



DETERMINATION OF MERGER NOTIFICATION M/07/012 - Bord na Móna/AES

Section 21 of the Competition Act 2002

Proposed acquisition by Bord Na Móna Public Limited Company of Advanced Environmental Solutions (Ireland) Limited.

Dated 02/05/2007

Introduction

1. On 7 March 2007 the Competition Authority (the "Authority"), in accordance with Section 18(1)(a) of the Competition Act, 2002 ("the Act") was notified, on a mandatory basis, of a proposed acquisition by Bord Na Móna Public Limited Company ("BnM") of the entire issued share capital of Advanced Environmental Solutions (Ireland) Limited ("AES").
2. Upon completion AES will be a wholly owned subsidiary of BnM and will form part of BnM's environmental business.
3. In its Annual Report for 2005/06 BnM outlined its future strategy to diversify its activities and pursue investments in the waste management, renewable energy and environmental sectors. Since 2002 BnM has been developing a project to provide an engineered landfill site at Drehid, Co, Kildare as part of this new diversification strategy. This is due to come online in November, 2007. However, BnM does not currently provide domestic and commercial waste collection, waste management or recycling services. The proposed transaction will provide BnM with a waste collection business and thus allow it to develop a vertically integrated offering of waste management solutions.

The Undertakings Involved

The Acquirer

4. BnM p.l.c. is a State-owned company. All of its shares are held by the Minister for Communications, Energy and Natural Resources and by or on behalf of the Minister for Finance. It is primarily engaged in the production and supply of peat to commercial and domestic customers. For the financial year ending March 2006 BnM generated a worldwide turnover of €295.7 million, of which €228 million was generated in the State.
5. BnM consists of a number of separate businesses including:
 - Energy – production and sale of milled peat to peat burning power stations;
 - Power generation – generation of electricity from peat and wind;

- Fuels – manufacture and sale of peat briquettes, importation and distribution of coal and distribution of oil products;
- Horticulture – manufacture and sale of peat based and peat free growing agents; and,
- Environmental – supply of pollution abatement products, environmental laboratory testing services and waste management services including:
 - Disposal of non hazardous ash from peat burning power stations;
 - Planning permission for an engineered landfill site – due to come on stream in November, 2007; and,
 - Range of consultancy services to waste operators.

The Target

6. AES, a limited company, is based primarily in the midlands. For the year ending June 2006, AES generated a turnover in the State of €45.4 million in the provision of domestic and commercial waste management services:
 - Commercial waste management: in this sector, which accounts for [..]% of its turnover, AES offers a nationwide waste collection and processing service. Using either its own fleet of collection vehicles or subcontracting to other collectors, AES takes waste from customers' premises to one of its waste transfer centres/materials recovery facilities¹ where it is segregated before being directed to the most appropriate disposal facility (i.e., landfill or recycling etc.); and,
 - Domestic waste management: includes the collection of refuse, recyclables and glass from up to 50,000 households in counties Kildare, Wicklow, Carlow, Tipperary, Offaly, Meath, Westmeath and Laois. This sector accounts for the remaining [..]% of AES's turnover.
7. AES does not own landfill sites.

Analysis

8. There is no horizontal overlap between the activities of BnM and AES.
9. Although the BnM landfill site at Drehid is currently under development it is scheduled to open in November 2007. Consequently within 2 years² of the notification of the transaction (and subsequent approval) BnM and AES could be considered to be operating in separate markets, albeit, at two vertically-related levels of the waste management industry:

¹ AES owns five waste transfer centres/materials recovery facilities located at Navan, Tullamore, Athlone, Portlaoise and Nenagh.

² The Authority typically uses a two year time horizon in considering the competitive effects of a merger. For details see Competition Authority, 2004, *Notice in respect of Guidelines for Merger Analysis*, Decision No. N/02/004 ("Merger Guidelines"). The Merger Guidelines may be accessed on the Competition Authority's website, www.tca.ie

- Upstream, BnM will provide significant landfill capacity for the receipt of waste and the provision of a composting facility at the same site; and,
 - Downstream, AES is involved in the downstream management and collection of waste materials.
10. There is a vertical aspect to the proposed acquisition because AES supplies waste to landfill operators.

