



ENFORCEMENT DECISION SERIES (NO. E/05/001)

Competition Act 2002

Decision of The Competition Authority (Case COM/05/03)

The alleged predation by the Drogheda Independent Company Limited in the market for advertising in local newspapers in the greater Drogheda area

Date of Decision: 7th December 2004

EXECUTIVE SUMMARY

The Competition Authority (“the Authority”) has taken the view that alleged predatory conduct by the Drogheda Independent Company Limited (“the DIC”) does not breach the Competition Act 2002. This view is taken on the basis that the DIC is not dominant nor could its alleged conduct constitute an abuse. The alleged conduct is arguably pro-consumer and more indicative of intense competition in the market than predatory conduct by a dominant undertaking.

The Authority’s investigation was prompted by complaints from the publisher of the *Drogheda Leader* (“the Leader”) alleging that the DIC was abusing a dominant position by: launching the Drogheda Independent Weekend Extra (“*the Extra*”) in 1997, selling advertising below cost since 1997, and selectively discounting the price of advertising in *the Extra* during January and February 2003. The Authority rejected the first two of these allegations on the basis that the DIC’s actions could not plausibly be considered as predation and the theory of predation was inconsistent with market facts. The Authority therefore only outlines in detail its analysis of the allegation of below cost selling of advertising space in *the Extra* during early 2003 in this decision note.

The Authority considers that the relevant market in which the DIC competes is the market for advertising in local newspapers in the greater Drogheda area. The DIC accounts for [65-75]% of this market. However low barriers to entry and expansion, low customer switching costs, and the relative size of the DIC’s rival, the *Drogheda Leader*, appear to constrain the ability of the DIC to profitably raise the price of advertising in its newspapers.

Finally, the conduct of the DIC represents a move to meet the competitive threat from an innovative low cost operator. Consumers and customers have benefited due to an increase in choice and quality of newspapers available in the Drogheda area that have arisen as a direct result of intense competition between the competitors in the relevant market.

The Authority has decided to publish an enforcement decision in this case to provide further guidance to practitioners and the general public on its approach to examining allegations of predation.

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1. THE ISSUES

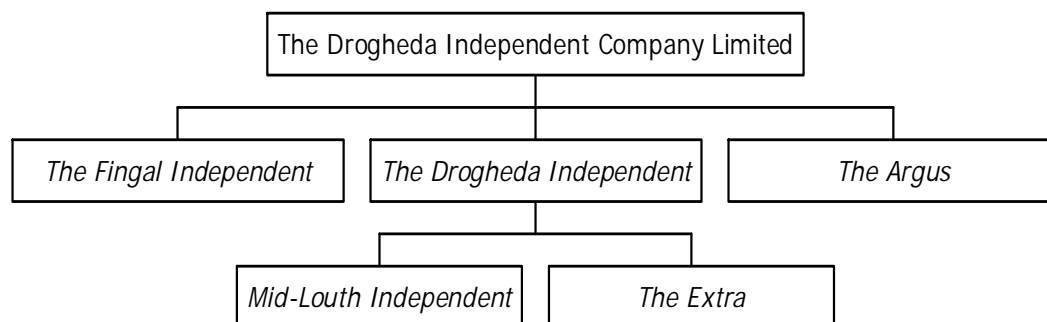
The complaint

- 1.1. The Competition Authority (“the Authority”) received a complaint in January 2003 from the publisher of the Leader (“*the Leader*”)¹ alleging that The Drogheda Independent Company Limited (“DIC”)² had abused its dominant position in the market for advertising in the Drogheda area by predatory pricing. The Leader alleged that the DIC had targeted property advertisers with low prices in one of its newspapers, the Drogheda Independent Weekend Extra (“*the Extra*”).
- 1.2. The complainant alleged that the DIC had reduced advertising rates for auctioneers during January and February 2003. The complainant stated that property advertisers were a very lucrative source of advertising revenue and accounted for [5-15]% of its turnover. The Leader claimed that the property advertisers’ advertisements were vital to its business and that it was an “emergency situation” requiring the “immediate assistance” of the Authority.
- 1.3. The complainant also alleged that the DIC launched *the Extra* in 1997 with the sole intention of putting the Leader out of business and that advertising had always been sold below cost in *the Extra*.

The Parties

- 1.4. The DIC first published the *Drogheda Independent* in 1884. The DIC publishes five newspaper titles: the *Drogheda Independent* and a related newspaper the *Mid-Louth Independent*, the *Drogheda Independent Weekend Extra*;³ and two other regional newspapers, the *Argus* (from Dundalk) and the *Fingal Independent*.

Figure 1: The DIC’s Newspaper Titles



Source: The Competition Authority

¹ Throughout this Decision Note, “the Leader” is used to denote the publisher of a newspaper called the *Drogheda Leader*, where the latter is denoted “the *Leader*”.

² Throughout this Decision Note “*Drogheda Independent*” is used to denote the paid for newspaper published by the Drogheda Independent Company Limited, denoted “the DIC”.

³ The *Drogheda Independent Extra* was launched in 1997 as a freesheet newspaper. It was re-launched in 2003 as the *Drogheda Independent Weekend Extra* and again in 2004 as the *Drogheda Weekend*.

1.5. The DIC publishes two newspapers in the Drogheda area:⁴

- the *Drogheda Independent*, a weekly paid for newspaper that has a circulation that covers Drogheda town plus an approximate fifteen mile radius around the town. The *Drogheda Independent* has an Audit Bureau of Circulation (“ABC”) audited circulation of 10,919.⁵
- *the Extra*, a weekly freesheet⁶ newspaper that is delivered to 15,000 homes and businesses in the Drogheda urban area. In a submission to the Authority⁷ the DIC stated, “[t]he Drogheda Independent Weekend Extra (DIWE) is designed to reach the thousands of readers (and 45% of households) who do not purchase the cover price Drogheda Independent.”

The *Drogheda Independent* and *the Extra's* circulation areas are depicted by the area marked Drogheda Independent in Figure 2 below.

Figure 2: The Geographic Circulation of the DIC Newspapers



Source: The DIC

⁴ The *Mid-Louth Independent* is an adapted version of the *Drogheda Independent* with additional editorial content of local interest in Mid-Louth.

⁵ Certificate of average net circulation for the 24 issues distributed between 29th December 2003 and 27th June 2004, approved by the ABC on 26th August 2004.

⁶ A freesheet newspaper does not have a cover price and is delivered free of charge to homes and businesses. Its only source of revenue comes from the sale of advertising space.

⁷ Submission to the Authority, 10th November 2003.

- 1.6. The DIC is a 100% owned subsidiary of Independent News & Media plc. It operates on a largely autonomous basis from its parent in terms of decision making, and has no alliance or relationship whatsoever in terms of advertising cross selling etc with Independent News & Media plc's national titles. The DIC would also appear to have little or no commercial relationship with the parent company's other regional titles⁸ apart from membership of the industry umbrella body, the Regional Newspaper Association of Ireland.
- 1.7. The *Leader* is a weekly door-to-door freesheet newspaper. Since its establishment in 1995 by a consortium of local business interests, *the Leader* has steadily grown to a weekly distribution of 18,000. It is printed in Kerry by Kerry's Eye, a newspaper and contract printing business. The *Leader* is distributed to every home in Drogheda and surrounding villages including; Bettystown, Laytown, Collon, Mornington, Duleek, Slane, Termonfeckin, Clogherhead and Dunleer. The *Leader's* distribution area is depicted in Figure 3 below.

Figure 3: The Geographic Distribution of the Leader



Source: The Leader

- 1.8. Throughout the investigation the DIC and the *Leader* have been extremely cooperative providing relevant information and documentation in a prompt manner when requested.

⁸ Independent News & Media plc also owns, *inter alia*, the following regional titles: the Kerryman, the Carlow People, the Wexford People, and the Wicklow People.

Introduction

2.1. Allegations that an undertaking (or a group of undertakings) has abused its dominant position are covered by Section 5 of the Competition Act, 2002 ("the Act") which reads as follows:

- (1) Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the state or in any part of the State is prohibited.
- (2) Without prejudice to the generality of *subsection (1)*, such abuse may, in particular, consist in-
 - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
 - (b) limiting production, markets or technical development to the prejudice of consumers,
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
 - (d) making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

An undertaking is defined in the Act as "a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service".

