Public Consultation on the Operation and Implementation of the Competition Act 2002:

Competition Authority Submission to the Department of Enterprise Trade and Employment

December 2007

S/07/008

The Competition Authority
An tÚdarás Iomaíochta

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1. INTRODUCTION

Introduction and Background

1.1 The Competition Authority is the statutory body established in 1991 to enforce and administer domestic and European competition law in the State. Since its establishment, the fundamental legislation under which it operates has changed twice: first in 1996 and then again in 2002. The Competition Authority has had considerable experience in working within its current legislative framework and has reflected on what legislative changes may be required so that it may operate more effectively. With the benefit of that insight, this Submission outlines potential revisions to The Competition Act, 2002 ("the Act"). In all, forty one proposals are made in this submission.

1.2 This Submission is being made in response to the public consultation on the Competition Act announced by the Minister for Enterprise, Trade and Employment on November 13th, 2007.

1.3 In accordance with the public consultation announced by the Minister, this Submission does not deal with the Competition (Amendment) Act 2006 or the Communication Regulation (Amendment) Act 2007.

Approach taken in this Submission

1.4 There are four remaining sections of the Submission:

- Section 2 outlines potential revisions of competition legislation that may be undertaken to increase the effectiveness and efficiency of the Competition Authority's enforcement programme. The potential revisions focus on investigative powers; protection of sources; and penalties and deterrents. Thirteen proposals are made in this section.

- Section 3 outlines potential revisions of competition legislation that may be undertaken to improve the effectiveness and efficiency of the Competition Authority's merger review regime. The potential revisions are designed to bring the merger review regime into line with international best practice. Broadly speaking, the potential revisions are of a technical nature. Twenty one proposals are made in this section.

- Section 4 focuses on the Competition Authority's Competition Advocacy role. The issues discussed relate to the status of Competition Authority recommendations and the role of Government in relation to them. One proposal is made in this section.

- Section 5 concludes by outlining a number of general revisions to competition legislation that affect the functioning of the Competition Authority across all three areas of activity. Six proposals are made in this section.

2. ENFORCEMENT

Introduction

2.1 The Competition Authority's enforcement programme under the provisions of the Competition Act, 2002 is clearly underway. This is evidenced by its record of convictions over the last few years as investigations commenced upon the enactment of the Competition Act, 2002 have come to fruition.

2.2 Criminal enforcement of the Act has pointed to the need for amendments that will enhance the capability of the Competition Authority to enforce Sections 4 and 5 of the Act and Articles 81 and 82 of the Treaty of Rome.

2.3 Since October 2005, there have been eighteen criminal convictions of individuals and companies in Ireland for cartel activity in violation of Section 4 of the Act.[1] Seventeen of them were in the Galway heating oil cartel cases, which produced two European firsts: the first criminal competition law conviction by a jury following a trial; and the first custodial sentence of a criminal defendant under competition legislation. In October 2005, J.P. Lambe pleaded guilty to aiding and abetting price fixing by members of the Connaught Oil Promotion Federation and was convicted and sentenced in March 2006 to six months in jail, suspended for one year, and a fine of €15,000. Also in March 2006, Michael Flanagan was convicted unanimously by a jury after just over two hours of deliberation. The total fines imposed by the courts in the heating oil cartels to date are €122,000. The final trial in this case, *DPP v. Pat Hegarty,* is awaiting trial in Circuit Criminal Court in Galway.

2.4 In early 2007, the Director of Public Prosecutions ("DPP") and the Competition Authority obtained the first conviction under the Competition Act, 2002. On 30 January 2007, Denis Manning pleaded guilty to one count of aiding and abetting price fixing by the Irish Ford Dealers Association. On 9 February 2007, Judge McKechnie sentenced Mr. Manning to 12 months in jail, suspended for 5 years, and fined him €30,000.

2.5 In June 2007, the DPP filed a six count indictment against John McGlynn alleging he violated Section 7 of the Criminal Law Act 1997 by aiding and abetting the Citroen Dealers Association in breaching Sections 4 and 6 of the Competition Act 2002 by fixing the prices of vehicles in Ireland. That trial has been scheduled to begin in Central Criminal Court before Judge McKechnie on March 3, 2008.

2.6 In the course of investigating and preparing those cases and others for prosecution, the Competition Authority has encountered significant challenges that go beyond those normally associated with the investigation of secret cartels, which are notoriously difficult to uncover and prosecute. In order to address those challenges we propose legislative amendments which generally fall into three categories: investigative tools; protection of sources; and penalties and deterrents.

[1] The heating oil cases were brought under the Competition Act, 1991, as amended by the 1996 Act.

2.7 In some cases proposals for new legislation are made, while in others, a clarification of existing legislation is suggested, including a number of technical amendments, to clarify unintended oversights and errors codified in the Act. The proposals fall into three categories:

- *Enforcement Proposal Set A - Investigative Tools:* The additional investigative tools proposed here are designed to assist the Competition Authority to uncover evidence, provide incentives for cooperation and punish obstruction of investigations. At their core cartels are conspiracies, characterized by collective action. It is not then surprising that the very structures of cartels lend themselves to false statements, perjury and obstruction of investigations. In this Submission we include proposals for new penalties to deal with false statements, perjury and obstruction, and to permit the Competition Authority to investigate such breaches as they occur in conjunction with a Competition Authority investigation. Also included are proposals that would expand the powers of Authorised Officers acting under judicial search warrants and that would allow for greater cooperation between the Competition Authority and other law enforcement entities within Ireland and internationally.

- *Enforcement Proposal Set B - Protection of Sources:* At present the DPP and the Competition Authority operate a joint Cartel Immunity Programme which provides a mechanism for individuals and undertakings which might otherwise face liability for a violation of the Act to qualify for and receive immunity from prosecution. Granting of immunity is on the sole discretion of the Director of Public Prosecutions, based upon the recommendation of the Competition Authority. The Cartel Immunity Programme provides coverage for individuals and undertakings which face potential liability for violations of the Act.

  The self-reporting of offences through the Cartel Immunity Programme supplements more traditional sources of information about violations of the Act which include citizen complaints and allegations from whistleblowers who often are industry insiders. In many situations whistleblowers may be those with information about a cartel who would not be otherwise culpable and would not, therefore, qualify for immunity. Whistleblowers may face reprisals that can seriously affect their livelihoods and reputations and therefore, the Competition Authority believes that they deserve and require statutory protection. Explicit statutory prohibitions and penalties for reprisals against whistleblowers would enhance the willingness of those with information to come forward. Section 50 of the Act, currently protects whistleblowers but does not contain sanctions for reprisals.

- *Enforcement Proposal Set C - Penalties and Deterrents:* The Competition Act, 2002 increased the penalties for violations under indictment to a maximum of five years incarceration and the greater of €4 million or 10 percent of turnover in the year immediately preceding the sentencing. Penalties for summary offences are capped at 6 months imprisonment and €3,000.

It is generally recognized that fines alone in cartel cases do not provide a sufficient deterrent. The Organisation for Economic Cooperation and Development reports that the average value of overcharges realised from cartels are prices that are 20 to 30 percent higher than would obtain in competitive markets. Under the present statutory scheme, the risk/reward equation improves every year that the cartel operates and there is no commensurate statutory disincentive. The European Commission and Courts have begun to address these discrepancies.

Numerous competition agencies around the world issue guidance on fines and penalties imposed under their competition laws. In 2006 the European Commission published revised guidelines on the method of setting fines imposed in respect of breaches of the EU competition provisions. The June 2007, *Agreed Programme for Government* and the DPP have both advocated for the enactment of judicially created sentencing guidelines.[2] The Programme also calls for the *"to appeal against lenient sentences in the District Court and allow the DPP to make submissions at sentencing stage."* [3]

The Competition Authority endorses the enactment of comprehensive sentencing guidelines for all criminal offences, including offences under the Competition Act.

Given the complex nature of competition offences, the Competition Authority believes that guidelines on the penalties to be imposed for offences under the Competition Act, 2002, along the lines of those set down by the European Commission would be of benefit to the general public and competition law practitioners alike. These could outline a set of factors that would be taken into consideration by the judiciary in considering competition cases. The decision of Judge McKechnie in *DPP v Manning*[4] also provides a basis for determining criteria to be considered in assessing the penalties to be imposed for offences under the Act. We recommend that certain of those criteria be made explicit, thereby clarifying those factors which may be appropriately taken into account by the judiciary in the exercise of their sole discretion at sentencing.

Steps to deter the formation of cartels at their instigation play an important part in anti-cartel enforcement. Public procurement in large infrastructural projects and on-going procurement of goods and services at all levels of government represent substantial expenditures of taxpayer monies. Ensuring that legitimate, non-collusive, arms-length tenders are presented to public procurement agencies is key to ensuring that the public receives value for money. Many jurisdictions

[2] The *Agreed Programme for Government* states at page 69 that the Government will *"Establish a Judicial Sentencing Commission under the auspices of the Courts Service. This Commission will be comprised only of serving judges from each of the State's courts and its powers will include the power to establish sentencing guidelines. These guidelines will improve the consistency of judicial sentencing without impairing the independence of trial judges in specific cases. Trial judges will be required to follow the Commission's guidelines or to explain why the guidelines are not being followed in any particular case."*

[3] *Ibid*.

[4] *DPP v Manning*, Central Criminal Court, unreported 9 February 2007.

have employed the use of additional tools to discover and discourage bid-rigging to public agencies.

Requiring that those who bid on public tenders submit certificates of independent, non-collusive pricing and providing for a separate, additional offence of false or fraudulent certification are among the tools that can be used to discourage the formation of bid-rigging cartels and other practices associated with collusive tendering. The certificate of independent pricing, signed under penalty of law by a person with knowledge and submitted on behalf of the undertaking, would certify that the bid has been arrived at without consultation, communication, agreement or other arrangements with competitors and that the content of the bid will not be disclosed directly or indirectly to a competitor prior to opening of the bids and/or award of the contract. Additionally, robust debarment proceedings that would remove companies convicted of cartel offences from the list of eligible bidders or sub-contractors on public contracts might also be considered as additions to present public contracting procedures.

Enforcement Proposal Set A - Investigative Powers

Enforcement Proposal 1: Amend Section 30(1)(b)
Amend the Act to clarify and make explicit that the Competition Authority has the power to investigate breaches of Articles 81 and 82 of the Treaty of Rome.

2.8 While Section 14(2) of the Act provides that the Competition Authority has a right of action to enforce Articles 81 and 82 of the Treaty of Rome, Section 30(1)(b) only explicitly covers the power of the Competition Authority to investigate breaches of the Competition Act.

2.9 The Competition Authority can bring an action for breach of Articles 81 and 82. A necessary and implicit corollary to bringing an action for a breach of Articles 81 and 82 is investigating alleged breaches. A technical amendment to make explicit the ability of the Competition Authority to investigate breaches of Articles 81 and 82 would provide statutory clarification to Section 30(1)(b).

Enforcement Proposal 2: Amend Section 30(1)(b)
Amend the Act to make explicit that the Competition Authority has the power to investigate breaches of the repealed Competition Act, 1991 Act (as amended).

2.10 Due to an apparent drafting oversight, the Competition Act, 2002 (and Interpretation Act) only refers to the Competition Authority's power to recommend prosecution of offences by the Competition Authority in respect of offences occuring after the enactment of the Competition Act, 2002. This apparent error in drafting should be rectified.

2.11 A necessary corollary to recommendations for prosecution of alleged breaches of the repealed Competition Act, 1991, is investigation of the alleged breaches. Violations of the Act, including cartel offences, may span decades and it would not be uncommon to uncover and investigate cartels that began life before the enactment of the Competition Act, 2002 and that have continued in existence after the coming into force of that Act.

2.12 Inasmuch as prosecution recommendations for pre-2002 offences necessarily will be preceded by investigations, this technical amendment will clarify an arguable uncertainty in that regard.

Enforcement Proposal 3: Amend Section 45(3)(b)
Amend the Act so as to clarify that a warrant to search a dwelling issued pursuant to Section 45(3)(b) may include the power to search vehicles at the dwelling in the same manner as Section 45(3)(a).

2.13 Section 45(3)(a), which deals with the power to search premises, includes the power to search vehicles located at such premises. Section 45(3)(b), which deals with the power to search private dwellings, contains no such provision.

2.14 This issue could be addressed by an amendment to Section 45(3)(b) of the Act to clarify that a warrant granted by a judge of the District Court pursuant to Section 45(3) authorising Authorised Officers and such members of An Garda Síochána as are necessary to search a dwelling also permits them to search any vehicles located within the curtilage of that dwelling.

Enforcement Proposal 4: Amend Section 45(3)(c)
Amend the Act so as to make explicit that Authorised Officers may seize, in addition to materials described in the warrant, any other materials reflecting a violation of the Act.

2.15 Common law provides that a constable in the execution of a search warrant for stolen goods might also seize other goods which he believed on reasonable grounds to have been stolen. Section 9 of the Criminal Law Act, 1976 provides that members of An Garda Síochána, prison officers and members of the Defence Forces may seize and retain any material that they believe to be evidence of any criminal offence. The Competition Authority, which is given statutory authority to investigate alleged criminal breaches of the Competition Act, is authorised to obtain judicial search warrants for premises and dwellings. Given the nature of cartel offences, during the course of a search, evidence of additional cartel activity is often uncovered. Such evidence is easily secreted or destroyed and would not likely be in existence at the time of a second search.

