



DETERMINATION OF MERGER NOTIFICATION M/18/045 – CDC/NETGEM/VITIS (JV)

Section 21 of the Competition Act 2002

Proposed acquisition by Netgem S.A. and La Caisse des Dépôts et Consignations of joint control of VITIS

Dated 6 July 2018

Introduction

1. On 30 May 2018, the Competition and Consumer Protection Commission (“the Commission”) received a notification of a transaction to which section 18(1) of the Competition Act 2002, as amended (“the Act”) applies, namely the acquisition by La Caisse des Dépôts et Consignations (“CDC”), of [>15] % of the issued share capital of VITIS (“VITIS”) from Netgem S.A. (“Netgem”) (the “Transaction”). The parties have informed the Commission that the Transaction conferred joint control of VITIS on each of CDC and Netgem. The Transaction was put into effect without being notified to the Commission.

The Transaction

2. On 27 May 2016, CDC, Netgem and the Océinde group of companies (the “Océinde Group”), through its wholly-owned subsidiary Réunicable S.A.S. (“Réunicable”), entered into an investment agreement (“IA”), whereby the parties agreed to establish a full-function joint venture, VITIS. On 14 June 2016, VITIS was incorporated by Netgem in France as a single-member simplified stock company. At the time of VITIS’ incorporation, Netgem was the sole shareholder of VITIS and, thus, exercised sole control over VITIS.
3. The IA provided for an increase in the share capital of VITIS and for each of CDC and the Océinde Group to subscribe for shares in VITIS in order to effect the formation of the



joint venture. The parties have informed the Commission that the Transaction involved the acquisition by CDC of joint control, with Netgem, of VITIS by way of the following steps:

- CDC acquired approximately [>15] % of the issued share capital of VITIS from Netgem;
 - The Oceinde Group acquired approximately [<15] % of the issued share capital of VITIS from Netgem; and
 - Pursuant to a shareholders' agreement (the "SA") dated 3 November 2016 between CDC, Netgem, Réunicable and Mathias Hautefort, President of VITIS, various veto rights over certain strategic decisions pertaining to the joint venture were granted to CDC¹ which, according to the parties, permitted CDC to exercise joint control over VITIS together with Netgem.
4. Following the implementation of the Transaction, CDC held approximately [>15] % of the issued share capital of VITIS and the Oceinde Group held approximately [<15] % of the issued share capital of VITIS, while Netgem held approximately [>15] % of the issued share capital of VITIS. In addition, CDC and Netgem could exercise veto rights over certain strategic decisions pertaining to VITIS and, thus, both CDC and Netgem had joint control over VITIS.

Putting the Transaction into Effect Prior to the Commission Clearance

5. On 16 May 2018², the parties sought to notify the Transaction to the Commission together with a separate, but related transaction. In that notification, the parties informed the Commission that the Transaction was put into effect without being notified to the Commission. The parties stated that:

¹ Both the SA and the Articles of Association of VITIS dated 3 November 2016 provide that only a shareholder holding at least 15% of voting rights in VITIS obtain veto rights over certain strategic decisions pertaining to VITIS.

² The notification dated 16 May 2018 was rejected by the Commission, because it considered that the two transactions referred to in the notification were separately notifiable to the Commission. The second transaction referred to in the notification dated 16 May 2018 was subsequently notified separately to the Commission on 30 May 2018 (reference number M/18/044). Pursuant to that transaction, it is proposed that the Oceinde Group, through Réunicable, will acquire a jointly controlling interest in VITIS together with Netgem and CDC.



“It has now come to light that the original assessment of Netgem’s turnover in the State (i.e. €0) was incorrect as a result of an incorrect accounting treatment of this turnover and Netgem’s absence of experience in calculating turnover for merger control purposes. In fact, Netgem did have turnover in the State in 2015 amounting to €[...]. In addition, CDC generated turnover of €[...] in the State during its 2015 financial year.

The initial creation of VITIS was therefore a notifiable transaction for the purposes of Part 3 of the Act and was not notified. However this was entirely inadvertent and unintentional. The original assessment of turnover was based on a good faith measurement by Netgem which has subsequently been shown to be incorrect by reference to the CCPC’s 2014 Notice in respect of Certain Terms Used in Part 3 of the Competition Act.”