2.2 In order to establish that there has been a breach of Section 5 of the Act, the Authority must demonstrate that the undertaking in question:

- holds a dominant position in a relevant market; and
- has abused that dominant position.

The creation or existence of a dominant position does not breach the Act; rather it is the *abuse* of that position that constitutes the breach.

2.3 Section 5 of the Act is based on Article 82 of the Treaty establishing the European Community. In applying Section 5 the Authority has regard not only to its interpretation by Irish Courts, but also to that of Article 82 by the European Commission ("Commission"), the Court of First Instance ("CFI") and the European Court of Justice ("ECJ").

2.4 There is no statutory provision for exemption from the application of Section 5 and/or Article 82 whereby the conduct of a dominant undertaking can be permitted if it satisfies certain welfare enhancing criteria. To distinguish abusive from legitimate behaviour European case law has used the concepts of "objective justification" and

“proportionality”.⁹ Establishing objective justification requires an assessment of the criteria considered by a dominant undertaking in determining its behaviour. If the conduct arises as a result of the application of objective (e.g., technical) rather than anti-competitive criteria that are uniformly applied in all its commercial dealings, this may be considered legitimate behaviour. Where it is established that the dominant undertakings conduct is objectively justified it must then be established that the conduct is proportional, i.e., does not go beyond what is necessary for the attainment of those objectives. These issues are considered on a case-by-case basis.

The relevant market

- 2.5 For the purposes of this investigation the relevant market is the market for advertising in local newspapers¹⁰ in the greater Drogheda area.¹¹

Defining the product market

- 2.6 The European Commission *Notice on Relevant Market Definition*¹² defines a relevant product market as one that

comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

- 2.7 The Notice proposes a test to determine whether particular products are substitutes and thus within the same market, the **S**mall but **S**ignificant **N**on-transitory **I**ncrease in **P**rice (“SSNIP”) test:

[T]he question to be asked is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.¹³

While data limitations often mean that the test cannot be applied, the test can nevertheless be a useful thought experiment in defining the market.

⁹ See, for example, *Centre Belge d'Etude de Marché Télémarketing v CLT*. Case 311/84 [1985] ECR 3261, [1986] 2 CMLR 558 and *Eurofix-Bauco v Hilti*. OJ [1988] L 65/19, [1989] 4 CMLR 677, upheld on appeal.

¹⁰ For the purposes of this Decision Note the term “local newspapers” refers to freesheet *and* paid for newspapers.

¹¹ The greater Drogheda area is defined hereinafter as the Drogheda urban area plus an approximate 15 mile surrounding radius. This is compatible with the *Drogheda Independent's* operational area shown in Figure 2 above.

¹² European Commission, *Notice on the Definition of Relevant Market for the Purposes of Community Competition Law*. OJ [1997] C 372/5.

¹³ Commission, *supra* note 12, paragraph 17. The test is sometimes referred to as the hypothetical monopolist test.

2.8 In defining the relevant market in the present case the Authority:

- Surveyed advertisers in the Drogheda area¹⁴ and canvassed the views of the local radio station, local newspapers from nearby territories, national newspapers, national newspaper representatives, and national advertising bureaux. Advertisers are the purchasers of advertising services and are therefore well placed to comment on the extent to which advertising in various media are substitutes.
- Reviewed relevant decisions of competition authorities of other member states. These decisions included the Danish Competition Authority (the Konkurrencestyrelsen) in *MetroXpress Danmark v. Berlingske Gratisaviser A/S*,¹⁵ the UK Competition Commission and, the recent decisions by the UK Director General of Fair Trading¹⁶ upheld by the UK Competition Appeals Tribunal¹⁷ in the *Aberdeen Journals* case; and,
- Reviewed pertinent Authority decisions relating to advertising markets involving radio and outdoor poster sites.

2.9 The Authority considered several possible product groupings in its analysis

- Local paid for newspapers and local freesheets;
- Local and national newspapers;
- Local newspapers and local radio; and
- Local newspapers and other media.

The alternative options reflect the fact that an advertiser has many media from which to select to deliver its message. The medium or media selected by an advertiser will depend on; *inter alia*; the target population, where they are located, price, budget, and bargaining power.

2.10 Advertisers place advertisements in a broad spectrum of complementary media as part of an integrated marketing campaign to reach a wide array of consumers in a number of different ways. This is done to reach a maximum number of potential customers in the most cost effective manner. Such a strategy reinforces an advertiser's overall message and increases the effectiveness of each type of advertising. In such instances some or all of the media may be complements, rather than substitutes, and hence not in the same product market.

Local paid for newspapers and local freesheets compete in the same product market.

2.11 Drogheda advertisers that the Authority surveyed viewed the local paid for and the freesheet newspapers as direct substitutes. [A Motor Dealer in

¹⁴ See Appendices 1 & 2 below for further details.

¹⁵ The Konkurrencestyrelsen (the Danish Competition Authority), *MetroXpress Danmark v. Berlingske Gratisaviser A/S*, Journal nr.3: 1120-0100-404/Fødevarer og Finans/hbs, 29th May 2002.

¹⁶ Director General of Fair Trading, *Predation by Aberdeen Journals (Remitted Case)*, No. CA/98/14/2002, 16th September 2002.

¹⁷ Competition Appeals Tribunal, *Aberdeen Journals v. Director General of the Office of Fair Trading* [2003] CAT 11.

Drogheda], for example, stated that there was no difference between the local freesheets and local paid for newspapers and that they are both local newspapers serving local markets. Advertisers tend to switch their advertising between the DIC newspapers and the *Leader* depending on their relative prices. They offer advertisers coverage of a broadly similar geographic market, the greater Drogheda area.

- 2.12 The UK Competition Commission has concluded in several investigations that freesheet and paid for newspapers compete. It found, for example, that:

[c]ompetition between newspapers for readers and advertisers depends largely on the degree of editorial content. Usually, but not invariably, free [sheet] newspapers have a lower quality and proportion of editorial content than paid for newspapers. Advertisements are, however, read as a source of information and interest and, to this extent, paid for and free newspapers may directly compete for readers and advertisements.¹⁸

The Director General of the Office of Fair Trading (“OFT”) came to a similar conclusion in the *Aberdeen Journals* decision. The Competition Appeal Tribunal upheld this decision.¹⁹

- 2.13 The DIC and the *Leader* each cite the other as its main competitor, suggesting that they are in the same market. This is consistent with the fact that the DIC has lost significant market share to the *Leader* since its launch in 1995. The DIC was the sole publisher of newspapers in the Drogheda area at the time of the entry of the *Leader* in 1995. It had lost [25-35]% of its market share in terms of advertising revenue to the *Leader* by 2004.²⁰ The DIC has tried a number of methods to slow the loss in market share to the *Leader*, one of which was to launch *the Extra*. According to the DIC “*the Extra* was launched in 1997 to protect itself [the DIC] from a low cost operator”.²¹
- 2.14 In *Aberdeen Journals*,²² conduct of the undertakings was used to establish whether the respective undertakings were part of the same market:

If an informed undertaking launches a product as a viable alternative to a product already provided by another undertaking, with the aim of taking business away from that undertaking, it is likely the new product will exert a sufficient competitive constraint on the existing product for both products to be treated as present on the same product market.

¹⁸ UK Competition Commission, 1999, *Portsmouth & Sunderland Newspapers plc and Johnson Press plc/Newsquest (Investments) Ltd/News Communications and Media plc*. London: HMSO, paragraph 2.22; referred to in para. 78, Director General of Fair Trading, *Predation by Aberdeen Journals (Remitted Case)*, No. CA/98/14/2002, 16 September 2002.

¹⁹ *Supra* notes 16 and 17 for the decision of the Office of Fair Trading and the Competition Appeal Tribunal, respectively.

²⁰ [.....].

²¹ Submission to the Authority, November 10th 2003.

²² Director General of Fair Trading, *Predation by Aberdeen Journals (Remitted Case)*, para 28, No. CA/98/14/2002, 16 September 2002.