2.16 The Competition Authority has encountered situations where it has uncovered evidence in relation to other possible breaches of the Act. In one instance, the Competition Authority requested a member of the Garda Síochána who was present during a search and found material that evidenced additional violations of the Competition Act, but that were not contemplated within the scope of particular search warrant, to seize the documents that evidenced additional violations pursuant to Section 9 of the Criminal Justice Act, 1976.

2.17 In the absence of an explicit provision, it is arguable whether an Authorised Officer could seize evidence demonstrating a violation of the Act beyond what was specifically described in the warrant. In order to make explicit the ability of Authorised Officers to seize materials that demonstrate other possible offences of the Competition Act, in addition to offences specified by a judicial search warrant, the Competition Authority seeks an amendment similar to Section 9 of the Criminal Justice Act, 1974. The amendment would limit the power for additional seizure of materials to violations of Sections 4 and 5 of the Competition Act.

Enforcement Proposal 5: New Provision
Amend the Act so as to provide for information sharing with the Revenue Commissioners and Department of Social and Family Affairs to assist in criminal investigations.

2.18 From time to time the Competition Authority has come into possession of information suggesting a breach of the provisions enforced by the Revenue Commissioners and Department of Social and Family Affairs. There are no provisions at present to permit the Competition Authority to refer this information to either agency given the confidentiality provisions of Section 32 of the Competition Act 2002.

2.19 Similarly, the Revenue Commissioners and the Department of Social and Family Affairs have extremely useful information in their records on companies and individuals that can assist the Competition Authority in its investigations. Access to this information could assist, for example, in the description of the type of business that the accused carries on (e.g., proving that they are an undertaking), information on business addresses and so forth.

2.20 Other agencies such as the Office of the Director of Corporate Enforcement have arrangements built into statute allowing the Revenue Commissioners to provide information to it when conducting investigations. This overcomes difficulties that both the Revenue Commissioners and the Department of Social and Family Affairs have regarding confidentiality. The Revenue Commissioners in particular have tried to be of assistance to the Competition Authority in the past but have been constrained as to what information they can provide.

Enforcement Proposal 6: New Provision
Amend the Act so as to clarify that Authorised Officers may be present at and participate in the questioning of suspects detained by An Garda Síochána in matters relating to investigation of competition offences.

2.21 It is not clear that Authorised Officers have the right to be present and to participate in the questioning of suspects in detention. This situation places an undue amount of pressure on members of An Garda Síochána seconded to the Competition Authority as they bear sole responsibility for the questioning of suspects in detention during the detention period.

2.22 This issue was addressed in respect of officers of the Criminal Assets Bureau ("CAB") by Section 58 of the Criminal Justice Act, 2007. This provision amends Section 8 of the Criminal Assets Bureau Act 1996 by

the insertion of a provision into that Act permitting a CAB officer, accompanied by a member of An Garda Síochána who is also a CAB officer, to attend at, and participate in, the questioning of a person detained pursuant to section 4 of the Criminal Justice Act 1984.

2.23 A similar amendment to the Competition Act, 2002 would permit Authorised Officers to assist members of An Garda Síochána (who are also Authorised Officers of the Competition Authority) in the questioning of persons detained pursuant to Section 4 of the Criminal Justice Act, 1984, in connection with an offence under the Competition Act, 2002.

Enforcement Proposal Set B - Protection of Sources

Enforcement Proposal 7: New Provision
Amend the Act so as to provide for punishments of those who retaliate against individuals providing information pursuant to Section 50 of the Competition Act, i.e., whistleblowers.

2.24 The Competition Authority can potentially draw on a number of different sources of information when investigating breaches of competition legislation. These include complaints from customers and competitors, and from cartel members who avail of the Cartel Immunity Programme. Another important source of information is whistleblowers. Such individuals may face reprisals for alerting the Competition Authority to the existence of a cartel or other violations of the Competition Act. Providing for prohibitions and penalties in legislation for reprisals would enhance the effectiveness of this source of information and thereby assist the Competition Authority with its enforcement programme.

2.25 Traditional sources of information about violations of the Competition Act include whistleblowers, who often are industry insiders. In many situations whistleblowers may be those with information about a cartel who would not be otherwise culpable and would not, therefore, qualify for immunity. Whistleblowers face reprisals that can seriously affect their livelihoods and reputations and we believe deserve and require statutory protection.

2.26 Section 50 of the Competition Act, 2002, currently protects whistleblowers but does not contain sanctions for those who retaliate against whistleblowers. Explicit statutory prohibitions and penalties for reprisals against whistleblowers would enhance the willingness of those with information to come forward.

2.27 It is understood that whistleblower legislation is being proposed in conjunction with other statutes. We believe that substantial effect can be given to the Competition Act and other statutory whistleblower provisions by including meaningful sanctions against those who retaliate in the legislation.

Enforcement Proposal Set C – Penalties and Deterrents

Enforcement Proposal 8: Amend Section 31(4)
Amend the Act so as to introduce a specific offence of perjury or suborning perjury for witnesses summoned to appear before the Competition Authority and examined under oath.

2.28 The offence under Section 31(4) is merely summary, without the power to arrest, detain and question persons suspected of having lied to the Competition Authority on oath. There should be specific reference in Section 31 to an offence of perjury.

2.29 The Competition Authority has encountered a number of instances where witnesses summonsed before it for examination on oath have deliberately told lies knowing that there is little that can be done as a follow up. On one occasion a witness who had given false testimony at a summons later recanted and decided to tell the truth and subsequently gave evidence before a jury at trial. Other witnesses who have given false testimony and lied under oath to the Competition Authority caused an investigation (which ultimately proved successful) to be substantially delayed, with all the attendant costs.

2.30 Perjury is a misdemeanour at common law which may be tried summarily in the judge-only District Court at the suit of the Director of Public Prosecutions. To sustain a conviction the prosecution must prove the authority to administer the oath, the occasion of administering it, the form of oath administered, the materiality of the matter sworn, the falsity of same and the corrupt intention of the person making the perjured statement. It is also a requirement that there be at least two separate witnesses to the act of perjury for a prosecution of perjury to succeed. Perjury cases are very difficult to prosecute successfully and as a result there have been very few such prosecutions under Irish law.

2.31 Suborning perjury is also an offence at common law but is equally difficult to prosecute with any degree of success. Subornation of perjury is the procuring of another to take any oath or affirmation that is perjury or punishable as perjury.

2.32 It is not clear whether the common law offence of perjury would apply to Section 31 of the Competition Act. The DPP has questioned whether it is a common law offence to lie to the Competition Authority whilst being examined on oath. The penalties for violations of Section 31 are summary in nature and do not reflect the serious nature of perjury and lying under oath.

2.33 Legislation making perjury an offence on indictment with a substantial fine and a maximum sentence of at least 5 years imprisonment upon conviction would be an appropriate deterrent and level of punishment.

2.34 In the absence of general perjury legislation that applies to statements made under oath, which would include statements to the Competition

Authority, a specific statutory offence under Section 31 covering perjury would be of great assistance. Penalties for perjury should include charges on indictment, substantial periods of incarceration and fines that would go well beyond summary prosecutions, up to and including punishments recommended above for a general perjury offence.

2.35 Additionally, the Act should be amended to permit the Competition Authority to investigate and recommend prosecution for such violations, rather than requiring that they be investigated by An Garda Síochána.

Enforcement Proposal 9: New Provision
Amend the Act so as to introduce a general offence of obstructing Authorised Officers and members of An Garda Síochána in conducting investigations under the Competition Act.

2.36 From time to time Authorised Officers encounter deliberate attempts by parties to obstruct investigations. Section 45(10) relates to obstruction of Authorised Officers during the execution of a warrant. However, at present there is no provision relating to obstruction of Authorised Officers at times other than during a search. The Act should be amended to include a general offence of obstruction, including making false statements to Authorised Officers.

2.37 A person convicted of the offence of obstruction under Section 45 (10) shall be subject to a maximum fine of €3,000 and/or a term of imprisonment of 6 months. There is no power of arrest associated with Section 45 (10).

2.38 An amendment to the Competition Act, 2002 that punishes obstruction of Authorised Officers in carrying out any of the functions covered by the Competition Act would be an important addition to assist the Competition Authority in enforcement. Such a provision may fit more appropriately within a separate section of the Act which could deal with any obstruction of a Competition Authority investigation or proceeding that may arise, for example during a witness summon hearing (i.e., in Section 31) or generally when investigating under Section 30(1)(b). Similar provisions are presently available to assist An Garda Síochána and other law enforcement and peace officers to discharge their statutory duties.

2.39 An amendment to the Competition Act, 2002 that provides for enhanced penalties for obstruction of Competition Authority investigations could include both summary and indictable offences depending upon the severity of the offence.

Enforcement Proposal 10: Amend Section 45(10)
Amend the Act by adding a new subsection to provide for the arrest without warrant by a member of An Garda Síochána of any person who obstructs or impedes an Authorised Officer or any person accompanying that officer in the carrying out of his or her duties during the search referred to in the section.

2.40 Provisions allowing the arrest of a person who obstructs Authorised Officers are ordinarily available in other legislation that allowing for searches. A real difficulty occurs where a person decides to obstruct an Authorised Officer during the course of a search conducted under current Act.

2.41 At present, an Authorised Officer must leave the site of the search, make a complaint to An Garda Síochána who in turn, must investigate the alleged obstruction, and if they find there was such obstruction, may bring summary proceedings in the District Court. In the meantime, the obstruction has succeeded in preventing the Authorised Officer from completing the search and possibly succeeded in preventing the uncovering of evidence in relation to a criminal breach of the Act.

2.42 What is required is the ability to remove the obstructing party while the search is ongoing thereby enabling the search to be completed successfully. The appropriate way to effect this is by specific legislation to provide for arrest by An Garda Síochána of the obstructing party and removing that person to a Garda station.

Enforcement Proposal 11: Amend Section 8(1)(a)
Amend the Act to state that the provisions of Section 1(1) of the Probation Offenders Act, 1907, do not apply to offences under competition legislation.

2.43 Section 1(1) of the Probation of Offenders Act, 1907, provides that a judge may dismiss a proven case based on the trivial nature of the offence. Section 1 (1) states:

> *"Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it*

is expedient to release the offender on probation, the court may, without proceeding to a conviction, make an order either:

- Dismissing the information or charge; or

- Discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for a conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

2.44 In March 2004 the Competition Authority secured convictions against six farmers for a breach of Section 4 of the Competition Act, 2002. The farmers (along with others) had blockaded Drogheda Port and prevented a ship from discharging its cargo of cheap imported grain. The farmers were fined €14,000 in total and ordered to pay €6,000 costs Drogheda District Court. On appeal in the Circuit Court in October 2004, the Circuit Court Judge affirmed that the facts were indeed proven against 3 of the 6 farmers, but owing to the trivial nature of the actions decided to apply the Probation Act and not record a conviction against the three farmers. This application of the Probation Act had a very negative impact on the enforcement of Section 4 in such cases.

2.45 The following Acts are those in which the Probation of Offenders Act cannot be applied (list not exhaustive):

- Sections 24 and 35 of the Intoxicating Liquor Act, 1927 - Licensing offences that carry mandatory endorsement on retail licence to sell intoxicating liquor;
- Section 9 Road Transport Act 1933;
- Section 13 (refusal to give sample) & Section 49 (drunken driving) under the Road Traffic Act 1961 (as amended);
- Section 16 of the Fisheries (Amendment) Act, 1962, for using "deleterious" matter for capture of fish;
- Section 34 of the Finance Act 1963, certain customs offences;
- Section 94 of the Finance Act 1983, (now Section 1078, Taxes Consolidation Act 1997), for failing to make returns of income and/or making false returns of income to the revenue; and,
- Aiding and abetting any/all of the above.

Enforcement Proposal 12: Amendment to Section 8 and A New Provision in Respect of Sentencing
Amend Section 8 of the Act and add a new provision in respect of factors that should be taken into account by judges in deciding competition cases.

2.46 The maximum sentence under Section 8 of the Competition Act, 2002 is five years imprisonment and a fine of the greater of €4 million or 10 percent of the turnover of an undertaking in the calendar year immediately preceding the imposition of the sentence. Section 8 should be amended to include a provision that would increase the fine for each calendar year or portion thereof that the cartel was in existence. Such a provision would more adequately account for and punish cartel activity spanning a period of years and would be in line with decisions of the European Court of Justice approving increased penalties for each year of the cartel.[5]

2.47 In addition, a new provision clarifying the factors to be taken into consideration would help to provide greater legal certainty to the general public and competition law practitioners on the factors that will be relevant to deciding the sentencing and penalties that will attach to offences under the Competition Act, 2002. Although applying the factors in consideration of a sentence would be solely within the discretion of the court, enumerating the factors would provide a sound basis for the exercise of discretion in imposition of an appropriate sentence.

2.48 Fines and incarceration that are calibrated at levels sufficient to punish the offence and to deter recidivism are of particular importance in competition cases. Where sentences are not pegged sufficiently high to discourage and punish cartel behaviour, cartelists may factor the risk of detection and level of fines into their cartel activity. The Competition Act provides for jail sentences and fines for individuals who violate Sections 4 and 6. Individual penalties that include jail sentences serve to punish cartel members and discourage others from committing similar offences.