6. Following the Commission’s rejection of the notification dated 16 May 2018³, the parties subsequently notified the Transaction separately to the Commission on 30 May 2018. In the notification dated 30 May 2018, the parties also noted that, when assessing whether a separate but, related transaction was notifiable to the Commission, they reviewed Netgem’s turnover in the State and calculated that, in 2015, it was €[...] (as opposed to €0, as initially believed at the time of the implementation of the Transaction) due to a change to the accounting treatment of Netgem’s turnover. In this regard, the parties stated that:

“While the accounting treatment of Netgem’s turnover in the State was €0 according to that treatment at time, this treatment has been looked at again in the context of the proposed acquisition of a jointly controlling interest by Reunicable. The original assessment of turnover regarding the JV was based on a good faith measurement by Netgem in 2016. On further analysis by reference to Irish merger guidance and reviewed in the context of the proposed acquisition of a jointly controlling interest in VITIS by Reunicable, Netgem may be regarded as having turnover in the State in 2015 of €[...]. Any difference with the Irish merger guidance was entirely inadvertent and

³ Please see footnote 2 above.



unintentional. In that regard, this notification is being made to the CCPC on a pre-cautionary basis and in an abundance of caution as well as fully respecting the Irish merger control process.”⁴

7. Pursuant to section 19(1) of the Act, any proposed merger or acquisition that is required to be notified to the Commission pursuant to section 18(1) of the Act shall not be put into effect until the Commission has made a determination in relation to such merger or acquisition (or until the statutory period for the Commission to make a determination in relation to such merger or acquisition has elapsed). If a proposed merger or acquisition is purportedly put into effect in contravention of section 19(1) of the Act, such merger or acquisition is void under section 19(2) of the Act.
8. Section 18(12A) of the Act provides that the Commission may accept notification of a merger or acquisition which is required to be notified to the Commission pursuant to section 18(1) of the Act but which was purported to have been put into effect without having been notified to the Commission. On 31 May 2018, the Commission announced that it had decided to accept the notification of the Transaction in accordance with section 18(12A) of the Act and proceeded to review the notification in accordance with the relevant provisions of the Act.
9. The parties have informed the Commission that CDC acquired a jointly controlling interest in VITIS on or about 3 November 2016. On the basis of the information provided to the Commission by the parties, it appears to the Commission as though the Transaction should have been notified to the Commission before being put into effect in accordance with the requirements of section 18(1) of the Act. The Commission reserves its right to commence an investigation into a suspected breach by the undertakings involved in the Transaction of the notification requirements under section 18(1) of the Act, which is an offence under section 18(9) of the Act.

The Undertakings Involved

CDC

⁴ Section 1.1 of the notification.



10. Prior to the implementation of the Transaction, the activities of CDC, a French public group serving the public interest and France's economic development, primarily fell into four categories, namely: (i) environment and energy; (ii) real estate; (iii) investment; and (iv) provision of services. CDC also had a controlling interest in companies in France which have been delegated by French local authorities to construct and operate public initiative networks.
11. Table 1 below provides a list of all of the companies owned and controlled by CDC (the "CDC Companies") that were active in the State prior to the implementation of the Transaction.

Table 1: CDC Companies active in the State

CDC Company	Business Activity
[...]	Management and operation of road infrastructure
[...]	Operation of public transport
[...]	Manufacturing semiconductors
[...]	Provision of shipping, reefer transport and handling facilities in ports as well as freight transport and logistics on land
[...]	Renewable energy
[...]	Postal and banking services
[...]	Manufacturing and designing wood stoves, pellet stoves, fireplaces and inserts, barbecues, planchas, casseroles and other decorative objects
[...]	Manufacturing of biscuits
[...]	Supplying artificial insemination of cattle
[...]	Providing solutions for electrical industrial heating and cooling including temperature measurement, control and power supply.

Source: Information provided by the parties.

12. For the financial year ending 31 December 2015, CDC's worldwide turnover was approximately €[...], of which approximately €[...] was generated in the State.

Netgem

13. Prior to the implementation of the Transaction, Netgem, a public limited company listed on NYSE Euronext Paris, offered digital entertainment solutions to providers of



television (“TV”) services. In the State, Netgem supplied TV solutions (namely, TV set-top boxes with related software and services) to eir.

14. For the financial year ending 31 December 2015, Netgem’s worldwide turnover was approximately €78.8 million, of which approximately €[...] was generated in the State.