As stated in paragraph 2.13 above, according to the DIC, the purpose of launching *the Extra* was to protect the *Drogheda Independent* from *the Leader*. Therefore using the logic of Aberdeen Journals, it would appear that all three titles form part of the same product market.

Local newspapers and national newspapers do not compete in the same product market.

- 2.15 To advertisers, local newspapers and national newspapers are similar in that they are both suited to informational or complicated advertisements that can be referred back to a number of times by a reader. They differ markedly however in terms of price and intended use (i.e., target audience covered).
- 2.16 A local newspaper would only be suitable for targeting consumers in its operational area but would typically have a far higher penetration in that area than a national newspaper. So while a national newspaper might have a lower cost per thousand ("CPT")²³ than a local newspaper, most of the coverage that a national newspaper offers to a local advertiser constitutes "wasted coverage", i.e., coverage that is not going to attract target consumers. Furthermore, from the Authority's survey it appears that local newspapers hold a special status for advertisers and consumers in local markets.²⁴ Hence each medium has a distinct usage in terms of the market or audience they are used to target.
- 2.17 Nevertheless local newspapers compete to a certain extent with national newspapers through an alliance of local newspapers, the Regional Newspapers Association of Ireland, to permit State-wide coverage by Mediaforce.²⁵ Some national advertisers also approach local newspapers directly.²⁶ In both cases a national advertiser may wish to complement an advertising campaign in a national medium with a carefully targeted campaign in one or more of the main urban areas; e.g., Dublin, Cork, Limerick, and Galway.²⁷ Approximately [10-20]% of advertising in the

²³ The Cost Per Thousand method of evaluating media efficiency is a ratio based on how much it costs to reach a thousand people. Advertisers and their advertising agencies and media buying services evaluate media efficiency based on CPT because it is a good comparative measure of media efficiency across several media. For example, the efficiency of reaching 1,000 listeners to the local radio station, LFMF, could be compared with how much it cost to reach 1,000 readers with an advertisement in the *Drogheda Independent*.

²⁴ In the course of the Authority's investigation one prominent industry source stated, "the issue with local advertising is that if the local shop doesn't advertise in the local paper, people think the shop is in trouble." Similarly, Mr. Pat Kierans, group sales and marketing manager of Thomas Crosbie Holdings Limited is quoted in an article entitled "Regional papers-A Grander Bit of Cake" published in the *Irish Marketing Journal*, April 2004, as stating "Our research has shown, however, trust and loyalty toward regional [news]papers is much higher than it is toward other media, including national titles" (emphasis supplied). (Thomas Crosbie Holdings publishes a number of national and regional newspapers in the State.)

²⁵ Mediaforce is a UK advertising agency that has been hired by the Regional Newspapers Association of Ireland to sell advertising space to national advertisers on behalf of 53 regional newspapers including the DIC. The agency was appointed in 2003 and replaced the RNAI's in house agency the Regional Newspapers Advertising Network ("RNAN"). A national advertiser can therefore conduct a national campaign through Mediaforce, which will place advertisements across a range of regional newspapers.

²⁶ For example, Lidl and Aldi advertise directly with the local newspapers across Ireland.

²⁷ This is commonly referred to as "upweighting" and is most evident in radio advertising. See Competition Authority, 2004, *Proposed acquisition by Scottish Radio Holdings plc of Capital Radio Productions Limited*. Determination No. M/03/033, 23rd February 2004.

Drogheda Independent comes from national advertisers through Mediaforce.²⁸

- 2.18 The Authority in its survey sought the views of advertisers that typically use the local newspapers in the Drogheda area. The consensus was that national and local newspapers were in different markets and that if anything they were complements not substitutes. See Box 1 below for details.

Box 1: The views of advertisers on the relationship between local and national newspaper advertising.

- A number of hotels stated that they advertise locally, nationally and also in local newspapers in other regions.²⁹ One hotel advertises rooms and overnight stay specials at a national level and advertises the restaurant and leisure centre in its own locale.
- A property advertiser³⁰ stated that it would advertise in a national newspaper if it had a very specific property such as a castle or a famous building and needed to advertise it beyond the circulation and distribution areas of the local newspapers.
- One motor dealer advertises both at a local level and a national level. The company tends to advertise its used cars and new [lower range] cars at local level. However, it advertises the more expensive [] cars in the national newspapers to attract people from areas that the local newspaper doesn't reach.
- One of the 80% of advertisers that only operate in the local market stated, "[t]he national newspapers are too expensive to advertise in and they cover too broad an area so they would not be of any benefit for reaching our target audience. There would be no point in using the nationals." As a local newspaper has the lowest CPT in a local market it is the most suitable print media available to small advertisers.

- 2.19 The Institute of Advertising Practitioners of Ireland ("IAPI") represents the views of national advertisers.³¹ The Authority sought to establish whether a national advertiser that typically advertises in a national newspaper would switch its advertising from a national newspaper to a local newspaper or a network of local newspapers. The IAPI stated that if a national advertiser were to switch its advertising from a national newspaper in the event of a small but permanent relative increase in the price of national newspaper advertising the advertiser would be unlikely to switch solely to a local newspaper in the Drogheda area. The IAPI stated that while advertising in regional press titles is cheap compared to the

²⁸ According to industry sources, the breakdown of advertising revenues in local newspapers across Ireland is 80% local and 20% national.

²⁹ This hotel advertises in the local newspapers in the Wicklow area but also advertises, *inter alia*, in local newspapers in the Drogheda area.

³⁰ According to the DIC, property advertisers accounted for [>5] of the top 10 advertisers in the *Drogheda Independent* newspaper during 2002 and 2003.

³¹ The IAPI is the professional trade association that represents advertising and media agencies in the Republic of Ireland. The IAPI is comprised of 44 member companies, accounting for over 95% of advertising agency expenditure in the state. Further information on the IAPI can be found on its website www.iapi.ie.

same space in a national title, it could be more expensive to mimic the same national coverage as a national title. Furthermore, using regional papers to achieve national coverage presents an advertising agency with more production and distribution issues than a single advertisement in a national title. However, these are not exactly like-for-like comparisons as the reach, i.e., circulation and readership patterns, of an array of regional newspapers would differ from that of a single national title. Those very differences may be exactly the reason a national advertising agency would consider a national over a regional title. The IAPI also stated that national advertisers would tend not to advertise in the Drogheda area as a stand-alone strategy unless they were doing something specific to that area, like a product or strategy test or a regional promotion.

- 2.20 The Authority sought the views of the National Newspapers of Ireland (“NNI”)³² and The Irish Times as to the competitive constraint that national newspapers felt from local newspapers. They suggested that national and local newspapers tend to be complements rather than substitutes. The medium that was described as being the closest competitor to national newspapers was television not local newspapers. It was felt that local advertisers would not switch to a national newspaper if a local newspaper were to raise its price by 5 to 10%. There does not appear to be a national newspaper with a penetration in the Drogheda area that would have a lower CPT than a local newspaper. As a result, it would not prove cost effective for a local advertiser to switch to a national newspaper.
- 2.21 For the purposes of this investigation, national newspapers complement local newspapers and are not substitutes. They compete in different markets.

Local newspapers and local radio do not compete in the same product market.

- 2.22 The IAPI and other advertising sources described newspaper advertising as being very efficient at delivering complicated or detailed advertisements that have to provide a lot of information to the reader. Radio cannot by its nature, provide the same detail as a newspaper advertisement and is more widely used for branding or product awareness campaigns.³³ In Drogheda where there is only one local radio station, LMFM,³⁴ advertisers can target different categories of consumers by the time of day and content of programme in which the advertisement is placed. Several examples illustrate the difference in advertising content between newspaper and radio:

³² The National Newspapers of Ireland (NNI) represents 18 daily and Sunday newspapers and has two primary functions; to promote national newspaper advertising, and to represent members on issues which affect the industry at a national and European level. Further information on the NNI can be found at www.nni.ie.

³³ The differences in characteristics between newspaper and radio advertising go beyond ‘informational’ vs. ‘branding’. Radio advertising is short and transitory but is more adaptable compared to newspapers and for certain times of the day produces a more captive audience, e.g., “drive-time”.