2.49 New provisions might incorporate the observations of Judge McKechnie in the Central Criminal Court on 9 February 2007[6] concerning "*what might be the appropriate approach of a court when dealing with a conviction or a plea on indictment of an offence alleged under the Competition Act*". For both criminal and civil matters such guidelines could draw upon the notice issued by the European Commission[7] and/or National Competition Authorities outlining the factors to be

[5] European Commission Press Release, 21 February 2007, "Competition: Commission fines members of lifts and escalators cartels over €990 million" http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/209&format=HTML&aged=0&language=EN&guiLanguage=en

[6] *DPP v Manning*, Central Criminal Court, unreported 9 February 2007, extracts cited from unapproved judgement delivered by Judge McKechnie.

[7] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance), OJ C 210, 1.9.2006.

taken into account in assessing the penalties to be imposed for competition infringements.

2.50 Judge McKechnie expressed the view in *DPP v Manning* that there "*are good reasons as to why a court should consider the imposition of custodial sentences*" in criminal cartel cases:

- Firstly, custodial sentences *"can operate as an effective deterrent in particular, where if fines were to have the same effect they would have to be pitched at an impossibly high figure";*
- *"Secondly, fines on companies may not always guarantee an adequate incentive for individuals within those firms to act responsibly";*
- *"Thirdly, a knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater cooperation in cartel investigations";*
- *"Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community and for those who are unlikely to re-offend can be a very powerful deterrent"; and,*
- *"[F]inally, the imposition of a sentence for the type or category of persons above described can carry a uniquely strong moral message."*

2.51 In setting the fines to be imposed reference to the European Commission Guidelines provides a number of factors to be considered, some of which have been explicitly approved by EU courts. Among the factors enumerated in the Guidelines are:[8]

- The value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates. The European Commission will normally take into account the sales made by the undertaking during the last full business year of its participation in the infringement;[9]
- The degree of gravity of the infringement;
- The number of years of infringement;[10]
- The nature of the infringement - horizontal price-fixing, market-sharing and output-limitation agreements will generally incur a higher penalty;
- The combined market share of all the undertakings concerned;

[8] *Ibid.*
[9] Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members.
[10] In order to take fully into account the duration of the participation of each undertaking in the infringement, the European Commission uses a multiplier based on the number of years of participation in the infringement. Periods of less than six months will be counted as half a year. Periods longer than six months, but shorter than one year, are counted as a full year.

- The geographic scope of the infringement; and,

- Whether or not the infringement has been implemented.

2.52 The European Commission Guidelines also take into account circumstances that result in an increase or decrease in the basic penalty decided. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances. These factors are similar in many respects to factors generally taken into account by courts when imposing sentences and are contained in Chapter 8 of the Director of Public Prosecutions' Guidelines for Prosecutors.

A. Aggravating circumstances

- Recidivism;

- Refusal to cooperate with or obstruction of the European Commission in carrying out its investigations;

- Where the party concerned has played the role of leader in, or instigator of, the infringement; and,

- Any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

B. Mitigating circumstances

- Where the undertaking concerned provides evidence that it terminated the infringement as soon as the European Commission intervened;

- Where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

- Where the undertaking concerned has effectively cooperated with the European Commission and beyond its legal obligation to do so; and,

- Where the anti-competitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation to engage in the behaviour constituting the offence (this defence is expressly provided for by Section 6(5) of the Competition Act, 2002 in respect of offences under Section 4(1)).

2.53 In exceptional cases, the European Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making

financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in the Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

2.54 While factors such as those outlined above, would provide guidance in respect of the penalties to be imposed in a particular case, the imposition of fines in a particular case would remain within the sole discretion of the court with the sentence in each case being decided on its own merits. Nevertheless, guidance regarding the penalties that would be imposed for a particular infringement would provide greater clarity to the public and legal practitioners.

Enforcement Proposal 13: New Provision
Amend the Act so as to permit Authorised Officers to serve witness orders and summons for court appearances.

2.21 At present witness orders and summons for appearances in court on Competition Act matters must be served by members of An Garda Síochána. Order 10 of the District Court Rules 1997 provides at Rule 3 (1):

> *"In proceedings by way of summons in which the prosecutor is the Director of Public Prosecutions or an officer or member of An Garda Síochána, a Minister of the Government or a Minister of State or an officer of the Revenue Commissioners, a document shall be served by a member of An Garda Síochána, or by any other person or any other means authorised by statute or rules of court."*

2.22 The Competition Authority is reliant on members of An Garda Síochána, seconded to the Competition Authority, to serve witness orders and summons for court appearances. An Garda Síochána has been entirely responsive in executing its duties under Order 10 and has provided service to the Competition Authority to ensure that witness orders and summons are properly served in a timely and efficient matter.

2.23 At times, however, when significant numbers of witness orders and summonses need to be applied for and served in a short space of time, this resource requirement is often substantial and requires service of a large number of summonses over a wide geographic area.

2.24 Order 10 of the District Court Rules 1997 envisions persons other than members of An Garda Síochána serving summonses when it states in the final line of Rule 3 (1): "...*or by any other person ... authorised by statute or rules of Court*."

2.25 There are sound reasons for designating members of An Garda Síochána to serve witness orders and summons for court appearances,

and it is envisioned that in most circumstances members of An Garda Síochána would continue to execute service under Order 10 for court appearances involving the Competition Authority. Circumstances have arisen and will arise in the future where the option of having service effectuated by an Authorised Officer of the Competition Authority would be of assistance to the DPP and An Garda Síochána. The proposed amendment would permit such flexibility in unusual circumstances.

2.26 In that regard, it should be noted that persons other than members of An Garda Síochána have the power to serve summonses in cases brought by the DPP under other statutes, for example Officers of Customs and Excise under the Customs Consolidation Act 1876 and an officer appointed under a school Attendance Committee under the School Attendance Acts.

Comment

2.55 The proposal amendments put forward by the Competition Authority in relation to its enforcement powers have been suggested by experiences faced by Authorised Officers in the conduct of investigations under the Competition Act, 2002. The Competition Authority is of the view that the amendments proposed above in relation to the agency's enforcement powers would significantly enhance its investigative powers. The proposed amendments would assist the successful conclusion of investigations to further the Competition Authority's successful enforcement record.

3. MERGER REVIEW

Introduction

3.1 The merger regime under the Competition Act 2002 is, on the whole, working well. However, given the passage of time since its introduction and with the experience gained from the number and range of mergers notified to it the Competition Authority has identified several areas in the legislation which are either unclear, giving rise to doubts as to their correct interpretation, or, although clear, do not appear to work as the legislature intended. In this section we highlight these in some detail and consider what might be done to improve matters.

3.2 In this section 21 amendments are proposed to the current merger provisions contained in Part 3 of the Act.[11] For each revision there is a summary of the problem and a proposed solution. In a number of cases further elaboration is provided, based on two papers prepared for the Competition Authority's conference of 11 April 2007, *"Merger Control in Ireland: Prospect and Retrospect."*[12]

3.3 The proposed revisions can be divided into several categories:

- *Merger Proposal Set A - to remove loopholes, ambiguities and create greater legal certainty:* In clarifying these issues the proposed changes frequently follow the 2004 European Community Merger Regulation ("the 2004 ECMR"). There are seven proposed changes under this heading.

- *Merger Proposal Set B - to bring the Act into conformity with the administrative procedures of the 2004 ECMR:* When the Act was passed in 2002 the merger provisions, apart from the competition test, were modelled on the 1989 ECMR. Subsequently the ECMR was reformed in 2004. It is therefore proposed to bring the merger procedures into line with current EU procedures. These five changes all relate to time lines in the procedures, with the exception of the power to reject incomplete notifications as invalid. As a result of these changes there may need to be some consequential changes made to the definition of "appropriate date" in Section 19(6) of the Act.

- *Merger Proposal Set C - to introduce more appropriate sanctions:* At the moment the sanctions for breaching various elements of Part 3 of the Act are criminal. It is, for reasons set out below, more appropriate that the sanctions are civil. There are two proposals in this regard. However, it should be borne in mind that there may be constitutional problems with these new sanctions.

- *Merger Proposal Set D - to reflect a new legal device to effect a merger*: Since the Act was passed in 2002 there have been changes in the legal form/mechanism by which a merger is sometimes effected, and these need to be reflected in the Act. Until now the Competition Authority has set out its own

[11] In several cases the suggested amendment contains several sub-amendments.
[12] Noreen Mackey, *'Improving Merger control in Ireland: Proposed Legislative Reforms Four Years On'*, and, Ibrahim Bah & Linda NiChualladh, *'The Curious Tale of Pig, Papers and Peru: Media mergers in Ireland.'* Both of these papers are available on the Authority's website www.tca.ie

interpretation of how schemes of arrangement fit within the Act. However, it might be better enshrined in the law. There is one aspect of the proposed revision that might require public consultation.

- *Merger Proposal Set E - to review the media merger provisions*. The only sector-specific part of the merger provisions refer to those in the media sector. All media mergers, irrespective of their size are notified to the Competition Authority, and to the Minister (who has to apply "the relevant criteria" in assessing the merger). Four proposed changes are suggested. One is designed to speed the process up, another to remove the Competition Authority from having to opine on something which is not within its area of competence. The next issue concerns an attempt to define the term "publication" so that it is less all encompassing. At the moment a few copies of a newspaper distributed in the State is sufficient to establish nexus. The Competition Authority has no satisfactory solution at present and as a result suggest that there should be consultation on the issue. Even with recent revisions to the media order, media mergers with little nexus to the State are still captured under the Act. It is thus proposed to introduce revisions to resolve this issue.

- *Merger Proposal Set F - to include partial investments*: At the moment the Act refers to mergers that involve a change in decisive control and are dealt with *ex ante*. There is a suggestion in the literature and case law that there is a case for analysis of partial investments – i.e. those that fall short of decisive control. However, this is a somewhat controversial area and it is likely to create considerable opposition. As a result the Competition Authority makes some tentative proposals for discussion.

3.4 In some cases the actual wording of the proposed amendment is provided, while in other instances the precise wording has as yet to be formulated.

3.5 A final criterion as to desirable reform of the merger provisions of the Act is to examine international best practice as set out in the Recommended Practice ("RP") of the International Competition Network ("ICN"). The Competition Authority therefore benchmarks the existing provisions of the Act to see whether there are further changes that need to be considered. The ICN's RPs are designed to spread best practice internationally and therefore a comparison of the Irish system of merger review is made with ICN recommended practice. If Merger Proposals 1 – 21 below are provided for, then the Irish system will fully conform with the ICN best practice benchmark.

Merger Proposal Set A - Removing Loopholes, Ambiguities and Creating Greater Legal Certainty

Merger Proposal 1: Amend Section 16(1)(b)
Amend the Act to clarify that an undertaking that does not already control another undertaking is included.[13]

3.6 As section 16(1)(b) is currently drafted, an acquisition within the meaning of the Act only occurs when the acquiring undertaking itself has subsidiaries.

3.7 Thus in its current form the text in the legislation means that even where an undertaking acquires control of another undertaking, it will not amount to a merger unless the first undertaking is already in control of some other undertaking. This deviates substantially from the EU position (which makes a clear distinction between individuals and undertakings[14]), and it could have serious consequences, as businesses could organise themselves in such a way as to bring themselves within this provision (by the creation of a special stand-alone company for the purpose of an acquisition, for example) – and thus avoid the duty of notification that might otherwise arise. This provision should therefore be amended so that the requirement of prior control related only to an acquiring individual. This will bring the Act in line with the wording of the ECMR.

Merger Proposal 2: Amend Section 16(1)(c)
Amend the Act to clarify the intention of the legislature with respect to Section 16(1)(c).[15]

3.8 Section 16(1)(c) of the Act gives rise to uncertainty at present, deriving from the ambiguity inherent in the phrase *"assets, including goodwill."* Does this mean that an asset acquisition will not constitute a merger unless the goodwill is also acquired, or is it simply indicating that goodwill is to be counted as an asset?

3.9 The provision envisages two types of acquisition:

- First, an acquisition of all the assets; or,

[13] See *'Improving Merger Control in Ireland: Proposed Legislative Reforms Four Years On'* at pp. 2-4.
[14] See Article 3(1)(b) of *COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* (the EC Merger Regulation).
[15] See *'Improving Merger Control in Ireland: Proposed Legislative Reforms Four Years On'* at pp. 4-5.

- Second, an acquisition of a substantial part of the assets.

3.10 Under the first, goodwill must also be acquired; under the second, it need not. Therefore if all of the assets except goodwill are acquired, the acquisition falls under the second heading – one has not acquired the assets including goodwill, one has rather acquired a substantial part of the assets. While this appears to be the most probable interpretation, it would nevertheless be helpful to have the matter put beyond doubt in the legislation.

Merger Proposal 3: Amend Section 16(6)(d) and 16(7)
Amend the Act so as to clarify that the section is not intended to be used to allow the real purchaser to use their investment banker as an intermediate purchaser so as to effect a quick sale for the vendor without Competition Authority approval.

3.11 Section 16 of the Act contains a number of exemptions under which a merger or acquisition is deemed not to occur. Section 16(6)(d) together with sections 16(7) and 16(8) provide that a merger is not deemed to occur where control is obtained by an undertaking whose normal activities include the carrying out of transactions and dealings in securities for its own account or the account of others, provided that the control is constituted by the undertaking's holding, on a temporary basis, securities acquired in another undertaking, and that the first undertaking only exercises voting rights in respect of those securities in order to arrange for the disposal of all or part of the other undertaking within a year.

