



## **DETERMINATION OF MERGER NOTIFICATION M/08/010 - IFP/C&D FOODS**

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### **Section 21 of the Competition Act 2002**

#### **Proposed acquisition by Irish Food Processors and Philip Reynolds of a jointly controlling interest in C&D Foods Group Limited**

**Dated 11/04/08**

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### **Introduction**

1. On 20 March 2008, the Competition Authority ("the Authority"), in accordance with section 18(1)(a) of the Competition Act 2002 was notified on a mandatory basis of the proposed acquisition by Irish Food Processors ("IFP") of a jointly controlling interest in C&D Foods Group Limited ("C&D Foods"), with Philip Reynolds.

### **The Undertakings Involved**

#### ***The Acquirers of Joint Control***

2. IFP is acquiring joint control of C&D Foods. It is active in the UK and Ireland in a range of beef and other meat processing-related activities, including through Anglo Irish Beef Processors (the Irish meat division of IFP). The principal sector in which IFP is active is in relation to the processing of beef products including round, loin, forequarter, frozen burgers, fresh and frozen sausage, meat filled pies and offal. In addition, IFP has recently established an agri-energy business and is developing a bio-diesel-based business in the UK and Ireland. In the financial year ended 31 March 2007, IFP had a worldwide turnover of approximately €[...] and a turnover of €[...] in the State.
3. Philip Reynolds is moving from a position of sole control of C&D Foods to a position of joint control. As well as currently being the sole owner of C&D Foods, he has another controlling interest in Nutrition Research Limited, a patent holding company. This company owns a patent for a food process, from which it received no royalty income in the last financial year. As such, his position as an "undertaking involved" will not be further analysed in this Determination.

#### ***The Target***

4. C&D Foods is active in the manufacture of pet foods generally and particularly wet cat food, wet dog food, dry cat food and dry dog food. It also produces, in small amounts, other types of pet food such as fish food and small animal food (e.g. rabbit food). C&D Foods is located at Edgeworthstown, Longford, where it manufactures wet cat food and wet dog food. Its manufacturing facility for dry cat food and dry dog food is in Driffield, Yorkshire, UK. C&D Foods sources a range of ingredients including pork, beef, lamb, fish, wheat, barley, maize and chicken to produce its wet and dry cat and dog foods. C&D Foods does not product any of its own brands in the State, where it manufactures

all of its produce for its customers' own-brand labels (Tesco, Dunnes and Aldi). C&D Foods in the UK does sell small amounts under its own brand "Pascoes", but no such sales are made into the State. For the financial year ended 31 December 2007, C&D Foods generated turnover of approximately €[.], of which approximately €[.] was generated in the State. The majority of its turnover was generated in the UK.

## **Analysis**

5. Since IFP is active in the processing of beef and C&D Foods manufactures pet foods, there is no horizontal overlap between the activities of the parties, either in the State or elsewhere.
6. In terms of vertical overlap, IFP and C&D Foods operate at different levels of the supply chain in that IFP processes beef products while C&D Foods produces pet foods (of which beef products represent one input). IFP does not supply product to C&D Foods, although the parties informed the Authority that it is likely that post-transaction, C&D Foods would begin to purchase some beef products from IFP.
7. C&D Foods does not use beef products from the State in its production of dry cat and dog foods (which are produced in the UK). As regards its wet dog and cat foods, which are produced in Ireland, beef represents approximately [20-30]% of the total volume and [10-20]% of the value of offal used.
8. In analysing a non horizontal merger such as the instant case, the key question is whether or not either of the undertakings involved has market power in any of the vertically related markets in which they operate.<sup>1</sup> Such market power is a necessary but not a sufficient "prerequisite for competitive harm from foreclosure." An anticompetitive effect of the transaction is only present if the merged entity has the ability and incentive to foreclose<sup>2</sup> a product/service from its competitors and if this results in demonstrable harm to consumers.

## **Input Foreclosure**

9. Paragraph 31 of the European Commission's *Guidelines on non horizontal mergers*<sup>3</sup> ("NHM Guidelines") defines input foreclosure as follows: "Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger."
10. In the instant case the issue is whether the merged entity would have (a) an incentive and (b) the ability to foreclose access by the

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<sup>1</sup> The Authority considers that it is not necessary to define the relevant product and geographic markets in the present case, since the proposed acquisition does not raise competition concerns.