³⁴ Established in 1989, LMFM is the independent local radio station for the Louth and Meath area and is thus greater Drogheda’s local radio station. It has a franchise area of Louth and Meath with an approximate population of 188,000 and a broadcast area covering Louth, Meath, North Dublin (Fingal), Cavan, Monaghan, Armagh, Down, and Kildare with a total broadcast population in excess of 300,000. LMFM attracts advertising from businesses located in the Louth and Meath area and from surrounding counties. In addition, the station accepts advertising from national brands targeting customers in the Louth Meath area. Further information on LMFM can be found at www.lmfm.ie.

- Local newspapers receive a significant volume of public announcements from local authorities, government or public bodies. Due to the informational content of these announcements they would be unsuitable for radio advertising.
 - Concerning property advertisers, LMFM stated, “radio doesn’t attract property advertisers as it not suitable for informational type advertising. If a property advertiser were to advertise on radio it would be to announce a new show house or a development but not to advertise a house for sale”.
- 2.23 There is some overlap between local radio and local newspaper advertising in that they provide advertising to the same pool of local retail advertisers. However, from an advertiser’s perspective the two media serve different purposes. The Authority’s survey revealed a general unwillingness by advertisers to switch from local newspaper advertising in the event of a small but significant rise in the price of advertising in local newspapers. This suggests that local radio and local newspapers are not in the same product market. This is also consistent with previous decisions by the Authority – merger determinations and notification decisions – that have found that local newspapers and local radio do not compete in the same product market.³⁵
- 2.24 For the purposes of this investigation local newspapers and local radio are not part of the same product market.

Local newspapers and other media³⁶ do not compete in the same product market.

- 2.25 Other media do not compete in the same product market as local newspapers. There are differences across these media in terms of price, impact, and target audience.
- Outdoor advertising was examined by the Authority in previous decisions and it was concluded that on balance the outdoor advertising market constituted a distinct product market and that larger sized posters constituted a distinct market segment within the overall outdoor advertising sector.³⁷
 - Cinema appears to be most useful for branding purposes as opposed to the informative features of newspaper advertising.
 - Magazines and local newspapers appear to contain distinctly different types of advertisements aimed at different demographics. While magazines unquestionably provide an outlet to directly target one’s likely customers (e.g., by advertising in a golf or fishing magazine one can directly target enthusiasts of those activities), local newspapers remain the primary source of advertising to a broad range of consumers in a local market.

³⁵ See, for example, Authority Merger determinations M/04/025, M/04/003, M/04/001, M/03/033.

³⁶ For the purpose of this analysis, other media includes, but is not limited, to the internet, television, national radio, magazines, leaflet drops, outdoor advertising, cinema advertising, and business telephone directories.

³⁷ See Authority Decision No. 378, *David Allen Holdings Limited/Adsites Limited - Licence Agreement*, 21st November 1994, paragraph 14 and Authority Decision No. 509, *TDI Metro Limited / Joseph John Patchell*, 17th June 1998, paragraph 9.

- The Internet, though a low cost method of advertising to a wide geographic audience, lacks high penetration in any one area or even nationally. Thus, while a local newspaper may be more expensive than the internet per advertisement it does offer an advertiser a targeted penetration in a narrow geographic market such as the one defined herein (see section on relevant geographic market below) and accordingly the two media offer distinct products to an advertiser.

These media complement local newspaper advertising and would not likely constitute viable substitutes for local newspaper advertising.

2.26 In sum the relevant product market is advertising in local paid for and freesheet newspapers.³⁸

The relevant geographic market³⁹

2.27 For the purposes of this investigation the geographic market is the circulation area of the Drogheda local newspapers – the Drogheda urban area plus an approximate 15-mile radius – hereinafter referred to as the greater Drogheda area.

2.28 The European Commission *Notice on Relevant Market Definition*⁴⁰ states:

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

As with defining the product market the SSNIP test can be employed to define the geographic market.

2.29 In *United Brands v. Commission*⁴¹ the ECJ stated that the opportunities for competition under Article 82 must be considered:

with reference to a clearly defined geographic area in which [the product] is marketed and where the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated.

2.30 As well as analysing price sensitivity of consumers and potential competitors across geographic areas, other factors typically considered in a geographic market definition analysis include,

³⁸ The DIC made submissions to the Authority that it faced competition from a number of sources including other local newspapers, local radio, national newspapers and other regional titles. The Authority takes the view that with the exception of local newspapers, the other sources identified by the DIC are complements and not substitutes and do not compete in the same market as the DIC.

³⁹ As the geographic market under assessment relates only to the greater Drogheda area the alleged conduct is unlikely to affect inter state trade. Thus, while the Authority has regard to EU jurisprudence in its investigation, Article 82 is not applicable in this case.

⁴⁰ See supra note 12.

⁴¹ Case 27/76 [1978] ECR 207.

- demand characteristics – e.g., regional preferences or preferences for local brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition;
 - the views of customers and competitors; and
 - current geographic patterns of purchase.
- 2.31 The Authority sought information from the local newspapers that border the greater Drogheda area: the *Dundalk Democrat*, the *Argus*⁴² (Dundalk), the *Weekender* (Meath) and the *Meath Chronicle*. The Authority sought to establish whether a local newspaper in another operational area could place a competitive constraint on the pricing decisions of a local newspaper in the Drogheda area. The Authority also surveyed advertisers based in Navan and Dundalk, as outlined in Appendices 1 and 2 below, to identify the geographic market for advertising space in local newspapers. Based on their responses to the Authority these newspapers receive only small amounts of advertising from Drogheda advertisers.
- 2.32 On the *demand side*, it appears that advertisers view local newspapers outside the area in which they are located as a means for the advertiser to target a wider market and upweight their local advertising expenditure.⁴³ Advertisers piece together advertising in different local newspapers to reach their chosen target market.⁴⁴ For example, when surveyed, one respondent [A Dundalk home improvements store] stated that it has been pursuing this strategy in its advertising policy for 12 years now and feels that it matches the business' objectives. [A Meath motor dealer] advertises in local newspapers in Drogheda, Navan and Dundalk. Local newspapers in the Drogheda area compete with each other for its "Drogheda" advertising but do not compete with a newspaper from say, Dundalk where the local newspapers there compete with each other within their operational areas.
- 2.33 The Authority also considered *supply-side* substitution: whether, if the price of advertising in local Drogheda newspapers were to rise by between 5 and 10% above the competitive level, firms that do not currently supply to that market might switch existing supply from another market. Such supply must be quick, 6 months to a year,⁴⁵ and easy, i.e., without incurring significant additional costs or risks. The example of supply side substitution used in the Commission's *Notice on Relevant Market Definition* is for a paper manufacturer to switch production between different grades of paper. It is not clear that local newspapers adjacent to the Drogheda area could switch supply easily with little risk, despite the fact that local

⁴² As shown in Figure 1 above *the Argus* newspaper title is owned by the DIC.

⁴³ See supra note 27 above for an explanation of the term upweighting.

⁴⁴ Since the implementation of the National Development Plan 2000-2006, the North East of Ireland (Meath, Louth, North Dublin, Cavan and Monaghan) has experienced a significant improvement in transport infrastructure enabling consumers in this wide geographic area to travel between the main population centres with relative ease increasing the level of competition between retailers throughout the region. Retailers use a combination of local newspapers to target as many consumers as possible across the North East. That is, advertisers view each local newspaper as selling access to that newspaper's readership. Combinations of local newspapers can therefore be used to capture a wider geographical area.

⁴⁵ The Competition Authority suggests a 6 month period in its *Notice in Respect of Guidelines for Merger Analysis*, Decision No. N/02/004, para 2.12. 16 December 2002. In its *Notice on the definition of the relevant market*, supra note 12, the Commission suggest a period of 1 year.

editorial content, a key differentiating factor for local media, can be purchased on a free lance basis, some investment and market research would be needed to switch markets. Furthermore, as observed below, entrants in the 1980s failed to get a foothold in the Drogheda local newspaper market suggesting that switching by a local newspaper from an adjacent area entails a certain amount of risk. Finally, it is of note that the one successful entrant, the Leader, was founded by a consortium of local businessmen who would have had contacts and a sense of relevant local news that a newspaper from an adjacent area might not readily have available.

