Coimisiún um Iomaíocht agus Cosaint Tomhaltóirí

Competition and Consumer Protection Commission

DETERMINATION OF MERGER NOTIFICATION M/15/074 - EIR / SETANTA

Section 21 of the Competition Act 2002

Proposed acquisition by eircom Limited of sole control of Setanta Sports Channel Ireland Limited and certain assets and the business of Setanta Sports Hibernia S.à.r.l.

Dated 29 January 2016

Introduction

1. On 18 December 2015, in accordance with section 18(1) of the Competition Act 2002, as amended[1] ("the Act"), the Competition and Consumer Protection Commission (the "Commission") received a notification of a proposed transaction whereby eircom Limited, which trades as eir ("eir"), would acquire sole control of Setanta Sports Channel Ireland Limited ("Setanta Ireland") and certain assets and the business of Setanta Sports Hibernia S.à.r.l. ("Setanta Hibernia") from Setanta Sports Broadcasting Limited ("SSBL").

2. Given that each of eir and SSBL carries on a "media business" within the State (as defined in section 28A(1) of the Act) the proposed transaction constitutes a "media merger" for the purposes of Part 3A of the Act.

The Proposed Transaction

3. Following the implementation of the proposed transaction, eir would have sole control of Setanta Ireland and certain assets and the business of Setanta Hibernia. The proposed transaction is to be implemented pursuant to:

   (a) a share purchase agreement ("SPA"), between eir, SSBL and Warrantors[2] for the acquisition of the entire issued capital of Setanta Ireland, and

   (b) an asset purchase agreement ("APA") dated 4 December 2015 between eir, SSBL and the Warrantors[3] for the acquisition of certain assets and the business of Setanta Hibernia.[4]

[1] It should be noted that the Competition and Consumer Protection Act 2014 made a number of important amendments to the merger review regime set out in the Competition Act 2002.

[2] [...].

[3] [...].

[4] The APA refers to the "*going concern*" assets of Setanta Hibernia.

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The Undertakings Involved

eir

4. eir, a private limited company registered in Jersey and with its principal place of business in Heuston South Quarter, Dublin, is involved, primarily in the State and also in the UK,[5] in the telecommunications sector and also, since January 2014, in the television broadcasting sector within the State. eir is a wholly-owned subsidiary of Eircom Holdings (Ireland) Limited which in turn is part of the eir group of companies ("eir Group").[6]

5. In the telecommunications sector, eir is a supplier of broadband, fixed line telephone and mobile telephone services to retail customers (i.e., individuals, households and businesses) through its eir, Meteor and eMobile brands. Eir is also a wholesale supplier of fixed line voice and broadband networks to telecommunications and television companies (e.g., Vodafone, Virgin Media and Sky) that supply services to retail customers.

6. eir is also involved in the broadcasting of television channels, on its internet protocol television ("IPTV") broadcasting platform[7] under its "eir Vision" brand. eir Vision television packages include a basic TV package, which includes over 50 channels, and other packages, which offer additional channels such as sports or movies, or which include other features such as broadcasting to more than one viewing device, high definition channels or offering a viewing on demand ("VOD") service. eir supplies its eir Vision television service to its customers in conjunction with its other telecommunications products and services, in particular its broadband services.

7. Eircom is subject to regulation by the Commission for Communications Regulation ("ComReg") with respect to its activities in the telecommunications (in particular its fixed line voice and broadband networks) and television broadcasting sectors.

8. For the financial year ending 30 June 2015, eir Group's worldwide turnover was approximately €1.249 billion, of which €[…] billion was generated within the State.

SSBL, Setanta Hibernia and Setanta Ireland

9. SSBL, a private limited company headquartered in Dublin City, is involved in the acquisition, production and distribution of television content and in the operation of subscription-based sports channels for broadcast in the State through its wholly-owned subsidiaries Setanta Ireland and Setanta Hibernia.

