The Competition Authority
An tÚdarás Iomaíochta

Determination No. M/05/039 of the Competition Authority, dated 4th August 2005, under Section 21 of the Competition Act, 2002

Notification No. M/05/039 – The proposed acquisition by Diageo plc of The "Old Bushmills" Distillery Company Limited

INTRODUCTION

1. On 6th July 2005, the Competition Authority, in accordance with Section 18 (1) of the Competition Act, 2002 ("the Act") was notified, on a mandatory basis, of a proposal whereby Diageo plc ("Diageo"), would acquire The "Old Bushmills" Distillery Company Limited ("Bushmills") from Pernod Ricard. Each of the undertakings involved filed separate notifications.

THE UNDERTAKINGS INVOLVED

2. Diageo, the acquirer, is globally active in the production, distribution, marketing, exporting and importing of spirits and wine. Diageo owns a number of spirits brands such as "Smirnoff" vodka, "Johnnie Walker" Scotch whisky, "Baileys" cream liqueur and "Captain Morgan" rum. Diageo is not active in the production or sale of Irish whiskey. Diageo also brews, markets and distributes beer globally. Diageo's beer brands include "Guinness" stout, "Kilkenny Irish Beer" and "Harp" larger. In the last financial year, Diageo generated turnover of [less than €1 billion] from its activities in the island of Ireland.

3. Bushmills, the target, is a wholly-owned subsidiary of Pernod Ricard. Bushmills produces the following Irish whiskey brands: "Bushmills Malt", "Bushmills Original", and "Black Bush", at its distillery in County Antrim, Northern Ireland. In the last financial year, Bushmills generated turnover of [less than €10 million] from its activities in the State. Recently, Bushmills launched a cream liqueur brand, "Bushmills Irish Cream". However, Bushmills generates no sales from its liqueur brand in the State.

THE PROPOSED TRANSACTION

4. The proposed acquisition would occur by purchase of 100% of the issued shares of Bushmills by Diageo from Pernod Ricard. The parties submitted that the proposed transaction is conditional upon the scheme of agreement in connection with the Pernod Ricard/Allied Domecq acquisition. The European Commission cleared that transaction on 24th June 2004.

5. Diageo submitted that its rationale for acquiring Bushmills is that it will give it a presence in the Irish whiskey market.

RELEVANT MARKET

6. In its submission, Diageo proposed the adoption of the Commission's approach in defining the relevant market in the *Guinness/Grand Metropolitan*[1] and *Pernod Ricard/Diageo/Seagram*[2] decisions. It both decisions, the Commission found that the whiskey market can be subdivided according to origin.

7. In *Guinness/Grand Metropolitan*, the Commission decided that "the relevant markets in this case, at all levels of the supply chain, are in general no wider than those for each of the individual-internationally recognised main spirit types (whiskey, gin, vodka, rum and so forth) and for each liqueur". Additionally, the Commission concluded that the whiskey market can be subdivided according to origin at least with regard to the Spanish and the Irish market.

8. In *Pernod Ricard/Diageo/Seagram*, the Commission reiterated that the relevant market is no wider than those for each of the individual-internationally recognised spirit categories. The Commission decided that a further segmentation within the whiskey market should be made in particular for Scotch whisky.

9. In both decisions, the Commission considered the relevant geographic market to be national in respect of the main spirit types.

10. In contrast to Diageo, Bushmills proposed the adoption of a wider whiskey market that is not delineated by origin.

COMPETITIVE ANALYSIS

11. Diageo is currently not active in the Irish whiskey market in the State or elsewhere. Diageo is active in the wider whiskey market in which it accounts for approximately 4.95% of the market in terms of volume.

12. Bushmills proposed that the wider whiskey market is the relevant sector to the proposed transaction in which it accounts for 4.97% of the market in terms of volume. Bushmills accounts for 6.4% of the Irish whiskey market.