Dominance

2.34 The Authority finds that despite its large market share the DIC does not have a dominant position in the market for advertising in local paid for and freesheet newspapers in the greater Drogheda area because of its inability to behave independently of the Leader, low barriers to entry and expansion, and low customer switching costs.

2.35 In *United Brands*,⁴⁶ the ECJ formulated the following test for dominance:

The dominant position thus referred to by Article [82] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

This is consistent with the view that a dominant firm is able to charge a price above the competitive level without attracting entry.

2.36 In *Hoffman-La Roche v Commission*,⁴⁷ the ECJ indicated that high market share may be related to market power, especially when a high market share is held for some time.

[A]lthough the importance of market shares may vary from one market to another the view may legitimately be taken that very large market shares are in themselves, and save *in exceptional circumstances*, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time ...is by virtue of that share in a position of strength. (emphasis supplied)

This has led to the use of market share as a screening device for delimiting instances where dominance is more likely to be present.

2.37 The Commission has summarised the Court's views as to what is a large or high market share as follows:⁴⁸

⁴⁶ Case 27/76, *United Brands v Commission* [1978] ECR 207; [1978] 1 CMLR 429.

⁴⁷ Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211.

⁴⁸ Case C-3/37.792 *Microsoft* [2003]. See also R Whish (2003) *Competition Law*. 5th Edition. London: Lexis Nexis. pp. 178-90.

[v]ery large market shares, of over 50%, are considered in themselves, and but for *exceptional circumstances*, evidence of a dominant position. Market shares between 70% and 80% have been held to warrant such a presumption.

(emphasis supplied)

More recently the Competition Appeal Tribunal in *Aberdeen Journals*⁴⁹ found that a market share of more than 70% by value and/or more than 60% by volume establish dominance unless exceptional circumstances are shown.

2.38 These judgements suggest that a number of factors need to be considered in determining whether or not a firm is dominant. These include:⁵⁰

- the market shares of the allegedly dominant firm relative to its competitors, both current and past levels,
- barriers to entry;⁵¹
- barriers to expansion;
- customer switching costs;
- the ability of the allegedly dominant firm to act independently of its competitors; and,
- countervailing buyer power.

These factors should not be viewed solely as a checklist, but rather as a means of understanding and characterising the dynamics of a market and thus coming to a view about dominance.

Market shares.

2.39 In 2004 the DIC's *Drogheda Independent* and *Extra* newspapers had market shares measured as a percentage of advertising revenue of [60-70]% and [<10]%, respectively. Hence the DIC holds a [65-75]% share in the relevant market (see Table 1 below).

2.40 Although the DIC has a high market share, the following must also be taken into account in assessing whether this is indicative of dominance:

⁴⁹ Competition Appeal Tribunal, *supra* note 17.

⁵⁰ Other factors include but are not limited to:

- Overall size of the undertaking;
- Economies of scale;
- Economies of scope;
- Technological advantages;
- Product differentiation;
- Vertical integration; and
- Access to capital (referred to as deep pockets).

For further discussion of the factors considered in establishing dominance, more specifically significant market power, see for example, *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services*, (2002/C 165/03) paras, 70-80.

⁵¹ Barriers to entry are direct or indirect limits or restrictions on the ability of potential suppliers to enter a particular market. These restrictions operate to prevent equally efficient new entrants from coming into the market and offering further choice to buyers.

- Since the entry of the Leader in 1995, the market share of DIC has decreased from 100% to [65-75]% in 2004.
- The DIC does not face a series of small fringe competitors, but rather a single, innovative, significant competitor that has steadily gained market share. Over the period 2001 to 2004, for example, *the Leader* more than doubled its market share from [10-20]% to [25-35]%.

Both of these factors demonstrate that the market share of the DIC in 2004 is not a reliable basis for making a finding of dominance.

Table 1: The market share of the DIC and the Leader, Local Newspaper Advertising in the Greater Drogheda Area, Annually, 2001-2004⁵²

Year	The DIC		The Leader
	Drogheda Independent	The Extra	
2001	[75-85]%	[<10]%	[10-20]%
2002	[65-75]%	[<10]%	[20-30]%
2003	[60-70]%	[<10]%	[25-35]%
Jan-June 2004	[60-70]%	[<10]%	[25-35]%

Source: Based on unaudited figures supplied by the DIC and the Leader to The Competition Authority

Inability of the DIC to behave independently of competitors.

2.41 In *Hoffmann-LaRoche* the ECJ stated,⁵³

The fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its prices is in general incompatible with that independent conduct which is the hallmark of a dominant position.

2.42 When asked about increases in advertising rates in their newspapers the DIC stated that it must have regard to the Leader's price when setting its own. For example, the DIC stated,⁵⁴

There has been an increase in advertising rates in line with the general CPI on an annual basis since 1997. This was purely to cover our costs. *The one exception was January 2002 when sustained discounting by the Leader led to both the Drogheda Independent and the Drogheda Independent Weekend Extra holding prices at year earlier levels.*

(emphasis supplied)

⁵² Market Share is expressed herein as a percentage of average annualised monthly advertising revenue.

⁵³ *Hoffman LaRoche v Commission* [1979] ECR 461 paragraph 71.

⁵⁴ Submission to the Authority November 10th 2003.

2.43 Other factors taken into account when analysing the DIC's ability to behave independently of its competitor were,

- The *Leader* does not appear to be capacity constrained in the quantity of advertisements that it can accept. As the *Leader* is a freesheet it can easily increase the number of pages in each edition if there is sufficient demand to support more advertising.⁵⁵ This may not be the case for a paid for newspaper, where a certain balance between the relative proportions of editorial content and advertising would be expected by its purchasers and advertisers.
- The *Leader* has introduced a number of innovations in the market. For example, the successful introduction of a freesheet newspaper and the move from a black and white to a colour publication were both innovations by the *Leader* that the DIC was forced to follow to remain competitive.
- The fact that the DIC is unionised may restrict or slow its ability to significantly alter its cost base and pricing structure with respect to the *Drogheda Independent*.

2.44 As the DIC does not appear to be able to increase its advertising prices due to the presence of the *Leader*, there are grounds for believing that the DIC is unable to behave independently of its competitor. Indeed, the DIC appears to have followed innovations introduced previously by the *Leader*.

Low Barriers to Entry

2.45 It appears that the barriers to setting up a local newspaper and in particular a local freesheet are low and falling. The traditional barrier, the purchase of a printing press, has fallen considerably and is no longer even a necessary expenditure as local newspapers can easily outsource their printing requirements.⁵⁶ A freesheet newspaper could conceivably be created with some of today's software packages and a laptop. Even the distribution of a freesheet can be outsourced. The initial costs of entry appear quite low and to a considerable extent do not appear to be sunk.⁵⁷

2.46 There is evidence of entry and exit of competitors to the DIC over the last 20 years.⁵⁸

- In the mid 1980's a newspaper called the *Local News* entered the market. It subsequently departed the market due to the poor economic climate at the time;

⁵⁵ All the players have increased the pagination of their titles in recent years which reflects the growing demand for advertising space. The *Leader* had increased from 16 pages at the time of its launch in 1995 to 36 pages in July 2003, based on the 16th June 2004 edition this has now increased to 54. *The Extra* had increased from 16 pages in 1997 to 28 pages in January 2003. In the 16th July 2004 edition this had fallen back to 24, possibly reflecting a quiet week for advertising.

⁵⁶ The DIC outsource the printing of the *Drogheda Independent* and *the Extra* to the *Midland Tribune* in Birr and the *Meath Chronicle* respectively, the *Leader* is printed by *Kerry's Eye*.

⁵⁷ Sunk costs are fixed costs that have been incurred and cannot be recovered. They arise because some activities require specialised uses that cannot readily be diverted to other uses. Second hand markets for such assets are therefore limited. Examples of sunk costs are investments in equipment that can only produce a specific product, the development of products for specific customers, advertising expenditures and R&D expenditure.

⁵⁸ The entry of *the Local News*, the *Boynesider*, the *North East News* and the *Drogheda Weekender* occurred before the introduction of new technology referred to in paragraph 2.45 above.