<sup>2</sup> Two separate types of foreclosure are examined – input foreclosure and customer foreclosure. These are examined in more detail below.

<sup>3</sup> European Commission 2007, *Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings*.

<http://ec.europa.eu/comm/competition/mergers/legislation/legislation.html>

competitors of C&D Foods to processed beef products and (c) if so, whether such a strategy would have a significant detrimental effect on competition downstream. For input foreclosure to be a concern, the merged entity must have a significant degree of market power in its upstream activity.

11. IFP's internal estimates suggest that it has a market share of approximately [20-30]% in relation to beef processing in the State, with the market shares of various competitors being as follows: Dawn Meats ([20-30]%), Kepak ([10-20]%), Liffey Meats ([<10]%), Kildare Chilling ([<10]%) and Slaney Meats ([<10]%). The Authority confirmed from its investigation that the competitors of C&D Foods have various alternative sources of supply of beef products. This leads to the conclusion that the merged entity would not have the ability to foreclose access to processed beef products. It is therefore unnecessary to consider the other aspects of the test.

### **Customer Foreclosure**

12. The issue of customer foreclosure relates to the possible anticompetitive activities of the merged entity in the downstream market. More specifically the *NHM Guidelines* define customer foreclosure as follows:

Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete... (Paragraph 58)

When considering whether the merged entity would have the ability to foreclose access to downstream markets, the Commission examines whether there are sufficient economic alternatives in the downstream market for the upstream rivals (actual or potential) to sell their output. For customer foreclosure to be a concern, it must be the case that the vertical merger involves an undertaking which is an important customer in the downstream market. If, on the contrary, there is a sufficiently large customer base, at present or in the future, that is likely to turn to independent suppliers, the Commission is unlikely to raise competition concerns on that ground. (Paragraph 61)

The Authority's investigation has revealed that there are "sufficient economic alternatives in the downstream market for the upstream rivals" that prevent customer foreclosure arising in this case. This is because C&D Foods estimates that the share of third parties for whom it manufactures wet cat food in the State is [<10]%, for wet dog food [<10]%, for dry cat food [<10]% and for dry dog food [<10]%. The parties informed the Authority that the percentage shares of Master Foods in these various sectors range from 35-58%, for Nestle 20-40%, for Red Mills/Irish Dogfood 4-17% and for Mackle Petfoods 2-10%. In addition, as a negligible proportion of IFP's output (less than [10]% by value) goes to the pet food sector, it is [a subsidiary] part of IFP's business and as such, the merged entity would have little incentive to foreclose the downstream petfood sector to IFP's rivals.

13. In light of the fact that neither input nor customer foreclosure will arise as a result of the proposed transaction, the Authority therefore considers that the proposed transaction does not raise competition concerns.

### **Ancillary Restraints**

14. Several agreements annexed to the notification contain restraints upon the notifying parties. The Share Purchase Agreement, a Joint Venture Agreement and various Option Agreements provide for two-year non-compete clauses (except in the case of the Joint Venture Agreement, which lasts for the life of the agreement) restricted by geographic area and by activity, on either or both of IFP and Philip Reynolds (depending on the relevant agreement). These clauses come into effect either on the completion of the agreements, or in the case of the Option Agreements, upon the relevant sale of shares.
15. The parties have satisfied the Authority that the restraints set out in the agreements are directly related and necessary to the implementation of the proposed transaction. The parties informed the Authority that the restraints are vital to ensure that IFP and Philip Reynolds can successfully operate the proposed joint venture. IFP would not have acquired its interest without all of the restraints and, similarly, Philip Reynolds would not have entered into the proposed joint venture with IFP without all of the restraints. The restraints protect the value transferred to the joint venture and justify the investment made in it. The parties highlighted to the Authority that the Option Agreements are an entirely indivisible part of the overall proposed joint venture and as such, appropriately limited restraints were entered into to protect the value of any exercised option.

### **Determination**

16. The Competition Authority, in accordance with Section 21(2)(a) of the Competition Act 2002, has determined that, in its opinion, the result of the proposed acquisition by Irish Food Processors of a jointly controlling interest in C&D Foods Group Limited with Philip Reynolds 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