3.12 While the Competition Authority believes that this exemption is required, it has occasionally been misused by parties whereby an undertaking is acquired by an interim buyer, normally an investment bank, with an agreement for the future onward sale of that undertaking to the ultimate acquirer. In this way the merger or acquisition only becomes notifiable once the second transaction occurs and the vendor is able to effect a quick sale without the need for regulatory approval. In other words the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer.

3.13 A similar exception exists at EU level, by virtue of Article 3(5)(a) of the Merger Regulation. However at paragraph 35 in its recent Consolidated Jurisdictional Notice,[16] the Commission has clarified its view on the applicability of this exemption in order to prevent the misuse noted above:

> *"From the date of the adoption of this Notice, the Commission will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties.*

[16] See http://ec.europa.eu/comm/competition/mergers/legislation/jn_en.pdf

The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer."

3.14 Generally, the Competition Authority has adopted the Consolidated Jurisdictional Notice as guidance for parties in circumstances where the Act and the Merger Regulation contain the same provisions, and where the relevant provision in the Act is open to more than one interpretation. However it would be preferable to amend the Act to reflect the true intention of this exemption.

Merger Proposal 4: Amend Section 19(6)
Amend the Act to clarify what "the appropriate date" is if only one undertaking notifies.

3.15 Section 19(6) of the Act provides that "the appropriate date" is the date of receipt by the Competition Authority of the notification. However, in the case of mandatory notifications, section 18(1) requires that each of the undertakings should notify the Competition Authority. If, however, one undertaking fails to do so for any reason, is the appropriate day the date on which the other undertaking notifies, or the final day of the month from the conclusion of the agreement (the period in which notification must be made)? The Competition Authority's view is that the appropriate date in such circumstances must be the final day of the month, because until that date has passed, it cannot be known with certainty that the second undertaking will not notify.

Merger Proposal 5: Amend Section 20(2), with consequential amendments to section 19(6)(i),(ii) and (iii); section 18(9) and section 19(7)
Amend the Act to provide that the Competition Authority may extend the specified period within which a requirement to provide further information must be complied with, at the request of, or with the agreement of the undertaking(s) upon which the requirement has been served.

3.16 Section 20(2) of the Act allows the Competition Authority to serve a requirement to provide specified information within a specified period upon any of the undertakings concerned. Section 19(6) provides that in such cases, the clock stops, and time only begins to run again either on the day the requirement is complied with, or, if it is not complied with, the day after the specified period ends. The Act does not

prescribe what the "specified period" is to be; this is left to the discretion of the Competition Authority, and depends upon the volume of information sought. It frequently happens that the undertakings find the period originally specified does not give them enough time to comply, and the Competition Authority has always taken the view that if it can decide on the length of the original period, it can also extend it where this is in ease of the undertaking concerned. However, for the sake of certainty, it would be better to expressly grant this power to the Competition Authority.

3.17 In *Flynn v Dublin Corporation* (Unreported, High Court, Kelly J, 19th December, 1996), the court was concerned with the provisions of section 26(4)(A) of the Local Government (Planning and Development) Acts, 1963 (as amended by section 39(f) of the Local Government (Planning and development) Act 1976) under which the period of consideration of a planning application may be extended. The respondent in that case argued that the statutory provisions permitted only one extension of time and that no further extension was permitted. Kelly J. said:

> *"I am of the opinion that the respondent's argument concerning the number of occasions upon which an extension of time can be granted is not correct at law. It appears to me that Section 26(4)(a) expressly refers to the 'appropriate period' as that defined in sub-section 26(4)(a). That in the context of this case is the period of two months beginning on the day of receipt by the planning authority of the application. Section 26(4)(a) then goes on to permit an extension of that period and then provides that sub-section 4(b) of the section shall,* "as regards the particular case to which the extension relates, be construed and have effect in accordance with the extension*". This appears to me to mean that when an applicant makes a request to the planning authority to extend the time for dealing with an application and where the planning authority so consents then the appropriate period is extended for whatever period the planning authority determines since it is they who extend the period in question. There is nothing in this sub-section to indicate that not more than one extension of the appropriate period can be granted. It seems to me that once the first extension is granted that extends 'the appropriate period'. This new extended period is now 'the appropriate period' and it in turn can be extended further."*

3.18 While the above case differs from the provisions of section 20 of the Competition Act, in that the initial period was actually specified in the Planning Acts themselves, the principle behind it is that once a statutory body has been given discretion to determine a period, it may extend that period as many times as it wishes. This must apply a fortiori where the statutory body has been given power to determine the original specified period, as is the case in section 20(2).

Merger Proposal 6: New Provision
Amend the Act by inserting a provision that would give the Competition Authority the power to review and monitor commitments made by the parties and conditions imposed on a merger.[17]

3.19 The Competition Authority, when making a merger determination (either in Phase 1 or Phase 2), may impose obligations (known as "commitments") on parties by relying on proposals made by them. Obligations of another, though similar, kind may be made only in Phase 2 determinations, and these are known as "conditions".

3.20 Since obligations of both kinds are imposed in order to ensure that there is no substantial lessening of competition in the relevant market, it is very important that they be adhered to. Indeed, section 26(4) of the Act makes it a criminal offence to breach a commitment, or contravene a determination (including a conditional determination). Although the Competition Authority considers this power to be implicit in its functions there is no express provision for this in the Act. For legal certainty, however, an express power is sought.

Merger Proposal 7: New Provision
Amend the Act to give the Competition Authority express power to review late notifications.[18]

3.21 Section 18(1) of the Act provides that mergers which meet the thresholds must be notified *"within 1 month after the conclusion of the agreement or the making of the public bid"*. The Act makes no provision as to what, if any, power the Competition Authority has to review mergers which are notified after the one-month deadline. The Competition Authority takes the view that it necessarily has such a power, but for legal certainty it would be desirable to express this in the Act.

[17] '*Improving Merger Control in Ireland: Proposed Legislative Reforms Four Years On'* at p. 17.
[18] *Ibid.* at p. 11.

Merger Proposal 8: New Provision
Amend the Act to clarify the meaning of to "carry on business".

3.22 Section 18(1)(a)(ii) of the Act does not define *"carry on business in any part of the island of Ireland".*[19] The failure to define "carry on business" results in mergers that have no nexus to Ireland being mandatorily notifiable.

3.23 The Competition Authority has issued *Notice N/02/003* as amended on 12 December 2006 which describes the Competition Authority's understanding of the term as follows:

> *"an undertaking carries on business in Ireland if it:*
>
> *(a) has a physical presence on the island of Ireland and makes sales and/or supplies services to customers on the island of Ireland, OR,*
>
> *(b) it has made sales into the island of Ireland of at least €2 million in the most recent financial year."*

3.24 Since the Notice has no legal effect an alternative would be if the Notice's treatment of the definition were put in legislation. It would be consistent with Merger Proposal 20 below concerning the introduction of a definition for "carry on a media business."

Merger Proposal Set B - Bringing the Act into Conformity with the Administrative Procedures of the 2004 ECMR

Merger Proposal 9: Section 22(4)
Amend the Act to bring the Competition Authority's Phase 2 merger review period in line with that of the European Commission.

3.25 Following a Phase 1 investigation, the Phase 2 review period is only three months. This is very short. The European Commission's Phase 2 period is four months, and this amendment would bring the Irish procedures in line.

3.26 While the legislature may have originally considered that the three month period was sufficiently lengthy our experience has been different. Given that fair procedures require that the parties to a merger have access to the file following the issuing of an Assessment, and given the undesirability of introducing new matters at a late stage, when neither the parties nor the Competition Authority have much

[19] *Ibid*. at pp. 9-10.

time to consider it. The Phase 2 time limit should be changed so that the total time for review is extended from 4 months to 5 months.

Merger Proposal 10: New Provision
Amend the Act to provide for the power to "stop the clock" during phase 2 of a merger review (similar to the EU Commission's powers) following a requirement of further information.[20]

3.27 Section 20(2) of the Act allows the Competition Authority, in certain circumstances, to make a formal requirement on any of the undertakings involved to provide further information. Section 19(6)(b) provides that if such a requirement is made within 1 month from the date of receipt of notification, the clock is stopped, reset, and begins again when either the requirement has been complied with or when the time limit has passed without compliance. At present, there is no such power at Phase 2. When a requirement to provide further information is made at this stage, the response may require time to consider and analyse.

3.28 By contrast, the 2004 ECMR does not distinguish between Phase 1 and Phase 2 in the case of such a requirement: the clock stops when, owing to circumstances for which one of the undertakings involved is responsible, a formal requirement is made. It would be desirable to have a similar provision inserted in the Act.

Merger Proposal 11: New Provision
Amend the Act so as to extend time by 15 working days at Phase 2 where proposals have been made by the parties.[21]

3.29 If parties submit proposals to address competition concerns identified by the Competition Authority, it is clearly important that the Competition Authority should have time to consider them fully and also the time, if required, to market-test the proposals

3.30 Section 21(4) recognises that this may well be a problem during the 1-month period of a Phase 1 investigation, and provides that if proposals are submitted during Phase 1, the time limit for review becomes 45 days instead of 1 month. However, no such provision is made in respect of Phase 2. By contrast, in respect of commitments made to the EU Commission, the 2004 ECMR provides for an extension of 15 working days at Phase 2, notwithstanding that the Commission's Phase

[20] *Ibid*. at p.16.
[21] *Ibid*. at p. 16.

2 stage is already one month longer than its Irish equivalent. Our experience to date suggests that it would be desirable to have a provision in the Act adding 15 working days to Phase 2 when proposals have been received.

Merger Proposal 12: Amend Section 18(1)
Amend the Act so as to allow notification prior to the conclusion of an agreement, for example, on the basis of a letter of intent.[22]

3.31 Many businesses find it more convenient and efficient not to conclude a merger agreement until shortly before implementation, and the inability to notify prior to that date therefore poses problems for them.[23]

3.32 The Council of the European Union has recognised this in the new Merger Regulation (139/2004) ("the 2004 ECMR") by the addition of the following paragraph, and a similar provision would be useful in the Act:

> *"Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement […] provided that the intended agreement […] would result in a concentration with a Community dimension."*

Merger Proposal 13: Amend Section 18 (1)
Amend the Act so as to render notification invalid if full details are not provided.

3.33 Although Section 18 requires "full details" to be provided with a notification, there is no sanction for failing to do so. It quite frequently arises that only sketchy details are provided. In contrast, a notification to the Commission is invalid if full details are not provided.

[22] Ibid. at p.7.
[23] There is of course a danger that some notifications will not result in a completed merger and have to be withdrawn.

Merger Proposal Set C - Introducing More Appropriate Sanctions[24]

Merger Proposal 14: Amend Section 18(9)
Amend that Act so as to eliminate criminal penalties, and instead substitute civil fines, for failure to notify a merger or provide further information.

3.34 Failures by an undertaking to notify or to respond to a requirement for further information under Section 20(2) are both criminal offences for the person in control of that undertaking. It is not at all clear that the criminal standard is appropriate. Further, the Act requires that the person in control "knowingly and willfully" authorises or permits the contravention - which would be very difficult to establish at the criminal standard of proof. Hence civil fines are more appropriate.

3.35 One drawback to the removal of the criminal sanction is that there would be no automatic disqualification of a company director for breaching the above provisions. However, the Section 204 of the UK's Enterprise Act suggests a resolution to that problem.

3.36 It is proposed to (a) eliminate criminal penalties for failure to notify and failure to provide further information, and substitute civil fines, and (b) insert a new provision to require a corporate officer to certify that any response to a formal request has been substantially complied with and no documents or other information have been withheld, unless pursuant to a claim of legal privilege.

Merger Proposal 15: Amend Section 19(1)
Amend the Act so to insert a penalty in the form of a substantial fine for implementation of a merger prior to clearance.

3.37 At present the only penalty for the implementation of a merger prior to clearance is that the merger is void. However, it would be useful for the Act to spell out the meaning of "voidness" – all contracts signed prior to the notification are not legally valid etc. The section does not provide for any penalties for implementation of a merger prior to clearance, apart from voidness. Failure to notify is an offence in certain circumstances, but implementation of a notified agreement prior to clearance is not. The Competition Authority has come across "gun-jumping" in a number of cases.

[24] 'Improving Merger Control in Ireland: Proposed Legislative Reforms Four Years On' at pp. 13-15.

Merger Proposal Set D - Reflecting New Legal Device to Effect a Merger

Merger Proposal 16: New Provision
Amend the Act so as to provide for a triggering event for notification where a merger is made by court-administered Scheme of Arrangement.[25]

3.38 This is an increasingly popular method of merger which is not covered by the Act. In the past, this gave rise to a difficulty since it is neither an agreement nor the making of a bid. Consequently, it was difficult to determine the triggering event for notification of the merger. The Competition Authority examined the notion of a scheme of arrangement, and concluded that it is closer in nature to the making of a public bid than to an agreement. Thus, since the posting of the bid is the triggering event in the case of public bids (as it is the moment when the bid is "made") the Competition Authority's interpretation is that the posting of the scheme is the triggering event in the case of schemes of arrangement. The Competition Authority has set out in a number of decisions its interpretation of how such schemes fit within the Act.[26] However, it would be better to set out the Competition Authority's interpretation in law.

