

ARTHUR COX

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AMENDMENT TO CLASSES OF “MEDIA MERGER” SUBJECT TO MANDATORY NOTIFICATION UNDER IRISH MERGER CONTROL RULES

By PAT O’BRIEN and RICHARD RYAN

EC and Competition Group

Arthur Cox

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On 1st May, 2007, a new Ministerial Order¹ came into force which amends the mandatory notification regime for “media mergers”. The objective of the Order is to reduce the scope of media mergers that are mandatorily notifiable under Irish merger control rules.² Pursuant to a previous Minister Order that entered into force on 1st January, 2003³, all mergers in which one or more undertakings involved carried on a media business⁴ in the State were mandatorily notifiable.

The new Order revokes the 2002 Order and specifies that the following classes of merger or acquisition are mandatorily notifiable to the Irish Competition Authority (the CA) pursuant to Section 18(1)(b) of the Competition Act, 2002:

¹ The Competition Act 2002 (Section 18(5) and (6)) Order 2007 (S.I. 222 of 2007).

² Mergers and acquisitions that meet certain specified financial thresholds set out in Section 18(1)(a) of the Competition Act, 2002 are also mandatorily notifiable to the CA under Irish merger control rules.

³ The Competition Act 2002 (Section 18 (5)) Order 2002 (S.I. No. 622 of 2002).

⁴ “Media business” is defined in the Competition Act, 2002 as:

- (a) a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs;
- (b) a business of providing a broadcasting service; or
- (c) a business of providing a broadcasting services platform.

- mergers/acquisitions involving two or more undertakings which carry on a media business in the State; and
- mergers/acquisitions involving one undertaking which carries on a media business in the State and another party to the transaction carries on a media business elsewhere.

This represents a reduction in the scope of media mergers that are subject to mandatory notification as now at least two of the undertakings involved must carry on a media business in Ireland or elsewhere.

In practice, the prior regime gave rise to mandatory notifications of many foreign to foreign mergers with very little or no nexus to Ireland or effect on media plurality in Ireland. For instance, several transactions between large multinational companies with diversified portfolios holding a media business in Ireland and companies in completely unrelated sectors of activity were considered to be “media mergers” under the prior regime and, therefore, mandatorily notifiable. GE’s acquisition of Zenon is one such example⁵. As GE owns CNBC news broadcasting network, it was deemed to carry on a media business in the State, thereby making every merger and acquisition in which it was involved in on a worldwide basis, including its proposed acquisition of Zenon (a Canadian water treatment facility) in 2006, subject to mandatory notification as a “media merger”.

The CA recognised that the “catch-all” provision went too far in this regard in its 2006 Annual Report by questioning whether the assessment of these mandatory notifications was: *“a sensible use of the Minister’s or the Competition Authority’s resources as such transactions would not be mandatorily notifiable were it not for the provisions of SI No.622 of 2002.”*

The CA has welcomed the Order since, although it does not resolve entirely the difficulties it has highlighted in this area, it goes some way towards implementing its submitted suggestions for narrowing the scope of media mergers to be notified on a mandatory basis.

⁵ Competition Authority Determination No. M/06/023.