10. SSBL, through its subsidiaries Setanta Ireland and Setanta Hibernia, controls the television content rights for distribution of the Setanta Ireland and Setanta Sports 1

[5] eir is authorised by the Office of Communications (Ofcom) to provide electronic communications services in the United Kingdom including Northern Ireland. The services are outsourced telecommunications services such as the provision of virtual private networks and fixed and mobile broadband and voice services. The services are not related to the proposed transaction or the television sector.

[6] Eircom Holdco SA, a company incorporated and registered in Luxembourg, is the ultimate parent company of the eir Group. For more information on eir see <https://www.eir.ie>

[7] IPTV television refers to internet protocol television content supplied via the internet.

channels[8] as well as the BT Sport 1, BT Sport 2, BT/ESPN and BT Europe channels for which it holds the broadcasting rights in Ireland.[9] These channels (collectively, the "Setanta Sports channels") are offered together as a so-called "bouquet" to broadcasting platform operators (e.g. eir, Virgin Media and Vodafone), which then supply the channels to their own retail customers. Setanta Hibernia also supplies the Setanta Sports channels directly to viewers on Sky's satellite platform.

11. Content available on these six Setanta Sports channels includes Premier League Football, Football Association (FA) Cup, Champions League, Europa League, top flight European football from Germany, Italy and France, and the League of Ireland. Other sports shown on these channels include European Champions Cup Rugby, Aviva Premiership Rugby, UFC, Formula One, Allianz National Leagues and GAA.[10]

12. Setanta Ireland is subject to regulation by the Broadcasting Authority of Ireland ("BAI"). Setanta Sports is licenced to operate under section 71 of the Broadcasting Act 2009.[11]

13. For the financial year ending 31 December 2014, SSBL's worldwide turnover was approximately €[…] million, of which approximately €[…] million was generated within the State.[12]

Rationale for the Proposed Transaction

14. In the notification, the parties state that:

> *"eir's objective with the Transaction is to improve eir's competitiveness across its core activities including, in particular, the provision of fixed broadband access to consumers. As bundles of services (including "triple play" bundles of voice, broadband and TV services and "quad play" including mobile) become increasingly important and eir's main competitors include key operators of international scope (Sky and Virgin Media), which are strong both in pay TV and broadband, developing a credible content-led proposition is critical to retaining eir's existing, and acquiring new, broadband customers.*
>
> *… In particular, the Transaction will allow eir to secure, in the short term, attractive content and develop appealing bundle propositions for existing and new broadband customers. Long term, the Transaction gives eir the backbone of content-centric capabilities enabling eir to develop further content-led bundled offerings and to leverage eir's investment in its high speed next generation access network."*[13]

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[8] For more information on content available on Setanta Sports see <https://www.setanta.ie>.
[9] These rights include High Definition (HD) options.
[10] SSBL states, in correspondence with the Commission dated 25 January 2016, […].
[11] The BAI, established on 1 October 2009 under the Broadcasting Act 2009, regulates content across all broadcasting within the State. Two types of licence are issued by the BAI: (a) television programme service contract, under section 70 of the Broadcasting Act 2009, and (b) content provision contract, under section 71 of the Broadcasting Act 2009.
[12] SSBL states, in correspondence with the Commission dated 25 January 2016, […].
[13] Notification page 8.

Third Party Submissions

15. One third party submission was received which raised concerns about the effect of the proposed transaction on competing broadcasting platforms and new entrants to the television broadcasting sector. In essence, two related concerns were raised:

    (a) The merged entity would have an incentive to harm competing broadcasting platforms, e.g., by imposing prohibitive commercial terms for broadcasting of the Setanta Sports channels.

    (b) The merged entity would have the ability and incentive to leverage its dominance in other telecommunications markets[14] to harm competing broadcasting platforms.

16. The Commission, as part of its review of the proposed transaction, has taken account of the points raised in the third party submissions, which are dealt with, in particular, in paragraphs 37-41 of this determination.

Television Broadcasting Sector

17. The Commission has recently examined the television broadcasting sector in *M/15/039 - Liberty Global/TV3* and *M/15/069 ITV/UTV.*[15] In its determinations in each of those cases, the Commission considered that the television broadcasting sector could be described as a supply chain involving television content, television channels, broadcasting platforms and television viewers.