3.39 At the April 2007 Merger Conference hosted by the Competition Authority, there appeared be general support for the idea that a special provision should be made in the Act for mergers by Scheme of Arrangement. Some legal practitioners expressed dissatisfaction with the Competition Authority view that the trigger for notification should be the posting of the scheme, by analogy with public bids. The view expressed was that the "making of a public bid" did not occur (as the Competition Authority believes it does) at the moment when the bid is posted, but at the earlier date when it is announced, that this was the general view internationally and that Ireland diverged from that.

3.40 However, the current interpretation by the Competition Authority of the deadline of making a public bid is based on discussions with the Takeover Panel. Hence any proposed changes, such as that proposed, would need to be further discussed with the Panel.

Merger Proposal Set E - Reviewing the Media Provisions

Merger Proposal 17: Amend Section 23(9)(a) and (b)
Amend the Act to allow media mergers to be put into effect prior to the 10 day/30 day period, if the Minister informs the Competition Authority before the respective period expires, that he or she is not making an order.

[25] ibid. at p. 8.
[26] See, for example, Babcock & Brown/Esot/eircom, M/06/035.

3.41 As the Act is currently drafted, even if the Minister informs the Competition Authority that he is not going to make an order, the parties still have to (unnecessarily) wait ten days.

Merger Proposal 18: Amend Section 23(7)
Amend the Act so as to abolish the requirement for the Competition Authority to form an opinion as to how the application of the relevant criteria should affect the exercise by the Minister of his or her powers.[27]

3.42 Section 23(7) of the Act obliges the Competition Authority to do something outside its area of expertise. The Competition Authority's expertise in assessing mergers is mainly in the area of the competition test, i.e., whether a media merger will lead to a substantial lessening of competition in markets in the State. However, under Section 23(7) of the Act, the Competition Authority is required to come to an opinion on "the relevant criteria" in relation to a media merger. The meaning of "relevant criteria" is defined at Section 23(10) of the Act. These criteria are not competition criteria but rather relate to diversity, the strength of media businesses indigenous to the State, the dispersion of media ownership amongst individuals and other undertakings and so on. The Minister has a determinative role in respect of the relevant criteria under Section 23(7).

Merger Proposal 19: Amend Section 23(10)
Amend the Act so as to either define, in relation to newspapers and periodicals, the term "publication", or redefine "media business" without the use of the word "publication"

3.43 "Media business" is defined in Section 23 (10) of the Act, as meaning, *inter alia, "a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs"*. The word "publication" itself is not defined in the Act. Up to now, the Competition Authority has understood the word "publication" in the broad sense in which it is used in the law of defamation, i.e., something is "published" wherever it is read. As a result, the Competition Authority has found that undertakings were carrying on a media business in Ireland where the newspaper published by them was on sale in Ireland. This has resulted in the Competition Authority

[27] See *'The Curious Tale of Pig, Papers and Peru: Media mergers in Ireland'* p. 15.

requiring mandatory notification of mergers that have little or no nexus to Ireland. For example, when understood in this way, the publishers of *Le Monde* and the publishers of *Corriere della Sera* would be carrying on a media business in Ireland, and if they merged, the merger would be mandatorily notifiable here.

3.44 Alternatively, one might use the dictionary definition of the word "publish", which is: *"prepare and issue for public distribution or sale."* One could then say that a "**business** of the publication of newspapers" is carried on in the place where the newspaper is produced and from which it issues for distribution or sale. However, that, too, poses problems due to technological advances which mean that a newspaper is no longer necessarily produced in one physical location.

3.45 The issue here is not a competition issue but more one concerned with diversity of opinion in the media. It would thus seem appropriate for the Government to provide a definition that takes into account the concerns expressed above while at the same time meeting their own diversity issues. One solution might be to set *de minimis* levels for publications in terms of weekly or daily circulation, by reference for example to the lowest level of circulation in the Audit Bureau of Circulation.

3.46 At the April 2005 Mergers Conference hosted by the Competition Authority, legal practitioners suggested that publication could be measured in terms of advertising or revenue. This suggests perhaps that some monetary threshold could therefore be put in the legislation to remove trivial media mergers. The Competition Authority has not found a satisfactory solution to this problem.

Merger Proposal 20: New Provision
Amend the Act so as to include a definition of what "carries on a media business" means, using the same criteria as set out in the Competition Authority's Notice No. N/02/003, with respect to "carries on business".[28]

3.47 The nexus test is not always satisfied in the case of media mergers. All media mergers have to be notified to the Competition Authority, irrespective of the size of the parties involved. SI No 122[29] does confine the types of media mergers that are required to be notified to the Competition Authority. For example, if both acquirer and target are carrying on a media business in the State, then this has to be notified.

3.48 Since the term "media business" is defined in the Act, it appears, according to legal advice, that the Competition Authority cannot define what it means by the term "carries on a media business". It did this with "carries on business" in *Notice N/02/003*, as amended on 12 December 2006. Therefore, it is proposed to define the term "carries

[28] *See 'The Curious Tale of Pig, Papers and Peru: Media mergers in Ireland'* pp.9-11
[29] S.I. No. 122 of 2007: COMPETITION ACT 2002 (SECTION 18 (5) AND (6)) ORDER 2007.

on a media business" using the same criteria as set for "carries on business".

Merger Proposal Set F - Extending the Act to include Partial Investments

Merger Proposal 21: New Provision
Amend the Act so as to give the Competition Authority the power to review partial investments which result in a substantial lessening of competition.

3.49 Partial investments arise when the investing firm shares the profits of the firm in which the investment has been made. In some cases the investment is passive in that the investor exerts no influence over its activities.[30] Among the possible anticompetitive effects that may arise in an oligopolistic market, the following is an example.

3.50 If firm A passively invests in firm B, prices may rise. If it had not invested, firm A would hesitate to raise the price of its brand, out of fear that such an increased price would cause it to lose too many customers to firm B. But if firm A passively invests in firm B, a price rise may become profitable, because even if some of the customers switch, firm A will share some of firm B's profits.[31]

3.51 It is also the case that a partial investment may result in the acquiring firm exerting influence over the target, but influence that stops short of decisive control. This will be referred to as an active investment. For example, the partial investor may get a place on the board and/or be briefed on the target's future investment plans.

3.52 In practice it is likely to be difficult to differentiate a passive investment from one where a firm purchases a minority shareholding but at the same time is able to influence the policies of the target without actually controlling it. Furthermore a firm with a partial investment may change from being a passive to an active investor.

3.53 A useful illustration of an instance where a minority investment may lead to an Substantial Lessening of Competition ("SLC") is the UK's Competition Commission's provisional findings report published on 4 October 2007 on the acquisition by BSkyB of a 17.9% stake in ITV.[32]

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[30] Passive and active partial investments falling short of decisive control are discussed in detail in 'Improving Merger control in Ireland: Proposed Legislative Reforms Four Years On' at pp. 5-7.

[31] This issue is discussed in M/05/24 UGC (Chorus)/NTL at paragraphs 122 to 130 available on the Authority's website www.tca.ie

[32] This may be accessed at: http://www.competition-commission.org.uk/inquiries/ref2007/itv/provisional_findings.htm

3.54 In a number of merger cases the Competition Authority has paid close attention to minority shareholdings that fall short of control and has as part of the clearance of the merger required divestment.[33]

3.55 At the moment the only way that the Competition Authority can deal with partial investments that may pose SLC concerns is via Section 4 of the Act, which is less than ideal. At best Section 4 is awkward; at worst, it does not apply at all.

3.56 At the April 2005 Mergers Conference hosted by the Competition Authority, some did not agree with the idea that passive investments should be made subject to the merger review process since, in their view, competition concerns in relation to passive investments arise only in oligopolistic markets, the situation is too rare to need to be brought into legislation. It would also lack clarity and certainty, and thus would not conform to ICN best practice.

3.57 Despite these views the Competition Authority thinks that it is worthwhile to raise the issue of minority investments that fall short of decisive control for discussion. Two issues need to be addressed. First, should the control be *ex post* or as with current merger control, ex ante. Second, what definition of partial or minority investment should be used? One possible way forward is for the Act to be changed to include reference to "material influence", as exists in the UK and was recently applied in the BSkyB case referred to above. An alternative would be to specify a level of partial investment in the target. For example, something below 30% which triggers under Irish takeover rules the necessity of the partial investor making a takeover bid. In the interests of certainty and clear bright lines one option would be to have an *ex ante* approach based on a partial investment level at the high end of 0% to 30% with a review of the workings of this approach after four years.

Conclusion: Revisions to Part 3 of the Act based on the Recommended Practices of the ICN

3.58 The ICN has produced a large number of Recommended Practices (RPs) for merger notification and review procedures.[34] Only some of these are relevant to the Act. In many cases, the RPs relate to administrative procedures within the Competition Authority and hence need not be dealt with in this paper. There are several instances where the Act does not conform with the ICN's RPs. However, in all cases the proposals made earlier in this section would bring the Act into conformity with best practice as set out in the RPs.

3.59 Table 1 below goes through the various RP subject headings to determine whether or not the current Act, the guidance provided by the Competition Authority, together with the proposed revisions, meet the RPs.

[33] Case M/03/033. *Proposed Acquisition by Scottish Radio Holdings plc of Capital Radio Productions Limited*, 23 February 2004.
[34] For details see:
http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/mnprecpractices.pdf

Table 1: Irish Merger Review Regime benchmarked against ICN Recommended Practice

ICN Best Practice	Conforming?	Action
Nexus to the Reviewing Jurisdiction	Partial	Addressed in proposal Merger Proposals 19 & 20 above.
Notification Thresholds	Yes	None
Timing of Notification	Partial	Addressed in Merger Proposal 12 above (see also note below)
Review Periods	Yes	None
Requirements for Initial Notification	Yes	None
Conduct of Merger Investigations	Yes	None
Procedural Fairness	Yes	None
Transparency	Yes	None
Confidentiality	Yes	None
Interagency Coordination	Yes	None
Remedies	Partial	Addressed in Merger Proposal 6 above (see also note below)
Competition Agency Powers	Partial	Addressed in Merger Proposals 14 & 15 above (see also note below)
Review Merger Control Provisions	Yes	See note below

3.60 Of the 13 RP subject headings, Ireland is in complete conformity on 9 counts and partial conformity on 4 counts. These are discussed below.

Nexus to the Reviewing Jurisdiction

3.61 The Act, and the Competition Authority's guidance material, with the exception of the nexus issue in media mergers, appears to be in conformity with the ICN RPs. Merger Proposals 19 and 20 above would bring the Act into complete conformity with the RP.

Timing of Notification

3.62 Similarly, the Act/guidance appears to be currently in conformity with these RPs. However, there is an exception. RP 3A reads:

> *"Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction."*

However, Merger Proposal 12 above suggests changes that will bring the Act into conformity with this RP.

Remedies

3.63 The Act/guidance appears to be currently in conformity with these RPs. However, there may be some doubt about the degree to which the Act is consistent with the RP that states:

> *"Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy."*

Although merger remedy packages are designed to be consistent with this RP, there is no express power to allow the Competition Authority to review and monitor commitments made by the parties and conditions imposed on a merger. Hence Merger Proposal 6 above deals with this issue.

Competition Agency Powers

3.64 It would also appear that the Act/guidance is currently in conformity with these RPs, with the exception of that RP that states:

> *"Competition agencies should have the authority and tools necessary for effective enforcement of applicable merger review laws."*

An essential part of meeting this criterion is the enforcement of non-compliance with Competition Authority orders. At the moment, the sanctions for non-compliance are either non-existent or are ineffective (i.e. criminal). However, Merger Proposals 14 and 15 above address these concerns.

Review Merger Control Provisions

3.65 The Competition Authority complies with these RPs: it held the Merger Control in Ireland conference earlier this year and is preparing its proposed changes in the Act so that they are consistent with the ICN's RPs.

4. COMPETITION ADVOCACY

Introduction

4.1 The 2002 Act added significantly to the Competition Authority's Advocacy functions. Prior to that, these were confined to major formal Studies under the 1991 Act. Section 30(1) of the 2002 Act considerably expanded the Authority's advisory and advocacy role, to include:

> *"(c) to advise the Government, Ministers of the Government and Ministers of State concerning the implications for competition in markets for goods and services of proposals for legislation (including any instruments to be made under any enactment);*
>
> *(e) to advise public authorities generally on issues concerning competition which may arise in the performance of their functions;*
>
> *(f) to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy;*
>
> *(g) to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition."*

4.2 To meet the challenge of this expanded role, the Competition Authority established an Advocacy Division, and the Division has been active in recent years raising awareness of competition and recommending the removal of anti-competitive laws and regulations. It has completed and publicised a number of major competition studies of economic sectors, it has published a number of submissions to Government Departments and other State Bodies on a range of competition issues, has regularly advised both Ministers and Public Bodies on request about competition matters, and regularly contributes to both broadcast and print media.

4.3 The very fact that the Act has entrusted the Authority with both public and private competition advocacy functions has created its own challenges, particularly those related to putting the case for pro-competition change, and countering the arguments of opponents of such change. Overall, however, the competition advocacy provisions of the 2002 Act appear to be working well, and the Authority and its Advocacy staff have gained much valuable experience over the past few years in meeting the political economy and other challenges thrown up by this new role.