VITIS

15. The principal activity carried out by VITIS prior to the implementation of the Transaction related to the provision of broadband Internet, fixed-line voice telephony and TV services on public initiative networks in France. In addition, VITIS provided TV programme content in France and video on demand services in France and other francophone countries. VITIS was not active in the State prior to the implementation of the Transaction.

Rationale for the Transaction

16. The parties state the following in the notification:

“The aim of the joint venture created in 2016 was to fund the roll-out of a “triple-play” fibre network operator on public initiative networks in France.”

Third Party Submissions

17. No submission was received.

Competitive Analysis

Horizontal Overlap

18. There was no horizontal overlap in the State between the activities of Netgem and CDC prior to the implementation of the Transaction. As described above, prior to the implementation of the Transaction, Netgem was active in the provision of TV solutions in the State. None of the CDC Companies that generated turnover in the State prior to the implementation of the Transaction were engaged in the same business activities as Netgem in the State. Similarly, Netgem was not involved in any of the business activities



in which the CDC Companies that generated turnover in the State prior to the implementation of the Transaction were engaged.

19. VITIS, as described above, was not active in the State prior to the implementation of the Transaction. Thus, there was no horizontal overlap in the State between the activities of VITIS and the activities of Netgem. Similarly, VITIS was not involved in any of the business activities in which the CDC Companies that generated turnover in the State prior to the implementation of the Transaction were engaged.
20. In light of the above, the Commission considers that the Transaction does not raise any horizontal competition concerns in the State.

Vertical Relationship

21. The parties informed the Commission that there was no vertical relationship in the State between Netgem and any of the CDC Companies that generated turnover in the State prior to the implementation of the Transaction. The Commission has not identified any vertical relationship between Netgem and CDC in the State.
22. There was no vertical relationship created between Netgem and CDC in the State after the Transaction was put into effect either⁵. However, following implementation of the Transaction, [...], (one of the CDC Companies which generated turnover in the State prior to the implementation of the Transaction [...]), could have potentially started to supply integrated circuits that could be used as an input for Netgem's TV solutions. The Commission considers that this potential vertical relationship does not give rise to any vertical foreclosure concerns in the State for the following reasons:
 - [...] did not supply integrated circuits for suppliers of TV solutions in the State prior to the implementation of the Transaction⁶. Furthermore, there are a number of well-established companies competing with [...] for the supply of integrated circuits on a worldwide basis, such as Broadcom, Inc., MaxLinear, Inc.

⁵ The parties informed the Commission that [...] was supplying integrated circuits to Netgem prior to the implementation of the Transaction and that this continues to be the case.

⁶ The parties informed the Commission that [...] does not currently supply integrated circuits for suppliers of TV solutions in the State.



and MediaTek Inc.. Thus, the Commission considers that the Transaction does not result in input foreclosure as competitors of Netgem continue to have a choice between a number of suppliers of integrated circuits which are active in the State.

- With regard to customer foreclosure, following the implementation of the Transaction, there remained other significant purchasers of integrated circuits for TV solutions including Sky plc, Samsung Electronics Co., Ltd. and Sagemcom SAS. On this basis, the Commission considers that [...] competitors are not foreclosed from supplying integrated circuits to suppliers of TV set-top boxes in the State.

23. For these reasons, the Commission considers that the Transaction does not raise any vertical competition concerns in the State.

Conclusion

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

Ancillary Restraints

25. The parties have informed the Commission that the SA contains a number of restrictive obligations on Netgem, Réunicable and VITIS. The duration of those restrictive obligations does not exceed the maximum duration acceptable to the Commission⁷. The Commission considers these non-compete and non-solicitation obligations to be directly related to and necessary for the implementation of the Transaction insofar as they relate to the State.

⁷ In this respect, the Commission follows the approach adopted by the EU Commission in paragraphs 36 and 41 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](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, as amended, has determined that, in its opinion, the result of the acquisition, whereby Caisse des Dépôts et Consignations, acquired [>15] % of the issued share capital of VITIS from Netgem S.A., which thereby conferred joint control of VITIS on Caisse des Dépôts et Consignations together with Netgem S.A., 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.

For the Competition and Consumer Protection Commission

Brian McHugh

Member

Competition and Consumer Protection Commission