18. Television content refers to (i) the production and recording of programmes for subsequent broadcast and viewing and (ii) the production of live programmes. Television channels acquire the rights to television content and arrange this content into a schedule of programmes to be shown at particular times.[16] Television broadcasting platforms provide the infrastructure whereby television content is broadcast to viewers. Television broadcasting platforms and television channels enter into carriage agreements which set out the terms and conditions on which channels can be broadcast. Television viewers are the final consumers of television programmes and advertisements broadcast on television.

Competitive Analysis

19. There is a minor horizontal overlap in the activities of the parties with respect to the broadcasting of television channels on broadcasting platforms in the State. As described above in paragraph 10, Setanta Hibernia broadcasts the Setanta Sports channels on Sky's satellite infrastructure only. This overlap is not significant.[17]

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[14] See <http://www.comreg.ie/_fileupload/publications/ComReg1489.pdf>.

[15] See, in particular, paragraphs 21-37 of *M/15/039 – Liberty Global/TV3*, at <http://www.ccpc.ie/enforcement/mergers/merger-notices/m15039-liberty-global-tv3>.
See also <http://www.ccpc.ie/enforcement/mergers/merger-notices/m15069-itv-utv>.

[16] This form of broadcasting is called "linear" television, as distinct from "non-linear" television services which are available to viewers at times other than scheduled linear services.

[17] SSBL's involvement in broadcasting television channels is limited only to the Setanta Sports channels which are broadcast using Sky's satellite platform. The parties estimate, on the basis of ComReg's Quarterly Key Data Report, Q3 2015, 10 December 2015, ComReg 15/130, that Setanta Sports channels, though SSBL's arrangement with Sky, have a market share of approximately 2%

20. There is a vertical relationship between the parties with respect to carriage by eir Vision of the Setanta Sports channels or, in other words, the supply of the Setanta Sports channels to eir Vision.

21. The Commission's analysis of the proposed transaction has considered the extent of the vertical competitive effects that might arise from this relationship. This has involved an analysis of:

(i) Relevant product and geographic markets i.e. the markets where competitive effects are most likely to arise.

(ii) The implications for the merged entity and competing television channels and broadcasting platforms, in particular the extent of vertical effects that might arise following the implementation of the proposed transaction.

(iii) The implications for the merged entity and its competitors from the bundling of television services (e.g., broadband, fixed line phone services and mobile phone services) given the position of eir in the market for fixed line telecommunications services (voice, data and broadband).

22. The purpose of this analysis is to assess whether the proposed transaction will lead to a substantial lessening of competition within the State.

Market Definition

23. The Commission defines markets to the extent necessary depending on the particular circumstances of a given case. For the reasons explained below, in this instance, it is not necessary for the Commission to define precise product or geographic markets because the Commission's conclusions would remain the same regardless of whether:

(a) The market for the supply of television channels is defined as a single market or distinguished into separate markets for:

(i) Free to air ("FTA") and pay-TV markets, or

(ii) Content categories (in particular, sports channels).

(b) The market for the supply of broadcasting platforms is distinguished into separate markets on the basis of technologies[18].

24. In its determination in M/15/039 *Liberty Global / TV3,* the Commission did not consider it necessary to distinguish separate markets for the supply of broadcasting platforms on the basis of particular technologies. The Commission considers there are no reasons to depart from that view in this instance.

25. The choice of geographic market will not materially alter the competitive impact of the proposed transaction in the State. Consequently, the Commission is of the view that

in a market for the broadcasting of pay TV channels to retail customers (Notification page 29). Given the limited extent of this overlap, the competitive effects of this horizontal overlap are not discussed further in this Determination.

[18] The main television broadcasting platforms are: digital terrestrial television, satellite (also referred to as Direct to Home), cable, IPTV, the internet more generally and mobile technologies (e.g. 3G and 4G mobile phones).

the issue of the appropriate geographic market can be left open in this instance, although the competitive impact will be assessed by reference to the State.