- In the late 1980's another freesheet called the *Boynesider* joined the market. This newspaper subsequently changed its name to the *North East News* in an unsuccessful bid to gain market share and left the market shortly afterwards;
- In 1989/90 the *Drogheda Weekender*⁵⁹ entered as a paid for newspaper, which incorporated some of the North East News into their operation. It left the Drogheda market after approximately six months as advertisers felt that there wasn't enough Drogheda news;⁶⁰
- The most successful entry was the Leader's in 1995.

2.47 While factors other than barriers to entry appear to have caused the first three of these entrants to leave the market, an efficient operator did manage to enter the market and establish a significant continuing presence.

Low Barriers to Expansion.

2.48 Barriers to expansion refer to factors that may restrict the ability of a new entrant, that is equally if not more efficient than an incumbent, to grow its market share. These appear to be low as demand in the market is growing and as discussed below customer switching costs are also low. Demand growth is liable to facilitate expansion.⁶¹ Drogheda is a growing town with a population and construction boom being fuelled by the town's relative proximity to Dublin and recent improvements in transport links by road and rail to the capital. These new residents are unlikely to have the same loyalty to an existing paid for local newspaper as established residents. It is possible to foresee a potential entrant entering the market and being able to achieve minimum efficient scale should this population expansion continue.⁶²

Low Customer Switching Costs.

2.49 The test for dominance as specified in *United Brands* requires that an undertaking has the ability to behave independently of *competitors and customers*. The reactions of customers to a potential price increase must therefore be analysed. If customers have alternative sources of supply and there are low costs associated with sourcing their demands elsewhere, it will undermine the ability of an undertaking with a large market share to profitably increase its prices. Evidence from the survey conducted by the Authority suggests that large buyers in the market are able to play the DIC off against the Leader in rate negotiations.

2.50 The initial complaint to the Authority concerned canvassing by *the Extra* of property advertisers in Drogheda. Property advertisers typically account for a significant proportion of the top ten advertisers for local newspapers. Advertising from property advertisers appears to be important to local

⁵⁹ *The Drogheda Weekender* was owned by *The Weekender*, a local paid for newspaper from County Meath.

⁶⁰ *The Drogheda Weekender* differed from *The Weekender* newspaper only in the front and back pages which were specific to Drogheda. The rest of the newspaper however was identical to *The Weekender* newspaper.

⁶¹ Although the market for advertising in local newspapers fell by 24% in 2002 as a result of the economic downturn following September 11, 2001 it has increased by 12% and 13% in 2003 and 2004 respectively. This conclusion is based on information supplied by the DIC and the Leader.

⁶² This is the smallest level of output for which average cost is at its minimum.

newspapers, as they are high volume advertisers. High volume advertisers in the Drogheda area can and do easily switch to the newspaper that offers the lower price.⁶³ Thus, it does not appear that a local newspaper could behave independently of this category of customer in terms of its pricing decisions.

Conclusions on Dominance.

- 2.51 In the case at hand high market share is not indicative of dominance. This reaffirms the view that market share should only be used as an initial screening device for situations where there may be competition concerns and not as a definitive test for determining dominance. A number of other factors discussed above need be considered in coming to a judgement on dominance.
- 2.52 The Authority takes the view that the DIC is not dominant in the market for local newspaper advertising in the Drogheda area. Notwithstanding its conclusions on dominance, the Authority believes it is appropriate to use this decision note – the first to deal with alleged predation – to provide guidance on its approach to assessing allegations of predation.

Abuse

- 2.53 The Authority finds that even if the DIC were dominant its conduct does not constitute an abuse and that of the three allegations of abuse by the DIC, the first two allegations are not plausible and while it appears that the DIC may have sold advertising in *the Extra* at a price below its average variable cost for a short period in 2003, there was a business justification for the conduct other than predation. The Authority takes the view that the aggressive pricing strategies of both the DIC and the Leader are more indicative of intense competition in the market than predatory pricing by a dominant undertaking.
- 2.54 Predatory pricing refers to a situation whereby a dominant undertaking strategically reacts to the entry or presence of a competitor by pricing so low that it deliberately incurs losses so as to expel the competitor from the market in order to charge above the competitive level in the future.⁶⁴ While consumers benefit in the short run from low prices, ultimately consumers suffer as a result of higher prices and reduced choice in the long term following the exit from the market of the undertaking subject to predation. Thus, predation has two purposes: to induce exit from the market and to deter future entry by establishing a reputation for fighting entry.⁶⁵

⁶³ During the advertising survey one property advertiser stated that it alternates between the DIC and the Leader depending on price and often switches to the lower priced newspaper on a weekly basis. Another advertiser [A Drogheda Home Improvements Store] stated it receives a volume discount from the Leader getting every 7th advertisement free. During the survey it stated that when dealing with local newspapers "Either you play them or they play you". Similarly, a Dundalk based property advertiser stated, "We play one newspaper off the other."

⁶⁴ Predatory pricing is the most commonly cited manifestation of predatory behaviour. There are however other forms of predation based on non-pricing strategies, e.g., temporary introduction of new or differentiated products, temporary extension of service, intensive advertising campaigns, etc., that like predatory pricing, represent conduct specifically designed and implemented to remove another player from the market. While predatory pricing is the subject of the present investigation the approach outlined may apply to other forms of predatory behaviour.

⁶⁵ A dominant undertaking with a reputation for fighting entry by engaging in predation may deter entry into the market and this reputation effect may constitute an endogenous barrier to entry.

2.55 When investigating predatory pricing allegations the Authority follows a structured rule of reason approach.⁶⁶ This contains the following elements:

- 1) *The plausibility of the alleged predation.* This would include both an *ex ante* and an *ex post* analysis. The *ex ante* part would consider whether the alleged predation made economic sense. In some instances – as shown below – predation would appear to be highly implausible. The *ex post* part would be to examine the market facts to see if they are consistent with the alleged predation: Did the alleged victim go out of business? Did prices drop dramatically only to be raised subsequently?
- 2) *A business justification.* If there could be a plausible case for predation, then consideration would be given to whether or not there is an alternative business justification. If there is no valid business justification then evidence of intent is likely to be informative as to what motivated the behaviour.⁶⁷
- 3) *Feasibility of recoupment.* As noted above predatory pricing requires that there is a reasonable expectation that short term losses can be recovered through charging higher prices in the medium to longer term. Recoupment depends on entry conditions in the relevant market: the higher the barriers to entry, the greater the chance of recoupment. Thus examination of the market is necessary to determine if the alleged predator has market power and is thus able to raise prices above the competitive level.
- 4) *Pricing below cost.* Finally, the issue of whether or not pricing below cost has taken place. This involves difficult measurement and definitional issues.

If the alleged predation appears to be implausible, there is a sound business justification and the feasibility of recoupment is remote, then there may be no need to deal with the issue of whether prices are below cost.

2.56 The structured rule of reason approach was applied to the three allegations made against the DIC. Two of the allegations were dismissed as implausible. While the third allegation is plausible, it appears that there is a sound business justification for the alleged conduct. Although the analysis could have stopped at this point, the issues of recoupment and below cost pricing are considered below to outline the Authority's approach on these issues. In both cases the evidence is not consistent with a finding of predatory pricing. Thus the Authority takes the view that the DIC is not engaged in predatory behaviour.

⁶⁶ In adopting this approach we have drawn upon Joseph F Brodley, Patrick Bolton and Michael H Riordan, 2000, "Predatory Pricing: Strategic Theory and Legal Policy," *Georgetown Law Journal*, Vol 88, No. 8, August, pp.2239-2330.

⁶⁷ Great care needs to be taken in interpreting intent from, for example, documentary evidence in the case of predatory pricing. As Fisher et al remark, "The subjective intent of a company is difficult to determine and will usually reflect nothing more than a determination to win all possible business from rivals – a determination consistent with competition." (See Franklin M Fisher, John McGowan, & Joen E. Greenwood, 1983, *Folded, Spindled, and Mutilated. Economic Analysis and U.S. vs. IBM.* Cambridge, Mass.: MIT Press, p. 272).

The plausibility of the alleged predation.