4.4 In the context of the current review of competition legislation, one aspect of the advocacy role deserves some consideration, and that is the status of formal recommendations made by the Competition Authority in its various formal Studies. In its recent *Annual Competitiveness Challenge* 2007 Report, the National Competitiveness Council (NCC) stated the following:

> *"The active pursuit of measures to enhance competition, particularly in locally trading sectors of the economy, e.g. engineers, architects, solicitors, barristers, banking and non-life*

> *insurance, transport, energy and waste services, medical and paramedical professions etc. Current laws, rules and customs should be reviewed to ensure that they are not anti-competitive. Anti-competitive practices take many forms; for example, they can restrict the ability of people to enter these sectors e.g. limited training places / limited recognition of overseas qualifications, of individuals and firms to advertise, and of customers to switch providers easily, etc.*
>
> *In recent years the Competition Authority has reviewed many of these sectors and has recommended a range of actions to promote greater competition. In this context, the development of structures to coordinate responses to these recommendations would be of value.* ***The coordinated preparation of responses to Competition Authority reviews from Government would also serve to highlight progress made and identify outstanding areas."*** [35]

4.5 This section discusses a current similar (self-imposed) obligation on the UK Government to respond to recommendations of the Office of Fair Trading (OFT) to lift restrictions on competition.[36] It explores the implications of introducing a similar arrangement in Ireland, as the NCC has suggested. The UK Government has an obligation to respond to recommendations made by the Office of Fair Trading (OFT) and other State bodies.

4.6 The analysis below acknowledges that there are both benefits and drawbacks to adopting a requirement on the Government in Ireland to respond formally to Competition Authority Recommendations. In particular, attention is drawn to the political economy issues implicit in such a proposal. The Competition Authority is not, therefore, formally proposing such a requirement at this stage. Rather, what follows is intended to aid the Department of Enterprise, Trade and Employment in considering whether such a requirement ought to be put in place in Ireland.

The UK System

The White Paper

4.7 In a February 2001 White Paper, "*Opportunity for All in a World of Change*",[37] the UK Government announced that:

> "*it wished the OFT and other competition regulators to advise where laws and regulations create barriers to entry and competition, or channel markets in a particular direction, thereby holding back innovation and progress.*"[38]

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[35] *Annual Competitiveness Report 2007, Volume 2: Ireland's Competitiveness Challenge*. National Competitiveness Council. Page 27 (Emphasis added).

[36] In addition to the OFT, the UK Competition Commission and sectoral regulators with competition powers are competition authorities. Here, the expression 'competition authorities' should not be confused with the expression 'designated authorities' used in Regulation 1/2003.

[37] UK Government White Paper (2001), *Opportunity for All in a World of Change*. No Longer available for download.

[38] UK Government White Paper (2001), *A World Class Competition Regime,* para. 4.15. Available for download from http://www.archive.official-documents.co.uk/document/cm52/5233/523301.htm

4.8 It was envisaged that this new role would apply to assessing the effects of *existing* and *proposed* new legislation.

4.9 In a separate White Paper in July 2001, "*A World Class Competition Regime*" ("the White Paper"), which eventually led to the Enterprise Act 2002, the UK Government undertook to:

> "*consider the advice it receives from the OFT, the Competition Commission or a sector regulator, balancing competition against other public policy considerations"*

and to

> *"publish a response within 90 days of receiving a report, setting out where it does or does not propose to make changes in light of the report, or where it proposes to consult on options*."[39]

4.10 Decisions on how to respond to recommendations are taken by Ministers collectively. The commitment may be characterised as follows:

- *The Nature of the Commitment*: The UK Government's undertaking to respond is a voluntary commitment. It is not a statutory obligation and as such is not set out in legislation; the only reference to the commitment is in the White Paper. Accordingly, the time within which a response is delivered is flexible (e.g. the 90 days can be extended).

- *To Whom the Commitment Applies*: The commitment applies to the UK Government, not to the specific Minister(s) to whom the recommendations are directed. The Minister and the Government Department to whom recommendations are directed are referred to as the "Policy Minister" and the "Policy Department", respectively.

- *The Scope of the Commitment*: The commitment applies to advice published by the competition authorities rather than informal advice. In practice, responses to advice have extended beyond competition issues identified by the competition authorities in market studies. For example, the UK Government has responded to advice relating to consumer issues. On occasion, the UK Government's response has gone so far as to provide action plans for implementation. The Government's response has to be reasoned and must "*balance competition against other public policy considerations".*[40]

- *How the Commitment Operates in Practice*: The Department for Business, Enterprise and Regulatory Reform (BERR) (formerly the Department for Trade and Industry) coordinates the Government response. In other words, it sets the agenda for change at Cabinet level. The D/BERR chairs meetings of an Interdepartmental Implementation Group, i.e., officials responsible for implementing the policy recommendations.

[39] ibid.
[40] ibid.

The Experience

4.11 Since the publication of the White Paper, the UK Government (and, in relation to devolved matters, the Scottish Executive, the Welsh Assembly Government and the Northern Ireland Executive) has formally responded to nine Market Studies published by the OFT. With the exception of the recommendations made in the OFT Pharmacy Market Study, all Government responses have either supported the OFT recommendations or provided a reasoned explanation as to why the advice could not be followed.

4.12 Three examples of UK Government responses are briefly presented in Annex A. They relate to the OFT Doorstep Selling Market Study,[41] the OFT Pharmacy Market Study,[42] and the OFT Taxi Market Study.[43] All the UK Government responses and the relevant documents, including the OFT's reports are available for download from: http://www.dti.gov.uk/bbf/competition/market-studies/page17610.html.

4.13 Overall, the practice of responding to Market Studies recommendations has been seen as both useful and successful in driving change or clarifying the rationale for the status quo. Why?

- First, requiring the Government to respond puts the burden of proof regarding liberalisation measures in the appropriate place: liberalisation measures are assumed to be beneficial unless the Policy Department concerned is convinced of the opposite. In practice it means that, when recommendations are agreed by the main economic/market-focused Departments, typically the Treasury and the Department for Business, Enterprise & Regulatory Reform, they will be implemented.

- Second, the "obligation to respond" within three months has made the process of policy-making more transparent, and reduced the advantage of producer interests in terms of resources. The 90-day deadline compares favourably with normal legislative processes where Government approves policy at the end of the policy formulation process – a two to three year process. The deadline imparts momentum to the Government in deciding on its position and leaves less room to manoeuvre successfully to those who wish to resist pro-competition change.

4.14 The only instance where OFT recommendations were not fully implemented concerned the liberalisation of the pharmacy sector. The OFT report did not include arguments to assuage the likely concerns of the relevant Policy Department (Health). As a result, the thrust of the OFT's recommendations were not implemented. The experience

[41] For further information on the UK Government's response to the Market Study on doorstep selling visit the DTI website: http://www.dti.gov.uk/bbf/competition/market-studies/doorstep-selling/page17661.htm

[42] For further information on the UK Government's Response to the OFT Market Studies on Pharmacies, please visit the DTI's website: http://www.dti.gov.uk/bbf/competition/market-studies/pharmacies/page25819.html

[43] For further information on the UK Government's Response to the OFT Market Studies on Taxis and PHV Services, please visit the DTI's website: http://www.dti.gov.uk/bbf/competition/market-studies/Taxis/page25808.html

suggests that reports should anticipate arguments in favour of the *status quo* and address them.

4.15 For a number of reports, the UK Government was not in a position to announce an action plan to implement the OFT's recommendations. While recommendations were accepted in principle, the 90-day deadline made it difficult to gather and analyse data that would establish the rationale for the proposed policy implementation decision.

Issues for Consideration in an Irish Context

4.16 If a similar requirement were to be considered in Ireland, the following issues would arise.

Should the Government make a commitment to respond?

4.17 The record of Departments in implementing Competition Authority Recommendations to date is somewhat mixed, as Annex B shows. The public nature of a Government response would enable more open and transparent debate on the merits of reform, and facilitate the expression of public opinion on the issues. Introducing such a requirement could also be seen as simply giving more teeth to the Competition Authority's functions under Section 30(1) of the Act.[44]

4.18 On the other hand, forcing the Government to respond to Competition Authority recommendations could (arguably) alter the relationship between the Competition Authority and the Government, and ostensibly give the Competition Authority more weight in public policy-making. This raises clear political economy issues. While the Competition Authority, at this stage, has considerable experience of dealing successfully with such issues, it could also be argued that a requirement on Government/policy-makers to respond to Competition Authority recommendations would give too strong a role in public policy-making to an independent public body. If that view prevailed, it would clearly damage the prospects for further pro-competition reform generally.

4.19 A commitment to respond would also likely force well-resourced producer interests (who may feel they have a *status quo* to defend) to increase their activity levels to resist reforms, thus putting more pressure on the Competition Authority to scale up its own resources in turn to counter this, particularly in the area of external communications.

Should any official commitment be required by statute, or remain voluntary?

4.20 Currently, Government Departments and Agencies, Statutory Regulators (e.g. Dental and Medical Councils) and third parties (e.g.

[44] "(a) to study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition ……..
(*c*) to advise the Government, Ministers of the Government and Ministers of State concerning the implications for competition in markets for goods and services of proposals for legislation (including any instruments to be made under any enactment);
……
(*e*) to advise public authorities generally on issues concerning competition which may arise in the performance of their functions;
(*f*) to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy."

Bar Council) are not obliged in any way to respond to recommendations of the Competition Authority. In the UK, the Government has made a "voluntary commitment" to respond to recommendations of the OFT and has set up the appropriate mechanisms to coordinate responses. The advantage of the UK arrangement is that the voluntary nature of the commitment allows a degree of flexibility. The advantage of replicating the UK arrangement here is that it would lessen the political economy disadvantages associated with a compulsory requirement. The disadvantage is that a "voluntary commitment" may dissipate over time.

Should a time-limit for making a response be specified?

4.21 If an obligation to respond was required by statute, it would seem essential to specify a timeframe, for otherwise it would be very hard to determine whether the Government had complied with such obligation. As regards what precisely the time-limit should be, this would depend very much on (a) the nature of the Competition Authority's analysis supporting the recommendation and (b) the nature of the envisaged response (this is discussed in more detail below). A statutory obligation and a specified time-limit would seem to go hand in hand.

To whom should any commitment/obligation apply?

4.22 In the UK, the commitment applies to the Government, with the D/BERR coordinating the responses of various parts of Government. It is clear, from the D/BERR's and the OFT's comments, that there are clear benefits in having the commitment/obligation apply to the Government rather than only to the relevant Policy Department (i.e. the Department or Agency to whom the recommendation is directed). The disadvantage of requiring a response from the relevant Department or Agency, as opposed to the Government as a whole, is the risk that a Department or Agency response may simply be a repeat of arguments that were behind the restriction in the first place. Reform is much more likely if reasoned arguments for the removal of restrictions are brought before a wider constituency.

4.23 One issue that a UK style system would not address, and which needs more consideration, concerns the many Competition Authority recommendations not directed to Government Departments or Agencies, but instead to statutory regulators like the Dental or Medical Councils, and third-party NGOs like the Bar Council or the Irish Bankers Federation. Although a way could probably be found to extend any "requirement to respond" to statutory regulators, non-statutory bodies like the Bar Council would continue to be problematical - in such situations, the Competition Authority would probably have to continue to rely on the power of persuasion or the threat of enforcement action.

What Competition Authority outputs might require a response?

4.24 In the UK, the commitment applies to advice published by the competition authorities, rather than informal advice. In Ireland at present, formal Studies are the main outputs where recommendations are preceded by a full analysis. By contrast, Submissions to Government Departments and others sometimes include final recommendations, but often they simply flag potential competition issues or possible solutions, to contribute to the policy making process. It seems sensible that only formal recommendations by the

Competition Authority, designated as such by the Authority, should require a reasoned Government response. Thus, the Competition Authority would identify where a reasoned response was required. This would obviously be done sparingly.

What should a response involve?

4.25 In the UK, a reasoned response, balancing competition with other public policy considerations, is required when the Government does not intend to follow the recommendations of the competition authorities. Where the Government is positively disposed toward implementing the recommendations, action plans outlining how it intends to deal with recommendations are often provided. Similar provisions seem appropriate in the Irish context.

4.26 This of course raises the question of what a "reasoned response" actually amounts to. Presumably, it should be fully-argued and not merely peremptory or dismissive.

4.27 Also, what happens if the Government is not positively disposed toward implementing a recommendation and provides a reasoned analysis to back up its view? What should be the policy of the Competition Authority in this kind of situation?

How might a commitment operate in practice?

4.28 In the UK, the D/BERR plays a central role, coordinating the Government's response to the competition authorities. Replicating the UK arrangement in Ireland would imply giving a similar role to the Department of Enterprise, Trade and Employment. While this is one option, there are alternatives. For example, the Department of the Taoiseach plays a central role with respect to regulatory impact analysis; the Department of Finance often plays a lead role with respect to many other economics-based policy initiatives.

What are the likely resource implications for the Competition Authority?

4.29 If the Government was required to respond to formal recommendations of the Competition Authority, this would place the Competition Authority at the heart of the Government policy-making process, and it is a power that would have to be discharged with appropriate care. Resource implications are likely to be broader than those relating purely to how the Competition Authority arrives at a particular recommendation. If there is perceived to be a greater likelihood that Competition Authority recommendations will be implemented, those opposed to change are likely to ramp up their own efforts to resist pro-competition reform. The consequence for the Competition Authority is that more resources would have to be devoted to pre-publication liaison with stakeholders, not least with Government Departments and others, as well as post-Study follow-up efforts. This would involve, not only additional effort by the Advocacy Division of the Competition Authority, but also a more intensive communications strategy.