26. For the purposes of reviewing the proposed transaction the Commission has examined the possible competitive effects of the proposed transaction within the State in relation to (i) the supply of all television channels and (ii) the supply of pay–TV sports channels.

Competitive Effects Analysis

27. The Commission's analysis focuses on the vertical competitive effects of the proposed transaction. As already indicated, at present, eir is licensed to broadcast the Setanta Sports channels in the State or, in other words, SSBL supplies the Setanta Sports channels to eir. SSBL also supplies these channels to other broadcasting platform providers.

28. The Commission's review of vertical competitive effects focuses on television broadcast rights and in particular on how the proposed transaction might affect:

- Competition between the merged entity and competing television channels.
- Competition between the merged entity and competing broadcasting platforms.

29. Chapter 5 of the Commission's Merger Guidelines[19] sets out the framework for the Commission's analysis of such vertical effects:

(a) Input foreclosure, whereby the merged entity harms downstream competitors - i.e., in this instance whether the merged entity will, upon completion of the proposed transaction, reduce or eliminate the ability of competing broadcasting platforms to acquire broadcasting rights for the merged entity's television channels (i.e., the Setanta Sports channels), and

(b) Customer foreclosure, whereby the merged entity harms upstream competitors – i.e., in this instance whether the merged entity will, upon completion of the proposed transaction, reduce or eliminate the ability of competing television channels to have their television channels broadcast on the merged entity's broadcasting platform.

30. As discussed below, a credible theory of harm for either input or customer foreclosure requires that, the merged entity will have (i) the ability and (ii) an incentive to foreclose competitors downstream (i.e., broadcasting platforms in this instance) or upstream (i.e., television channels in this instance) as a result of the implementation of the proposed transaction. The ability to foreclose competitors requires that the merged entity has market power in one or both markets. The incentive to foreclose competitors depends on the expected return to the merged entity from doing so.

[19] Guidelines for Merger Analysis, adopted by the Competition and Consumer Protection Commission on 31 October 2014 (the "Merger Guidelines"). See <http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf>.

Input Foreclosure

31. Input foreclosure would involve the merged entity harming competing broadcasting platforms by blocking or otherwise restricting the access of competing broadcasting platforms to broadcast the Setanta Sports channels.

32. Chapter 5 of the Commission's Merger Guidelines states:

> *"The ability of a merged entity to harm a downstream competitor through input foreclosure depends on various factors. … foreclosure will be more likely to harm a downstream competitor if the input cannot be readily substituted with other inputs. …The incentive to foreclose downstream competitors depends, all things being equal, on the balance between (i) reduced profits from discontinued upstream sales of inputs to downstream competitors and (ii) increased downstream profits from the sale of the merged entity's products. "*[20]

33. Within a market for the supply of all television channels (i.e., including pay-TV and FTA channels) in the State, the Setanta Sports channels would have a market share of less than 5%.[21] By comparison, and as noted by the Commission in its determination in *M/15/069 – ITV/UTV*, the market share within the State for all RTE channels is approximately 28% and approximately 13% for all TV3 channels (including 3e). The low market share of the Setanta Sports channels indicates that the merged entity would have neither the ability nor the incentive the ability to engage in input foreclosure (i.e., to restrict the ability of competing broadcasting platforms to broadcast the Setanta Sports channels).

34. Within a narrower market for the supply of pay-TV channels in the State, the parties estimate that, of those customers subscribing to pay-TV sports channels, approximately [80-85]% are subscribers to Sky Sports channels and the remaining approximately [15-20]% are subscribers to the Setanta Sports channels. Further, the parties estimate that there are approximately […] subscribers to Sky Sports channels of which:

- approximately […] (approximately [75-80]%) are subscribers to Sky TV,
- approximately […] (approximately [15-20]% are subscribers to Virgin Media, and
- approximately […] (approximately [0-5]%) are subscribers to eir Vision. [22]

35. In comparison, SSBL states that there are approximately […] subscribers to the Setanta Sports channels of which:

- approximately […] (approximately [65-70]% are subscribers to Sky TV,
- approximately […] (approximately [25-30]%) are subscribers to Virgin Media, and

[20] See <http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf>. Page 26.
[21] This figure is based on AC Nielsen analysis of data for 2015.
[22] SSBL states, in correspondence to the Commission dated 25 January 2016, […].