- 2.57 It was alleged by the Leader that the DIC engaged in predatory pricing by
- a) Launching *the Extra* in 1997;
 - b) Selling advertising below cost in *the Extra* since its launch in 1997; and,
 - c) Offering free advertisements to property advertisers in its freesheet *the Extra* if they advertised in the *Drogheda Independent* during January and February 2003.
- 2.58 The Authority rejects as implausible the first allegation that the launching of *the Extra* in 1997 constituted an act of predation by DIC. Instead the Authority views the launch of *the Extra* as a rational strategy for the DIC to grow its business and meet the competition it faced from a more efficient innovative lower cost competitor, the Leader. As stated by the DIC “[t]he *Extra* was launched in 1997 to protect itself [the DIC] from a low cost operator”.⁶⁸
- 2.59 The second allegation, that the DIC has been selling advertising below cost in *the Extra* since 1997 is both lacking in an adverse economic effect and plausible economic rationale. *First*, it is not economically rational that a dominant undertaking would engage in predatory pricing, over a seven year period, with no sign of it ending. *Second*, as a result of low barriers to entry it would be unlikely that the DIC would ever be in a position to recoup such losses even if it were to become a monopolist in the market. *Third*, there does not appear to have been any impact in the market as a result of the alleged behaviour. *The Leader* is still in the market and continues to increase its market share.
- 2.60 This leaves the final allegation that the DIC offered free advertisements to property advertisers during January and February 2003. In 2003 when the complaint was made this allegation unlike the first two could not be dismissed as implausible because:
- The DIC’s initial strategy of launching *the Extra* to protect the advertising revenues of the *Drogheda Independent* appears to have failed with a market share that is low and declining (see Table 1 above). The selective price reduction of advertising in *the Extra* may have been an alternative strategy to combat the growth of *the Leader*,
 - The two month time period during which the predation allegedly took place is sufficiently short that recoupment could be possible,
 - The pricing strategy appeared to be targeted at a particularly important group of advertisers (namely property advertisers) that accounted for over [20-40]% of advertising revenue ,
 - The complainant in 2003 asserted that his business was in danger as a result of the conduct of the DIC.⁶⁹

⁶⁸ See paragraph 2.13 above.

⁶⁹ See para 1.2 above.

A business justification⁷⁰

- 2.61 The DIC appears to have commenced the selective price reductions for property advertisers as part of a relaunch of its freesheet, *the Extra*, to encourage customers to advertise in it. The relaunch of *the Extra* also involved a change of name, more colour print, a new printing contract, more pages, and a more efficient distribution team. This allowed *the Extra* to better satisfy the significant demand of property advertisers for advertisements that use more colour to market property to consumers. In this instance, it appears that the DIC's pricing strategy was intended to raise the profile of *the Extra* and grow the business rather than solely to remove its competitor from the market. By offering advertising space to property advertisers at a reduced rate for a limited period, the DIC anticipated that this would lead to increased long run demand at higher non-discounted prices.
- 2.62 The *Drogheda Independent* had been losing market share to *the Leader*. The strategy of selective price cuts in *the Extra* as part of the relaunch was designed to counteract the growth of *the Leader* and thus protect the advertising revenue of the Independent. As such the DIC's strategy appears to constitute a plausible commercially rational strategy. Effectively, the DIC used *the Extra* to fight *the Leader* on its merits and in doing so it hoped to protect the DIC's advertising revenues.
- 2.63 The Leader referred to three property advertisers in its complaint alleging that these advertisers had either completely abandoned or seriously reduced their advertising in favour of the DIC. The Authority surveyed all three property advertisers. These property advertisers asserted that they still use the Leader and use it more than the DIC. One of them stated that it used the *Leader* more than the *Drogheda Independent* as it viewed the *Leader* as being more price effective with a larger penetration in the Drogheda urban area. When surveyed, another advertiser stated that it thought the DIC was losing business to the Leader.
- 2.64 There appears to be no obvious impact as a result of the alleged actions of the DIC. *The Leader* remains in business and has regained any advertisers that it lost while *the Extra* was giving special offers to property advertisers during early 2003.

Feasibility of recouping losses.

- 2.65 For predation by a dominant undertaking to be a credible threat (i.e., for that undertaking to willingly incur short run losses on each unit of output by pricing below marginal cost) it must be feasible for that undertaking to expect to recoup any losses in the future by charging a price higher than the competitive level. This would require high barriers to entry into the market and an absence of countervailing power restricting the undertaking's ability to raise its price. In other words, the firm would need to be dominant.
- 2.66 The relatively low barriers to entry and expansion in this market and the high demand for advertising in local newspapers suggest that another potential entrant may enter the market if the DIC were to raise its prices substantially. This, or the threat of it, would seriously hamper the ability of

⁷⁰ For a detailed discussion on business (or efficiencies) justification, see Patrick Bolton et al, supra note 66 above.

the DIC to increase its prices above the competitive level and so would render any predatory threat non-credible.

Pricing below Cost.

2.67 In *AKZO v Commission*⁷¹ the ECJ held that where prices were below an undertaking's average variable costs predation had to be presumed as every sale would generate a loss. Pricing below average variable cost is a commonly used benchmark to assess predatory pricing.⁷² In considering pricing below cost reference will be made not only to January and February 2003 but also to the much longer period of February 2002 to July 2004. This will enable the Authority to test the validity of its earlier dismissal of below cost pricing by the DIC since the initial launch of *the Extra* as implausible.

2.68 The DIC's estimates of the average weekly avoidable costs of *the Extra* in the period from February 2002 to July 2004 are shown in Table 2 below:⁷³

Table 2: Average Weekly Variable Costs of *the Extra*, 2002-2004

Cost Component	€	Percentage of Variable cost
Printing	€[...]	[20-30]%
Newsprint	€[...]	[10-20]%
Delivery from printer to Drogheda	€[...]	[<10]%
Door to door distribution	€[...]	[20-30]%
Advertising Commissions	€[...]	[10-20]%
Editorial purchased	€[...]	[<10]%
Other	€[...]	[<10]%
Total	€[...]	100%

Source: The DIC

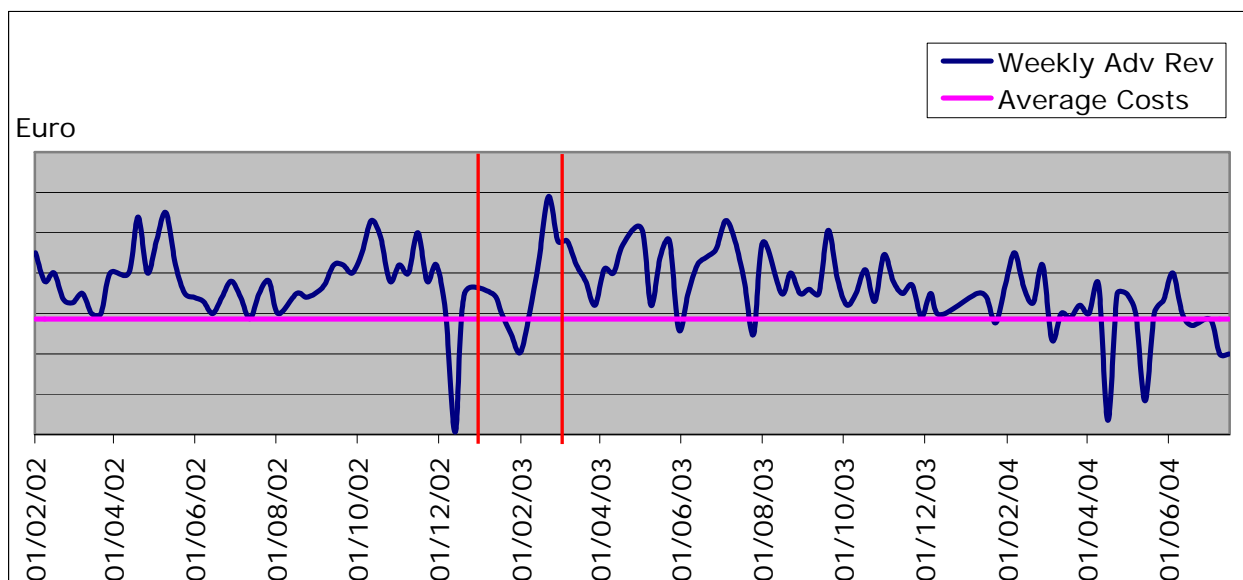
2.69 Each of the costs displayed in Table 2 varies with the number of units produced and represent the average variable cost of production of *the Extra* over a two year period. Information relating to *the Extra's* advertising revenue submitted to the Authority by the DIC is presented with the average variable cost for advertising in Figure 4 below.