Comment

4.30 Giving the Competition Authority a more influential role in relation to Government policy-making, at least in the formal sense implied by an

obligation on Government to respond to recommendations made by the Competition Authority, could be very valuable – it would in effect give teeth to the Competition Authority's Advocacy function. The reform would mean that once recommendations had been arrived at, the policy making process would retain momentum outside the Competition Authority. Moreover, the Competition Authority would have to rely less on the like-mindedness of implementing Government Departments and Agencies and instead may be able to raise the level of debate and effectively draw out the rationales for retaining State restrictions of competition in particular sectors of the economy.

4.31 That said, such reform would have implications for how the Competition Authority is perceived, by Government and others, for the political economy of competition policy, and for how the Competition Authority approaches its Advocacy and Communications functions. There are also likely resource implications.

4.32 Although the UK experience with competition-related recommendations is very useful, a word of caution is in order in applying it directly to Ireland. It could be argued that a "*competition culture*" has a longer history in the UK than in Ireland, and that this limits the analogies we can usefully draw.

4.33 Finally, Annex B contains a summary of historical recommendations following Competition Authority Studies, including details of relevant Government Departments or Agencies, and responses or outcomes.

5. GENERAL REVISIONS AND CONCLUDING COMMENT

Introduction

5.1 The following section deals with potential amendments to the Act that are relevant either to more than one of the activities of the Competition Authority or to the functioning of the Competition Authority. There are six proposals:

- The first relates to the Competition Authority's power to obtain information relevant to the carrying out of its functions;
- The second relates to the notification to the Competition Authority of private actions;
- The third and fourth relate to civil infringements of the Competition Act 2002; and,
- The fifth to seventh relate to the functioning of the Competition Authority and the meaning of time periods specified in the Act.

Competition Authority Powers to Obtain Information

General Proposal 1: New Provision
Amend the Act so as to provide the Competition Authority with the power, in connection with the carrying out of its functions under the Act, to issue a demand to any person to require (a) that person to provide documents by sworn affidavit and/or (b) that person to provide answers to questions by affidavit.

Background

5.2 In connection with the carrying out of its functions under the Act and, in particular, with respect to investigations of possible breaches of Sections 4, 5 and 15B, the Competition Authority has two formal investigative measures available: a search warrant under Section 45 which is issued by a court and a witness summons under Section 31 issued by the Competition Authority.

5.3 Although the proposal contemplates making available the demands for documents and answers to questions for the carrying out of all functions under the Act, the discussion in this note focuses on the use of the proposed powers in the conduct of an investigation of a breach of the Act where a civil proceeding pursuant to Section 14 of the Act is under consideration.

5.4 The normal practice in the conduct of an investigation of a breach of the Act (for which a civil proceeding may be considered under Section 14 of the Act) is to request the parties involved (complainant, if any, and the party or parties whose conduct is being investigated) and third

parties to provide documents and other information on a voluntary basis.

5.5 Where a person refuses to provide documents and information voluntarily, the Competition Authority may issue a witness summons under Section 31 to obtain the needed information. (In some limited circumstances, a witness summons is issued without having previously requested the documents or information to be provided voluntarily.)

5.6 Reliance on voluntary cooperation is cumbersome and is the main cause for delay in the conduct of an investigation. It is the practice of the Competition Authority to state a deadline, usually 3 weeks, for the delivery of the response to the request for documents and other information. Almost always, the respondents request extensions of the deadline and the Competition Authority usually grants the extension. Also not infrequently, the Competition Authority encounters reluctance from third parties to provide documents or other information. Where time is of the essence, it may not be practical to conduct a witness summons hearing of the third party.

5.7 As indicated above, where a respondent refuses to provide information voluntarily or the information provided is not responsive, the Competition Authority may issue a witness summons to compel a person to attend to be examined under oath and to provide documents.

5.8 In a witness summons hearing, the witness is asked to provide documents and to answer questions. There are several important limitations to the use of this investigative measure:

- First, the quality of answers to questions is less precise than if the answers are given in written form.

- Second, although the witness hearing is recorded, it is the normal practice not to produce transcriptions, given the cost. Instead, the Competition Authority uses the notes taken by Competition Authority staff.

- Third, it is understood that the law does not allow the witness to be required to produce documents which the witness has to create, for example, to do calculations and to provide an analysis of data. It should be noted that in voluntary requests for information, the Competition Authority does not exclude questions for which a response requires analysis or calculations.

Rationale for Proposal

5.9 The proposal would formalize the current practice of requesting persons to provide documents and other information on a voluntary basis. The benefits of doing so are:

- First, the ability to enforce by court proceedings any failure to provide written information requested within the specified time limits;

- Second, it would eliminate any potential for a respondent to raise objections or doubts about the scope of the documents or information the Competition Authority may request on the

grounds that the respondent has to create the information, i.e., conduct analysis or make calculations;

- Third, it would speed up the gathering of information;
- Fourth, it would avoid having to use witness summons powers where information sought is best provided in written form; and,
- Fifth, it would facilitate obtaining documents or other information from third parties where time is of the essence.

5.10 As noted above, the rationale for the proposal is based on experience in conducting investigations for which a civil proceeding is contemplated. It is suggested that the same rationale should apply in a merger review under the Act. It is noted, however, that the power to demand documents and other information may be of limited use where a criminal proceeding is contemplated.

Other Jurisdictions

5.11 Virtually all national competition authorities in the European Competition Network have powers to compel the disclosure of information, including documents. The form it takes varies across jurisdictions.

5.12 In carrying out its duties under Regulation 1/2003, the European Commission has broad investigative powers including the power to make a simple request, or by formal decision to require an undertaking or an association of undertakings to provide information (Article 18). The respondent to the request is required to comply.

Notification to the Competition Authority of Private Actions

General Proposal 2: New Provision
Amend Section 14 of the Competition Act, to require notification to the Competition Authority of the filing of any case in the courts where violations of Sections 4 or 5 of the Competition Act and/or Articles 81 and 82 of the EU Treaty are alleged.

5.13 Section 14 of the Competition Act, 2002 creates a right for "any person" to bring an action in the courts for violations of Sections 4 or 5 of the Act. Because the filing of pleadings is not well-publicized and they are not a matter of public record, the Competition Authority will become aware of such filings only if one of the parties to the action deems it appropriate to inform the Competition Authority of the case.

5.14 Because there is no mechanism for the Competition Authority to become informed on a regular basis of case filings that allege violations of the Competition Act, the Competition Authority is unable to regularly monitor such filings in order to determine if it wishes to petition to join the case or become an *amicus curiae*.

5.15 Private enforcement of the Competition Act and of Articles 81 and 82 of the Treaty of Rome are important corollaries to public enforcement by the Competition Authority and the European Commission.

5.16 It is anticipated that private cases will increase in the future and will contribute substantially to enforcement and jurisprudence. It is desirable and important to have a mechanism whereby the Competition Authority would regularly become informed of private competition cases at the time they are filed.

5.17 Likewise, it would be desirable for the Competition Authority to be served with a copy of the pleadings and papers in such cases at the time they are filed with the Court.

5.18 An amendment to Section 14, which would require a party filing a case in which violations of Sections 4 and/or 5 of the Competition Act, 2002, or Articles 81 and 82 of the Treaty are pleaded or alleged, along with a requirement to serve copies of pleadings and papers upon the Competition Authority simultaneous to the filing of such documents in court would achieve the stated goals.

5.19 For purposes of clarity, the statutory language might also include language to the effect that such notification to the Competition Authority creates no rights to the parties to require participation by the Competition Authority or obligations on the Competition Authority in respect of the private cases.

Proposal to Create a New Section 14A and to Make Consequent and other Amendments to Section 14.

General Proposal 3: New Section 14A
Amend the Act so as to introduce a new section providing for the right of the Competition Authority to bring a civil action for the breach of Sections 4 and 5 of the Act, and for Articles 81 and 82 of the Treaty, and provide for the remedies to be imposed. Also, provide that the court may impose fines in addition to the other remedies provided for by this section.

5.20 Civil infringements of the Competition Act 2002 are not subject to effective sanction as the courts have no power to levy fines on the offending parties. While the court may award private plaintiffs damages in a civil action, including exemplary damages, in a civil action brought by the Competition Authority relief is limited to injunction or declaration. As a result of this anomaly, for many types of offences under the Competition Act, there is no effective deterrence since the offending party faces no sanction for offending conduct in the past. The sanction is limited to a commitment not to offend in the future. The Competition Authority recommends that this anomaly be corrected by giving the courts such a power to fine. Furthermore, the fining power should be exercised by the courts in accordance with principles of public enforcement and deterrence as set out in Enforcement Proposal 12 of this document.

5.21 The Competition Authority believes it can be argued that the courts already have power to impose fines in civil cases involving a breach of Article 81 or Article 82 of the Treaty of Rome. Article 5 of Regulation 1/2003 ("the Regulation"), which confers power on the designated competition authorities of the member states to apply Articles 81 and 82 in individual cases, provides that for that purpose, the competition authorities may take certain specified decisions, including "*imposing fines, periodic penalty payments or any other penalty provided for in their national law*". SI No. 130 of 2005 designated the courts as competition authorities for the purpose of Article 5. It is arguable that the Regulation confers the fining power directly upon the Irish courts.

5.22 If this is so, it would be very difficult to argue that the courts should not exercise the same power in respect of breaches of Sections 4 and/or 5 of the Act. Take for example a cross-border case where it was alleged that both Section 5 and Article 82 had been infringed. If the plaintiff succeeded on both counts, and a fine was imposed in respect of the breach of Article 82, but only an injunction in respect of Section 5, the effect upon the defendant would be the same as if the fine had applied to both breaches. A statement by the court to the effect that it was only being imposed in respect of the breach of Article 82 would be of little comfort to the defendant, and would, in the Competition Authority's opinion, be simply a splitting of hairs.

5.23 While the Competition Authority is aware that an argument could be made to the effect that the courts' power to impose fines in *criminal* cases is sufficient to comply with article 5 of the Regulation, the Competition Authority does not believe that such an argument would withstand scrutiny, for the following reasons:

- First, Article 11 of the Regulation requires that Member States:

  "shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty ***in such a way that the provisions of this Regulation are effectively complied with.****"* [Emphasis Added]

  Effective implementation, then, is the primary obligation imposed upon the Member States by the requirement to designate competition authorities.

- Second, successful criminal prosecutions are unlikely to occur in respect of any breach other than a hard-core cartel, because of the requirement that the case be proved beyond reasonable doubt. This means that in any other case, whether it involves a breach of Article 81 or Article 82, the only sanctions likely to be imposed will be injunctions. In the Competition Authority's view, this would not be an effective deterrent, and consequently, would not be an effective way of applying the community competition rules. It appears to the Competition Authority that the Regulation will only have been effectively implemented if the designated competition authorities have the power to impose fines in respect of *all* breaches of Articles 81 and 82.

5.24 Currently, the private right of action for aggrieved persons and the right of action of the Competition Authority are placed in the same provision, Section 14. This creates the erroneous impression that the

two rights of action are derived from the same source. The right of action of the Competition Authority is part of its public enforcement power, and is a corollary to its power to seek criminal sanctions in respect of a breach of Sections 4 or 5, or Articles 81 or 82. The right of action of an aggrieved person, on the other hand, is simply aimed at recompensing that person for harm suffered as a result of a breach of the Act or of Articles 81 or 82.

5.25 The amalgamation of both private and public actions in a single section of the 2002 Act can have serious consequences for effective enforcement. First, as noted above, the 2002 Act does not provide an effective deterrent for past offences. In addition, where the Competition Authority's public enforcement power is linked to the right of action of a private plaintiff, the court might be equally reluctant to grant relief to the Competition Authority where the impugned conduct has ended. This is inevitable since in actions brought by a private plaintiff, the court is usually reluctant to grant relief by way of injunction or declaration if the infringing conduct has ended. However, from the perspective of public enforcement and compliance it may well be both desirable and appropriate to sanction the conduct in such a case since such precedents are valuable for purposes of public deterrence.

General Proposal 4: Consequent and other amendments to Section 14
(1) Amend Section 14 by deletion of sub-section (2), by deletion of the reference to sub-section (2) in sub-sections (7) and (8) and by the references to the Competition Authority in sub-sections (6) and (7). *(2) Amend sub-section (1) to include a reference to Articles 81 and 82.*

5.26 Amendment (1) is necessary since public enforcement and actions taken by the Competition Authority are to be set out in a separate section.

5.27 Amendment (2) is required since the right of action for aggrieved persons is currently limited to breaches of Irish competition law. It is clear from the case law of the European Court of Justice that private individuals have a right to seek damages for breaches of community competition law, and it would seem desirable, for the avoidance of doubt, to enshrine this right in the Competition Act. (see Case C-453/99, *Courage and Crehan,* [2001] ECR I-6297, and Joined Cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619)

Functions and functioning of the Competition Authority

General Proposal 5: New Provision
Amend the Act to provide for meetings of the Competition Authority to be held where necessary without the physical presence of the quorum (e.g., by teleconference).