Non Horizontal mergers

11. 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. Such market power is a necessary but not a sufficient "pre-requisite for competitive harm from foreclosure."³
12. An anticompetitive effect of the transaction is only present if the merged entity has the ability and incentive to foreclose⁴ a service from its competitors and if this results in demonstrable harm to consumers. For purposes of this merger, three interrelated markets are examined:
- Landfill services
 - Composting services
 - Waste collection services

Landfill Services

13. At paragraph 30 of the European Commission's 2007 Draft Guidelines on non horizontal mergers ("NHM Draft Guidelines")⁵ input foreclosure is defined as follows:

"A merger may significantly impede effective competition through input foreclosure 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."

14. In the instant case the issue is whether BnM has (a) an incentive and (b) the ability to foreclose access, to competitors of AES, to its planned landfill site at Drehid. If it could engage in this type of foreclosure then it would be possible for the merged entity to discriminate against rival downstream providers of waste management services and in doing so possibly raise the price faced by consumers of these services.

³ Economic Advisory Group for Competition Policy, 2006, *Non-Horizontal Mergers Guidelines: Ten Principles*, Brussels: the Commission, p.4. This may be accessed at www.ec.europa.eu/dgs/competition/eagcp.htm

⁴ Two separate types of foreclosure are examined – input foreclosure and customer foreclosure. These are examined in more detail below.

⁵ European Commission, 2007, *Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings*. Draft Commission Notice ("NHM Draft Guidelines"). This may be accessed at http://ec.europa.eu/comm/competition/mergers/legislation/draft_nonhorizontal_mergers.pdf

15. The Authority's investigation found that it is unlikely that BnM will have an *incentive* to foreclose access to its new landfill site at Drehid post merger.
16. BnM's underlying rationale for this acquisition is to develop an integrated waste management business since this is seen as the most appropriate model for growing this business. This is supported by the evidence provided in BnM's pre-merger internal documents – in particular an external independent economic report by [...] which was undertaken pre-merger in 2004 to evaluate BnM's waste business strategy and recommends vertical integration as the preferred strategy:
- "The analysis suggests that while there is an opportunity to establish a business on the basis of supplying landfill capacity, the supply of capacity may not amount to a long term sustainable basis for the business. In other words, the landfill will be the key strategic asset to facilitate entry into this business in the short to medium terms but will decline in importance relative to other competencies and assets as the years pass. A key issue is that the pace of change and consolidation in the waste management industry means that it will not be possible for BnM to achieve the agreed objective through organic growth alone. BnM will need to acquire businesses engage in joint ventures, or enter long term agreements with existing firms in the sector."
17. In addition BnM is actively seeking to attract customers to its Drehid site. Current planned capacity at Drehid is 120,000 tonnes per year rising to [...] tonnes per year⁶. AES currently produce a landfill waste stream of [...] tonnes per year. However, it would not be viable for AES to deliver all of that waste to Drehid. AES has a [...] year agreement to supply between [...] tonnes and [...] tonnes per annum to [...], another composting plant when it comes on stream. Furthermore BnM are currently negotiating with [...] for the provision of landfill waste streams.
18. Regarding BnM's *ability* to foreclose access, to competitors of AES, to its planned landfill site at Drehid, the Authority's investigation found that such an ability on the part of BnM is at most limited:
- BnM has not entered the market yet which undermines its putative ability to restrict access and it faces strong competition from Greenstar, which is currently the only vertically integrated waste services supplier in Ireland;
 - The continued implementation of the Landfill Directive, which targets landfill biodegradable waste at 50% of its 1995 levels by 2009 will mean diminishing streams for landfill providers;
 - Gate fees for landfill have fallen very considerably from the highs of the 2002/2004 period and [...] ⁷;

⁶ This is supported by the "Request for Capital Expenditure Approval for the proposed Drehid Waste Management Project" submitted to Government in November 2006 in which BnM request approval to develop a landfill site with 120,000 tonnes capacity per year [...]

⁷ [...]

