



**Determination No. M/04/003 of the Competition Authority, dated 5<sup>th</sup> March 2004, under Section 21 of the Competition Act, 2002**

**Notification No. M/04/003 – Acquisition by Radio Two Thousand Limited (t/a 98 FM) of sole control of News 106 Limited (t/a NewsTalk 106 FM)**

**Introduction**

1. On 13<sup>th</sup> January 2004 the Competition Authority was notified of a proposal whereby Communicorp Group Limited (“Communicorp”) would acquire indirect control of 53.12% of News 106 Limited. The parties and the Minister were informed that the Authority considers that the transaction amounts to a “media merger”, within the meaning of section 23 of the Competition Act 2002 (“the Act”).

**The Parties**

2. Communicorp, through its subsidiary European Radio Corporation Limited, holds 75.18% of Radio Two Thousand Limited (“Radio 2000”). Radio 2000 (t/a 98 FM) operates a radio broadcasting service and is licensed by the Broadcasting Commission of Ireland (“BCI”) to provide an “adult contemporary” music mix to a demographic audience of 20-44 year olds in Dublin city and county. Radio 2000 also owns 33.33% of Maypril Limited (t/a Spin 103.8 FM), which is licensed to provide a “hot urban contemporary” music based broadcasting service in Dublin city and county to a demographic audience of 15-34 year olds. Communicorp, through its subsidiary La Touche Investments Limited, owns 26.99% of East Coast Radio Limited (t/a East Coast FM), which is licensed to broadcast a “lively mix of music, news, sport, current affairs and local issues” to a target audience of 15-55 year-olds in Wicklow county. Prior to the present acquisition Radio 2000 held 45.97% of the shares of News 106 Limited (t/a NewsTalk 106 FM).
3. News 106 Limited (“NewsTalk”) was incorporated on 5<sup>th</sup> July 1999 and was licensed by the BCI to provide a “talk based programming with news, sport & traffic, every 20 minutes” to a target audience of 25-44 year olds in Dublin city and county. It commenced broadcasting on 9<sup>th</sup> April 2002. The initial shareholding comprised a number of members including the two largest commercial local radio licensees in the Dublin region, viz. Capital Radio Productions Limited (t/a FM 104) and Radio 2000, both of which initially held equal shareholdings in NewsTalk.

**Structural changes**

4. Due to funding requirements to maintain NewsTalk in operation, a number of rights issues took place. A rights issue involves an offer by a company, in this case Newstalk, to all shareholders to participate in funding the station by subscribing for new shares. Shareholders may opt to take up some or all of the



shares offered in proportion to their shareholding, or decline to take up any of them. The third rights issue, whereby Radio 2000's shareholding increased to 53.12%, closed on 1<sup>st</sup> October 2003. Two further rights issues whereby Radio 2000's shareholding would increase to Radio 2000's shareholding to 59.61% have since taken place.

#### **Failure to notify on time in breach of section 18(1) of the Act**

5. The parties failed to notify the transaction within the time period set out in section 18(1) of the Act, thus contravening that section. The rights issue which brought Radio 2000's shareholding to 53.12% closed on 1<sup>st</sup> October 2003 and should have been notified prior to that date. The Authority, having fully considered the matter, found insufficient evidence to seek a criminal penalty, as it was not apparent that any officer of NewsTalk, Radio 2000 or Communicorp knowingly and wilfully authorised or permitted the contravention, pursuant to section 18(11) of the Act.

