;
- The novel question of interpretation raised by the present case about the meaning of Section 16(1)(4); and,
- The parties immediate acceptance of the Authority's position conveyed in the letter of 4 December 2008 and the commitment to make a filing forthwith.

Analysis

23. There is no horizontal overlap between the joint venture and the joint venture partners in the State. In the State, Communicorp is mainly active in the radio sector while Boxer will provide multi-channel pay television services to DTT subscribers. Boxer Sweden has no business activity in the State.
24. There will be a minimal vertical overlap between Communicorp and Boxer in the State. The multi-channel pay television services to be provided by Boxer will include radio stations supplied by Communicorp. However, there is no risk of vertical foreclosure as a result of the proposed transaction due to the following:
- (i) Boxer made a commitment to the BCI that it will make its DTT platform available to all radio stations on equivalent terms and for the same fee¹³;
 - (ii) British Sky Broadcasting Group plc ("BSkyB") and UPC Ireland ("UPC") which, together, currently account for over 90% of the pay television market also host radio stations on their platforms¹⁴. BSkyB offers multi-channel pay television services over satellite, while UPC offers similar services over cable and multichannel multipoint distribution service (MMDS).
25. In light of the above, the Authority considers that the proposed acquisition does not raise competition concerns in the State.

Ancillary restraints

26. It is envisaged that the shareholders agreement to be entered into by Communicorp and Boxer Sweden will include non-compete provisions preventing both companies from directly or indirectly engaging in the provision of subscription based television services to final customers in the State for a period of twelve months.

¹³ Section 10 of Boxer's written submission to the BCI.

¹⁴ The market share calculations are based upon the data in Section 5.1 of ComReg's Quarterly Key Data Report (http://www.comreg.ie/_fileupload/publications/ComReg0875.pdf)

27. The Authority considers that these non-compete clauses are directly related and necessary for the implementation of the proposed transaction.

Determination

28. The Authority, in accordance with section 21(2)(a) of the Competition Act, 2002, has determined that, in its opinion, the result of the creation of the full function joint venture Boxer DTT Limited by Communicorp Group Limited and Boxer TV-Access AB will not be to substantially lessen competition in any markets for goods or services in the State and, accordingly, the acquisition may be put into effect, subject to the provisions of section 23(9)(a) of the Act.

For the Competition Authority

Dr. Stanley Wong

Member of the Competition Authority