⁷¹ Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, [1993] CMLR 215.

⁷² See, for example, R. Whish, 2003, *Competition Law*, 5th Edition, London: Lexis Nexis, pp. 704-706.

⁷³ Bolton et al, supra note 66, use average avoidable cost as the relevant cost benchmark for assessing predation. However it is not clear that there is any distinction between average variable cost and average avoidable cost in this case.

Figure 4: Comparison of weekly advertising revenue and average variable cost of *the Extra* for the period Feb 2002 to July 2004



Source: The Competition Authority

- 2.70 As expected, the average variable cost of *the Extra* falls slightly below its average revenue for a short period in January and February 2003.⁷⁴ This reflects the fact that the DIC gave special rates for advertising in both the *Drogheda Independent* and *the Extra* to those property advertisers who advertised in the *Drogheda Independent* for the reasons referred to in paragraph 2.61 above.
- 2.71 The longer period of February 2002 to June 2004 (i.e., the full range of Figure 4) further demonstrates that the DIC did not pursue a long term below cost pricing strategy thus emphasising the implausibility of the Leader's allegation that the DIC has always sold advertising below cost in *the Extra*.
- 2.72 Weekly advertising revenues typically exceed average variable cost for the period February 2002 to July 2004. However there are a limited number of instances where advertising revenue drops below average variable cost. Some correspond to weeks when *the Extra* wasn't published. Other instances where advertising revenues were below average variable cost are explained by bad debt adjustments.

⁷⁴ The vertical lines in Figure 4 represent the period during which predation is alleged to have occurred, i.e., 1st January 2003 to 28th February 2003.

3.**DECISION**

- 3.1. On the basis of the facts and for the reasons set out above, the Authority has decided that the DIC does not hold a dominant position in the market for advertising in local newspapers in the Drogheda area. Therefore, the DIC's behaviour cannot constitute an abuse. Furthermore, even if the DIC could be shown to be dominant, the conduct of the DIC does not, in the Authority's view, breach Section 5 of the Act.
- 3.2. This decision of the Authority does not affect the rights of private parties to take an action under the Act.

For the Competition Authority

Dr. Paul K. Gorecki
Member and Director Monopolies Division

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APPENDIX 1: Methodology of Survey of Advertisers

Introduction

As part of its investigation into alleged anti competitive practices by the DIC the Authority surveyed advertisers that advertise in local newspapers in the Louth and Meath area. The Authority conducted qualitative over the telephone surveys that lasted approximately 15 minutes each.

Objectives

The main objectives of the survey were

1. To establish what product market the DIC and the Leader compete in by
 - Establishing which print and non-print media are available to advertisers in the Louth/Meath area and which of these would be considered alternatives to local newspaper advertising
 - Examining to what extent advertisers use other media and to what extent these media substitute or complement advertising in local newspapers in the Drogheda area
 - Seeking views of advertisers as to the effectiveness of the media available to them/that they have used in the past
 - Examining the conditions under which an advertiser would switch its advertising from a local newspaper to another medium and patterns of switching in the past
2. To establish what geographic market the DIC and the Leader compete in by:
 - Establishing the target market that advertisers in the Meath/Louth area sought to advertise to
 - Establishing the geographic market that advertisers use local newspapers and other media to capture
 - Examining under what conditions an advertiser would use a local newspaper in another area
3. To identify if any countervailing buyer power exists in the market
4. To examine payment arrangements that exist between advertisers and local newspapers

Method and sample

5. The Authority compiled a random sample of advertisers that had used the following newspapers during June 2004
 - The Drogheda Independent
 - The Drogheda Independent Weekend Extra
 - The Leader
 - The Meath Chronicle
 - The Dundalk Democrat.

6. In total the Authority compiled a list of 79 advertisers and spoke with 45 of them. 21 advertisers agreed to be surveyed over the telephone. The others either didn't want to answer a survey or the relevant person responsible for advertising was unavailable. The various categories of advertisers surveyed and where they are located are displayed below.

Category	Location	Total
Property	Drogheda	4
Motor	Co Meath	2
	Drogheda	2
Retail	Drogheda	4
	Dundalk	2
Home improvements (including furniture)	Drogheda	2
	Dundalk	1
Other	Dundalk	1
	Drogheda	1
	Co. Meath	1
	Co. Wicklow	1
Total		21

The survey

7. A copy of the survey is presented in Appendix 2

Results

8. Survey results are not published to protect the confidentiality of respondents. However, their comments and views are incorporated into the text of the decision note.

APPENDIX 2: The Survey of Advertisers

Introductory Explanation

The Competition Authority is currently studying/looking at local advertising markets and we are contacting you as part of a general survey of advertisers in the Louth/Meath area. The purpose of this survey is to get general market information on the type of media advertisers in this area typically use to reach their customers and the circumstances under which they might consider switching to other advertising mediums.

1. Name and position of person we speak with. *(Ideally respondents should be responsible for placing local newspaper advertisements on behalf of their respective companies).*
2. What type of advertising is your business active in:
 - Property
 - Motors
 - Recruitment
 - Retail
 - Local Authority
 - Other *(please give details)*
3. Who are your target customers/target audience? Where are they based/located?

A: Local Newspapers

1. Which local/regional newspapers do you advertise in?
 - The Drogheda Independent
 - The Drogheda Independent Weekend Extra
 - The Leader
 - The Dundalk Democrat
 - The Dundalk Argus
 - The Meath Chronicle
 - Any other local/regional newspaper *(please give details)*
2. Why do you advertise in these particular papers? What are the factors affecting your decision to advertise in these papers?
 - Rates
 - Service levels
 - Type/quality of paper
 - Inertia
 - Historical connections
 - Other *(please give details)*

3. If you advertise in more than one local/regional newspaper please outline why and what the benefits are?
4. Do other local/regional newspapers ever contact you with promotional deals/material? If so:
 - (a) Which newspaper(s) would typically contact you?
 - (b) What type of offer is usually made (e.g., as regards price, position in paper, any exclusivity requirements, etc.)?
5. Has your company ever switched its advertising from one local/regional newspaper to another? If so:
 - (a) When?
 - (b) Which newspaper(s) did you switch to and why?
6. Are there any differences between advertising in local free-sheets compared to advertising in local paid-for/subscription newspapers, e.g., as regards price, effectiveness in reaching target group, quality, image, etc.?
7. If there was a 5% increase in the price of advertising in the local newspaper you currently advertise with would you switch your advertising to another local/regional newspaper? If so, to whom? If not, why not?

B: Other Publications

8. Which other printed publications do you advertise in?
 - National newspapers (e.g., Irish Independent, Irish Times, Evening Herald, Irish Star, Sunday Independent, Sunday World, Sunday Tribune, Sunday Business Post, Ireland on Sunday, any other national titles)
 - Magazines
 - Advertising only publications
 - Leaflets
 - Directories
9. If so, why do you advertise in these publications?
10. How do they compare with local newspaper advertising (e.g., as regards price, effectiveness, target group, quality, image, etc.)? Could these other media be used in place of local press or only alongside it?

C: Non-Print Media

11. Which non-print media do you advertise through?
 - TV
 - Radio
 - Internet
 - Outdoor/Billboard
 - Recruitment Agencies

- Other

12. Why do you use these?

13. How do they compare with local newspaper advertising (e.g., as regards price, effectiveness, target group, quality, image, etc.)? Could these other media be used in place of local press or only alongside it?

14. If there was a 5% rise in the price of the local newspaper(s) you currently advertise in would you switch your advertising to one of these other printed or non-printed media? What about a 10% price increase?

D: Pricing Arrangements

15. How are advertising prices/rates negotiated with the local newspapers?

16. What price are you charged for each advertisement you place in your local newspaper(s)? On what basis is that price levied (e.g., per half page, per quarter page, per sccm)? What level of discount do you typically receive?

E: Conclusion

17. Finally, would you mind summarising how the various media compare with one another from an advertiser's perspective (e.g., in terms of price, effectiveness, etc.)? What is the single biggest factor influencing your choice between them?