- approximately […] (approximately [0-5]%) are subscribers to eir Vision.[23]

36. The figures presented above, particularly the breakdown of Setanta Sports channels subscriptions by broadcasting platform, indicate that the merged entity would have neither the ability nor the incentive to engage in input foreclosure (i.e. restricting the ability of competing broadcasting platforms to broadcast the Setanta Sports channels). In particular, only approximately [0-5]% of the total number of subscribers to the Setanta Sports channels view those channels on eir Vision. This limited market share indicates that eir does not enjoy market power in this market. Furthermore, an input foreclosure strategy would likely result in a significant loss of revenue from competing broadcasting platforms acquiring the rights to broadcast the Setanta Sports channels. This would act as a disincentive to the merged entity to attempt to engage in an input foreclosure strategy.

37. A further theory of harm involving input foreclosure, as mentioned in the third party submission, concerns the selling of television services as part of a wider bundle of products, such as fixed and mobile telephone services and broadband services. For example, it is alleged that the merged entity would have the incentive to use eir's currently strong positions in fixed line voice services and broadband services to increase prices to competitors of essential inputs for competing IPTV television services.

38. The ability to engage in such behaviour is, however, curtailed by regulation. ComReg has imposed regulatory obligations on eir, including an obligation to not "unreasonably bundle" telecommunications services it offers to retail customers when that bundle includes certain regulated services.[24] In practice, this means that eir is subject to pricing obligations with respect to certain bundled services and must satisfy a Net Revenue Test ("NRT") i.e., the revenue from the bundle must cover the long run average costs of the bundle.

39. In correspondence with the Commission dated 22 January 2016, ComReg states that:

> *"The objective of this obligation was and is to facilitate the development of effective competition and to militate against the risk of eir leveraging its dominance from one market into another."*[25]

40. ComReg also states that when unregulated services such as mobile or television are included in a bundle, those services must cover their own Long Run Incremental Costs ("LRIC").[26]

41. The Commission considers that the current regulation of eir by ComReg is sufficiently robust to ensure that the proposed transaction will not result in a substantial lessening of competition in the supply of broadcasting platforms in the State as a result of eir

[23] These figures are taken from correspondence between SSBL and the Commission dated 25 January 2016.

[24] ComReg has found eir to have significant market power in the supply of retail access to fixed line telephone networks. See <http://www.comreg.ie/_fileupload/publications/ComReg1489.pdf>.

[25] ComReg states that in the absence of the NRT requirement there is a significant risk that eir could cause a margin squeeze against competitors supplying retail customers. That is, by reducing the difference between (a) retail prices and (b) the wholesale prices for inputs to competitors to the point unprofitably, competitors will not be able to remain in the market.

[26] ComReg states that in exceptional circumstances where, in ComReg's view, the bundling of the unregulated service will not have a significant impact on competition, ComReg will consider the use of the standard of average avoidable, i.e. non-sunk, costs in the assessment of unregulated services.

attempting to use its market position in fixed line telephone networks to implement an input foreclosure strategy to the detriment of competing broadcasting platforms.

42. Finally, at present Setanta Sports channels are available on broadcast platforms that compete with eir. The parties also state that, following the completion of the proposed transaction, the Setanta Sports channels will continue to be available on each of Sky, Virgin Media and Vodafone.[27]

Customer Foreclosure

43. Customer foreclosure involves the merged entity harming competing television channels by either not acquiring broadcasting rights from competing channels, or offering low prices to do so, or otherwise disadvantaging competing television channels relative to the Setanta Sports channels. (For example, the merged entity's IPTV might promote the Setanta Sports channels to a greater extent than it would promote competitor channels.)