#### **Implementation of the acquisition in breach of section 19(1)(a) of the Act**

6. Section 19(1)(a) of the Act states that a merger or acquisition to which section 18(1) (a) or (b) applies shall not be put into effect until the Authority has so determined. Section 19(2) of the Act states that any such merger or acquisition which purports to be put into effect, where that putting into effect contravenes subsection (1), is void.
7. The Authority is of the view that the acquisition of control by Radio 2000 of NewsTalk has already been put into effect in contravention of section 19(1)(a) of the Act. In forming this view, the Authority relies on evidence including NewsTalk board minutes in September 2003 describing the ceding of operational control to Radio 2000, evidence under oath from the CEO of Communicorp that the rights issue which is the subject of the notification closed on 1<sup>st</sup> October 2003, appointment of the previous CEO of 98 FM to the position of CEO of NewsTalk in September 2003 whilst continuing to be retained on the 98 FM pay roll until December 2003, and a detailed report prepared by Communicorp to the board of NewsTalk in September 2003 relating to the running of NewsTalk and what action it had taken to implement operational control.
8. Section 19(2) does not state whether a merger or acquisition which contravenes section 19(1)(a), is rendered void for all time, or merely until such time as the Authority makes a determination. Based on a reading of all the pertinent provisions, the Authority is of the view that the section is designed to protect the Authority's right of review and is not intended to render a merger or acquisition void indefinitely. In particular, the Authority notes that section 19(1)(a) does not provide that a clearance determination of the Authority should be subject to subsection 19(2), giving rise to the inference that the Authority's determination would allow the merger to be implemented, notwithstanding that the prior purported implementation was void. The Authority takes the view that any other interpretation would result in an absurdity: namely, that a completed merger would be void for all time. This position is consistent with international best practice. Therefore the Authority considers that it can make a determination



under section 21 of the Act despite its view that there has been a contravention of section 19(1)(a) and that the notified acquisition is thus void.<sup>1</sup> The Authority considers that a merger or acquisition which has been put into effect prior to a clearance determination from the Authority, remains void until such time as the Authority issues a clearance determination. The Authority's analysis on competition grounds, leading to its determination, is set out below.

### **Analysis on competition grounds**

9. The Authority is of the view that there is a market for the sale of radio advertising slots.<sup>2</sup> Spin 103.8 FM, NewsTalk and 98 FM all broadcast in Dublin city and county. The advertising broadcast on these stations includes local advertising relating to goods and services in the Dublin region, in addition to national advertising broadcast on these stations as a local upweight. As all three stations broadcast in Dublin city and county only, the geographic market is Dublin.
10. Newstalk is strongly differentiated from Spin 103.8 FM and from 98 FM. Its programming style is unique amongst the six licensed local Dublin radio stations and renders it more similar to Radio 1's format. Moreover the demographic of its listenership is substantially different from that of Spin 103.8 FM and 98 FM.
11. The Authority was concerned that Communicorp's combined interests in Dublin radio could give it market power with respect to local radio advertising time. However there were a number of factors which alleviated the Authority's concerns in this regard. First, although commercial radio stations are limited by law to broadcasting a maximum of ten minutes advertising per hour, there is sufficient available advertising capacity amongst the six licensed Dublin stations. Secondly, its small listenership (2% according to JNLR book Jan-Dec 2003) does not give NewsTalk the power to exert a competitive constraint on the other Dublin stations. Finally, with very differentiated programming format, Newstalk is not perceived by advertisers as a substitute for 98FM or Spin 103.8 FM. Therefore the transaction does not give rise to competition concerns.

### **Determination**

The Authority, in accordance with section 21(2) of the Competition Act 2002, determines that the result of the acquisition will not be to substantially lessen competition in markets for goods and services in the State and, accordingly, having regard to its view that a breach of section 19(1)(a) of the Competition Act 2002 has occurred and that the acquisition is void until the Authority's determination, the acquisition may now be put into effect.

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<sup>1</sup> In cases where the Authority believes its ability to effectively review a merger or acquisition has been impaired due to a breach of section 19(1)(a), it will seek appropriate legal action to undo the merger.

<sup>2</sup> Decision No: 591 in relation to Notification No. CA/1/01 – Independent Radio Sales/Shareholders Agreement and Determination No. M/03/033 – Scottish Radio Holdings/FM 104 of 5<sup>th</sup> February 2004.



**The Competition Authority**  
An tÚdarás Iomaíochta

**For the Competition Authority**

**Edward Henneberry**  
**Member of the Competition Authority**

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**5<sup>th</sup> March 2004**