- The more pragmatic application of the 'proximity principle'⁸ in recent years means there is now less reliance by waste providers on local landfill sites; and,
 - While some uncertainty remains with respect to landfill disposal capacity in the Greater Dublin Area, recent developments which demonstrate planned extra capacity at sites which are currently under development in the Greater Dublin Area, the possible introduction of incinerators and the points discussed directly above, offset these concerns.
19. In short, BnM has no incentive and limited ability to foreclose access to competitors of AES, to its new planned landfill site at Drehid.

Composting Services

20. The Authority also examined the similar possibility of input foreclosure in relation to the provision of composting services to rivals of AES post merger but found that there are no merger specific competition concerns associated with the possible development of a composting site at the Drehid plant by BnM. In the short term, due to the unfavourable economic climate prevailing in the composting sector there is some doubt as to whether the composting facility, which was given planning permission on the Drehid site, may not be developed.[..].
21. Internal BnM documents are consistent with the views expressed by BnM to the Authority that the development of a composting facility at Drehid is not imminent:
- The brief to consultants for tenders to develop phase 2 of the project explicitly excludes the composting facility; and,
 - The underlying cost and revenue projections included in the "Request for Capital Expenditure Approval for the Proposed Drehid Waste Management Project" submitted to Government in November 2006 do not contain any costs or revenues associated with the composting facility.
22. Even if the composting facility was to be made operational within the two year time horizon for considering the competitive effect of the merger it is not clear that there will be a merger specific impact. The target has a [...] year contract to supply waste to an alternative composting facility when it comes online [..].

⁸ The EPA in its 'Manual on Site Selection, Draft for Consultation' (2006) notes that the proximity principle follows from Article 5 of the Waste Framework Directive and that in "its simplest form, the principle requires that waste for disposal should be dealt with in one of the nearest appropriate installations." However, the EPA goes on to say that "It is accepted that for some waste producing regions/centres, export from that region or centre will remain a necessary option.... Proximity should be considered a broad aim rather than a defining point." In 2004 the Government published a policy paper, 'Waste Management – Taking Stock and Moving Forward' in which it outlined policy objectives in relation to waste management, and suggested some key issues and considerations that must be addressed. In particular, with regard to the proximity principle it notes "that inter-regional waste movement needs to be catered for in waste planning."

23. In addition it is unlikely, in the event that BnM develops a composting facility in the future, that BnM could exercise any market power, given:
- The number and size of composting facilities currently operational in the State⁹;
 - The planned/putative development of composting facilities by Dun Laoghaire/Rathdown County Council, Fingal County Council, Greenstar and Throntons Recycling;
 - A more pragmatic application of the proximity principle discussed in footnote 8 above; and,
 - There is a limited market for the output of the composting facilities and with such low gate prices for landfill there is little uptake of composting services.
24. The Authority thus concludes that there are no merger specific competition concerns associated with the possible development of a composting site at the Drehid plant by BnM.

Waste Collection Services

25. The issue of customer foreclosure relates to the possible anticompetitive activities of the merged entity in the downstream market. More specifically the NHM Draft Guidelines defines customer foreclosure at paragraphs 57 and 60 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.” (Para 57)

“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.” (Para 60)

26. The Authority’s investigation has revealed that there are “sufficient economic alternatives in the downstream market for the upstream rivals” which prevent the issue of customer foreclosure arising in this case:

⁹ The parties submit that there are 44 composting sites in with over 350,000 tonnes of capacity while the BnM composting facility that received planning permission at the Drehid site had a capacity of 25,000 tonnes.

- The increasingly pragmatic implementation of the proximity principle means that landfill operators can now attract waste supplies from waste management service companies outside their own regions;
 - County Councils continue to be significant providers of waste for landfill throughout the country offering landfill owners a sufficient alternative to the waste supplies of the merged entity;
 - The existence of numerous competitors in the waste management services operating at various points in the value chain (i.e. Greenstar, Thornton Recycling, Indaver, Oxigen); and,
 - The continued implementation of the landfill directive and increased rates of diversion away from landfill towards recycling.
27. The merged entity has neither the incentive nor ability to foreclose the markets identified. The Authority therefore considers that the proposed transaction does not raise competition concerns in the State.

Determination

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 Bord na Móna Public Company Limited of Advanced Environmental Solutions (Ireland) Limited, 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 Gorecki
Member of the Competition Authority