13. Both parties agreed that if the Authority considers a narrower whiskey market, that is, by origin, as appropriate to the proposed transaction, there would be no horizontal overlap between the parties' activities. Alternatively, if the Authority considers a wider whiskey market as appropriate to the proposed transaction, the parties combined market shares would be approximately 9.92%.

---

1 Commission decision of 15.10.1997, case No IV/M.938.

2 Commission decision of 9.05.2001, case No COMP/M.2268.

14. The Authority, however, considers that it is not necessary to make a final determination with respect to the appropriate whiskey market in this case. The Authority considers that regardless of which whiskey market is deemed appropriate to the proposed transaction there would be minimal horizontal overlap between the parties' activities (with respect to a wider whiskey market) or no horizontal overlap between the parties' activities (with respect to a narrower whiskey market).

Portfolio effects

15. The Authority considered whether the proposed transaction would lead to anti-competitive portfolio effects by Diageo, for example, by refusing to supply a particular product(s) to a customer who is not willing to buy a certain range of products. Following the Commission's assessment of this subject in *Guinness/Grand Metropolitan,* Diageo proposed that the proposed acquisition would not lead to a portfolio effects.

16. In *Guinness/Grand Metropolitan,* the Commission identified a number of factors that should be considered when assessing portfolio effects:

   i. *Whether the holder of the portfolio has the brand leader or one or more leading brands in a particular spirit market;*
   ii. *The number of markets in which the portfolio holder has a leading brand;*
   iii. *The relative importance of the individual spirit markets in which the parties have significant shares;*
   iv. *In addition, the strength of the portfolio has to be considered in the context of the relative strength of competitors' brands and portfolios.*

17. In applying these factors to the situation in Ireland, Diageo submitted, that the proposed transaction could not possibly give rise to anti-competitive portfolio effects. First, Diageo owns leading brands in only two categories in the over all spirit brands - vodka (19.23%) and flavoured spirits (4.74%). Second, Bushmills with 6.4% market share ranks fourth in the Irish whiskey brands and eleventh (1.59%) in the over all spirit brands. Third, data obtained from IWSR, a market research company, on the top 20 spirit brands in the State, shows that Pernod Ricard's portfolio is more significant than that of Diageo's both for all spirits and for Irish whiskey brands.

18. Additionally, Diageo operates separate and different distribution methods and trade terms in respect of its beer, spirits and wine businesses. For example, because "on-trade" beer in Ireland is predominantly sold in draught form, Diageo distributes it in a separate and different manner to the packaged products, such as, spirits and wine. Consistent with this approach, Diageo operates separate trade terms for its draughts products. Diageo submitted that its trade terms [……].

19. The Authority considers that the proposed transaction is unlikely to lead to anti-competitive portfolio effects. There is no evidence to suggest that Diageo is likely to engage in anti-competitive practices, for example, by refusing to supply a certain product(s) to a customer who is not willing to buy a certain range of products. In support of this finding, the Authority also notes that Diageo's trade terms […..].

Additionally, in relation to the Irish whiskey market, the Authority notes that Pernod Ricard is the market leader in the State.

ANCILLARY ARRANGEMENTS

20. In schedule 11 of the Share Purchase Agreement, the parties agreed to provide transitional services to each other in order to ensure a smooth separation of the businesses. The transitional services include warehousing and bottling, IT services, and cross supply arrangements in connection with malt and grain whiskey in Northern Ireland.

21. In considering the transitional services arrangements, the Authority notes that a similar arrangement was approved by the Commission in the context of the sale of the Dewars Scotch whisky to Bacardi Martini following the *Guinness/Grand Metropolitan*. The Authority considers that the situation in the proposed transaction is comparable to the sale of the Dewars Scotch whisky and that it is reasonable to accept that the transitional services arrangement (as defined by the time limits proposed in the agreement) is required to facilitate the complete transfer of Bushmills to Diageo.

DETERMINATION

The Competition Authority, in accordance with Section 21(2) (a) of the Act has determined that, in its opinion, the result of the proposed acquisition by Diageo plc of The "Old Bushmills" Distillery Company 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

Edward Henneberry
Member of the Competition Authority