44. Chapter 5 of the Commission's Merger Guidelines states:

> *"The ability of a merged entity to harm an upstream competitor through customer foreclosure depends on a number of factors. For example, harm to competitors is more likely if the merged entity is a significant customer and hence a significant source of sales revenue for the upstream competitor than if the merged entity is but one of many customers. … The incentive to foreclose upstream competitors depends, all things being equal, on the balance between (i) increased production costs, if any, from no longer purchasing inputs from the foreclosed upstream competitor and (ii) increased prices and profits from upstream and/or downstream transactions."*[28]

45. The parties state, on the basis of ComReg data, that as of September 2015 there were approximately 1.6 million television viewing households in the State and, of those, approximately 1.1 million (approximately 70%) view pay-TV services and approximately 500,000 (approximately 30%) view FTA television services.

46. Table 1 shows the number and proportion of television viewing households within (i) a potential broad market for the supply of all television broadcasting platforms (i.e., FTA and pay–TV) in the State and (ii) a narrower potential market for the supply of pay-TV broadcasting platforms only in the State. [29]

[27] Correspondence between SSBL and the Commission dated 25 January 2016 and correspondence between eir and the Commission dated 26 January 2016.

[28] See <http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf>. Page 26

[29] The parties base these estimates on ComReg's Quarterly Key Data Report, Q3 2015, 10 December 2015, Comreg 15/130. These market shares may be overstated to the extent that some households subscribe to multiple providers.

Table 1 – Market Shares Broadcasting Platforms September 2015

	Number of Households	**Proportion of Single Market (FTA & Pay-TV)**	**Proportion of Pay-TV only Market**
Saorview (FTA)	480,000	30%	0%
Sky (pay-TV)	720,000	45%	65%
Virgin Media (pay-TV)	350,000	22%	32%
eir Vision (pay-TV)	30,000	2%	3%
Total • FTA & pay-TV[30] • Pay-TV only	 1,600,000 1,100,000	 100% 	 100%

Source: Information provided by the parties

47. The market share figures presented in Table 1 indicate that that eir Vision has a market share of only 2% in a potential broad market for the supply of FTA and pay-TV in the State and a market share of only 3% in a potential narrow market for the supply of pay-TV in the State. This indicates that the merged entity would have neither the ability nor incentive to pursue a customer foreclosure strategy.

48. It is also the case, as stated in paragraph 42, that eir Vision now carries channels other than the Setanta Sports channels and will continue to do so following the completion of the proposed transaction.

[30] Percentage figures are subject to rounding.

Conclusion

49. In light of the above, the Commission considers that the proposed acquisition will not substantially lessen competition in any market for goods or services in the State.

Ancillary Restraints

50. Both the APA and the SPA contain restrictive obligations on the Warrantors. In addition, upon completion of the proposed transaction, eir would enter into agreements that contain restrictive obligations with two named individuals.[31] None of these restrictive obligations exceeds the maximum duration acceptable to the Commission.[32] Given the particular nature of the proposed transaction, the Commission considers that these obligations are directly related to and necessary for the implementation of the proposed transaction.

[31] […].

[32] In this respect, the Commission follows the approach adopted by the EU Commission in paragraph 20 of its "Commission Notice on restrictions directly related and necessary to concentrations" (2005). For more information see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(02)&from=EN>.

Determination

The Competition and Consumer Protection Commission, in accordance with section 21(2)(a) of the Competition Act 2002, has determined that, in its opinion, the result of the proposed transaction, whereby eircom Limited would acquire sole control of Setanta Sports Channel Ireland Limited and certain assets and the business of Setanta Sports Hibernia S.à.r.l from Setanta Sports Broadcasting Limited, will not be to substantially lessen competition in any market for goods or services in the State, and, accordingly, that the acquisition may be put into effect subject to the provisions of section 28C(1)[33] of the Competition Act 2002.

For the Competition and Consumer Protection Commission

Gerald FitzGerald
Member
Competition and Consumer Protection Commission

[33] Section 28C(1) of the Competition Act 2002, as inserted by section 74 of the Competition and Consumer Protection Act 2014.