5.28 Section 37(1) of the Act requires a quorum of three members for meeting of the Competition Authority. Section 37(3) provides as follows:

> *"Every question at a meeting of the Authority shall be determined by a majority of the members present and voting on the question […]"*

5.29 As there is nothing in the Act to indicate that the word "present" may be understood in any but its literal sense of "physically present", the legislation would appear to require a quorum of three to be physically present at every meeting of the Competition Authority. It has occasionally happened that only two members of the Competition Authority were physically present at a time when it was necessary to hold a meeting. During one recent period where the membership of the Competition Authority was temporarily reduced to three, it was necessary for the Minister to appoint a temporary part-time member so as to ensure that if one of the existing members was out of the office for any reason, there would be a quorum present. It would not have been necessary to go to those lengths if it had been permissible to have meetings by teleconference or conference telephone call.

5.30 The proposal would ensure that necessary decisions of the Competition Authority could be made even where three members were not able to be physically present at a meeting.

5.31 There is a precedent for this proposal in Schedule 6 of The Central Bank Act 1942, as inserted by The Central Bank and Financial Services Authority of Ireland Act, 2004, which provides as follows in relation to meetings of the Financial Services Ombudsman Council:

> *"10.—(1) The Council may, if it thinks fit, transact any of its business by the circulation of papers among all its existing members. A resolution approved in writing by a majority of those members is taken to be a decision of the Council.*
>
> *(2) The Council may, if it thinks fit, transact any of its business at a meeting at which its members (or some of its members) participate by telephone, closed circuit television or other means, but only if any member who speaks on a matter being considered by the meeting can be heard by the other members. For the purposes of—*
>
> *(a) the approval of a resolution under subparagraph (1), or*

(b) a meeting held in accordance with subparagraph (2),

the members of the Council have the same voting rights as they have at an ordinary meeting of the Council.

(3) Papers may be circulated among Council members for the purposes of subparagraph (1) by the electronic transmission of the information in the papers concerned."

General Proposal 6: New Provision
Amend the Act so as to provide for the authorisation of a whole time Member of the Competition Authority to act as Chairperson where the office of chairperson is vacant.

5.32 The Act does not deal directly with the situation that arises upon the Office of Chairperson falling vacant, although the possibility of such a situation is contemplated in Section 37(2) (b) where "*if the office of chairperson is vacant, the members of the Authority who are present* [at a meeting] *shall choose one of their number to be chairperson of the meeting*".

5.33 Section 35(2) makes provision for the Minister to authorise another Member of the Competition Authority to act as Chairperson where it appears to the Minister that the Chairperson is temporarily unable to discharge his or her duties. Would this provision allow the Minister to authorise an acting Chairperson if the Office of Chairperson is vacant? On the plain reading of the words, it would not. In order for a situation to arise whereby a Chairperson is temporarily unable to discharge his duties, a Chairperson would have to be in existence. A non-existent Chairperson cannot be either able or unable to discharge his duties.

5.34 By virtue of the fact that the only mention of a vacancy occurs in Section 37(2) (b), the Act appears to contemplate that nobody should exercise the office of Chairperson in such a case except during a meeting of the Competition Authority. This is an undesirable situation, as the Chairperson has certain statutory functions that cannot be exercised by anyone else. For example:

- He/she manages and controls generally the staff, administration and business of the Competition Authority (Section 38(1));
- He/she gives evidence when required to Dail Committees (Section 38(2)); and,
- He/she appears when required before Oireachtas Committees. (Section 38(4)).

5.35 It has already occurred, following the resignation of the last Chairperson, that the office was vacant for some months before the incumbent was able to take up his duties.

5.36 The proposal would ensure that the above functions of the Chairperson could be carried out on a temporary basis. It seems logical that if this can be done when an existing Chairperson is unable to perform his or her duties, it should also be done when the office is temporarily vacant.

General Proposal 7: New Provision
Amend the Act so as to express all time periods in "working days".

5.37 Time periods in the Act are expressed in terms of days and months. The Interpretation Act requires "month" to be interpreted as "a calendar month" and although "day" is not defined in that Act, "week-day" is defined as a day which is not Sunday, thus giving rise to the implication that "day" *simpliciter* must include Sunday. This means that days and months, when referred to in the Act, include Sundays and other holidays. This effectively shortens the time limits where they fall on a weekend, a bank holiday, or during an extended holiday period, such as Christmas. The 2004 ECMR has dealt with this difficulty by expressing all time limits in working days, and we believe it is desirable to adopt a similar approach in our own legislation. Using working days throughout would also make the time limits more transparent and accessible, as, at present, one has to consider which month the appropriate date falls in before one can know precisely how long the time limit will be.

A. THE UK GOVERNMENT RESPONSES TO OFT MARKET STUDIES

A.1 This Annex presents a summary of the UK Government Response to three of the OFT Market Studies: the Market Studies on Doorstep Selling, on Pharmacies and on Taxis and PHV Services.[45]

The UK Government Response to the OFT Market Study on Doorstep Selling[46]

A.2 The OFT published a report on Doorstep Selling on 12 May 2004, recommending a strengthening and broadening of measures to protect consumers to better protect consumers from salespersons in the home. Under the Consumer Protection (Cancellation of Contracts concluded away from Business Premises) Regulations 1987 (the Doorstep Selling Regulations) a seven day cooling off period is provided for purchases made following an unsolicited visit. A cooling off period does not apply to sales following solicited visits. The OFT has identified a number of concerns which, taken together, mean this sales practice can cause problems for consumers. The OFT recommended that the UK Government should extend the legislation to give cancellation rights to solicited visits as well as unsolicited. To prevent the undermining of cooling off periods the OFT recommended that Government consults on the possibility of removing the legal exception and of banning work and/or payment with in the cooling-off period (with exceptions).

A.3 After a public consultation on the measures recommended by the OFT to better protect consumers from salespersons in the home and consultation of stakeholders, the UK on doorstep selling and cold calling along with the updated Regulatory Impact Assessment, the Government announced in November that it will:

- Extend to solicited visits, the cancellation rights and cooling-off period that consumers currently enjoy for unsolicited visits;
- Require cancellation notices to be provided within contracts; and
- Encourage greater transparency on prices and greater willingness to provide written quotes.

A.4 To implement the first two measures a) the Government plan was to introduce primary legislation in the Consumers, Estate Agents and Redress Bill by November 2006 and statutory instruments (Regulations) by 2007, with a view to implementing the revised Regulations in 2008. The third measure was to be taken forward through industry self-regulation, by encouraging traders to operate under Codes of Practice that have been approved under the Office of

[45] All the UK Government responses and the relevant documents are available for download on the following page: http://www.dti.gov.uk/bbf/competition/market-studies/page17610.html.
[46] For further information on the UK Government's response to the Market Study on doorstep selling visit the DTI website: http://www.dti.gov.uk/bbf/competition/market-studies/doorstep-selling/page17661.htm

Fair Trading's Consumer Codes Approval Scheme,[47] or for the building and construction trades through participation in TrustMark.[48]

The UK Government Response to the OFT Market Study on Pharmacies[49]

A.5 In January 2003, the Office of Fair Trading (OFT) published a report into the UK market for retail pharmacy services. The report suggested that removing restrictions on entry to the community pharmacy market would give consumers greater choice, benefits from greater competition and better access to pharmacy services.

A.6 On 30 June 2003, Gerry Sutcliffe, Parliamentary Under-Secretary of State for Competition and Consumers, issued an interim response and the Government responded fully on 17 July 2003 in a written statement to the House of Commons. This statement announced a new package of measures to raise the quality of services offered by pharmacists and boost local access, but it fell short of full liberalisation as recommended by the OFT's report. On 18 August 2004, the Government announced the implementation of the package of measures outlined in their response.

- New criteria of competition and choice in assessing the adequacy of local service provision will be introduced through secondary legislation as originally proposed;
- Shopping developments over 15,000 square metres (excluding developments in town centres) would be exempted from the Control of Entry regulations; and,
- Consortia wishing to establish new one stop primary care centres will similarly be exempted. However, they will need to provide a regular and comprehensive range of services and serve a substantial population.

A.7 John Vickers, the then OFT Chairman responded to the Government announcement in the following terms:

> "*The pharmacy entry rules block new and better ways of delivering medicines to the public. We recommended that they should go, but the Government last year proposed only limited liberalisation – a missed opportunity. We regret that the Government has now decided on even less liberalisation for the time being, but we look forward to the further review of the rules in 2006*"[50]

[47] For further information on the OFT Scheme please visit their website: www.oft.gov.uk/Codes.
[48] For further information on trustmark see www.trustmark.org.uk.
[49] For further information on the UK Government's Response to the OFT Market Studies on Pharmacies, please visit the DTI's website: http://www.dti.gov.uk/bbf/competition/market-studies/pharmacies/page25819.html
[50] http://www.oft.gov.uk/news/press/2004/pharmacy

UK Government Response to the OFT Market Study on the Regulation of Taxis and PHV Services[51]

A.8 The Office of Fair Trading published a report into the UK market for taxis and private hire vehicles and whether consumers are best served by the current regulatory regime under which they are licensed on 11 November 2003. The report recommended:

- The repeal of the legislative provisions allowing licensing authorities to impose quantity controls in England (outside London), Wales and Scotland and that, in the meantime, OFT recommends that Local Authorities with quantity controls remove them;

- The Department for Transport promotes and disseminates local best practice in applying quality and safety regulations involving the Scottish Executive and the Department of the Environment (Northern Ireland) in this process; and,

- Throughout the UK Local Authorities should only set fare tariffs which represent the maximum that can be charged, and not set fixed or minimum fares. It should be made clear to consumers that they are able to negotiate on fares, for example, when ordering a taxi over the telephone. OFT also recommends that, where possible, Local Authorities actively facilitate more price competition in the market, particularly in the rank and hail sectors of the market.

A.9 In March 2004, the Government accepted the OFT's recommendations on quality and safety regulations and maximum fares and agreed with OFT that consumers should enjoy the benefits of competition in the taxi market. However, rather than impose a legislative solution on taxi numbers, the Government proposed a number of steps to encourage Local Authorities to remove restrictions unless they can show that they deliver benefits to consumers.

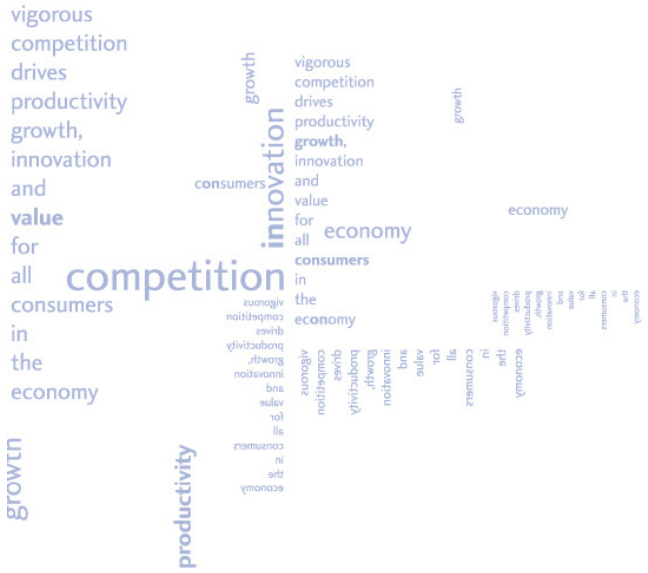
[51] For further information on the UK Government's Response to the OFT Market Studies on Taxis and PHV Services, please visit the DTI's website: http://www.dti.gov.uk/bbf/competition/market-studies/Taxis/page25808.html

B. FORMAL COMPETITION AUTHORITY RECOMMENDATIONS[52]

Year	Subject	Comments/Progress
1998	**Liquor Licensing**	4 recommendations were directed to the Minister for Justice, Equality and Law Reform. **One implemented**, in 2000
1999	**Transport**	A number of recommendations were made to then Minister for Public Enterprise regarding the re-structuring and re-regulation of the rail and bus passenger transport market in the State. **None implemented**
2002	**Casual Trading**	10 recommendations, mainly to Local Authorities **One implemented** in 2007, unclear re the remainder.
2004	**Engineers Profession**	2 recommendations. **One implemented** by the profession, the second (to Minister for the Environment etc.) does not yet arise
2005	**Non-life Insurance**	47 recommendations, mainly to Financial Regulator (36), but also to Department of Transport (4) & D/Finance (1) Financial Regulator has addressed 21 recommendations and will address others in the context of its review of intermediaries. **Departments have not implemented any recommendations.**
2005	**Banking**	25 recommendations – 6 to Department of Finance, 10 to IPSO, 3 to Financial Regulator, 4 to Irish Bankers Federation, 2 to banks. 15 recommendations have been implemented to date (end-2007), including **1 by D/Finance**.
2006	**Architects Profession**	11 recommendations, including 7 to the Minister/ Department of the Environment, Heritage and Local Government. **Minister has implemented 3**, other implementation by HEA (1), RIAI (2).
2006	**Optometrists Profession**	5 recommendations – 2 to Minister for Health & Children, 1 to HSE, 1 to Opticians Board/Association of Optometrists Ireland/Minister for Health & Children, and 1 to the HEA. **None implemented to date**
2006	**Solicitors and Barristers Profession**	29 recommendations, including 15 to Minister for Justice, Equality and Law Reform, 13 to Bar Council, 4 to Law Society.

[52] In some cases the Recommendations listed were addressed to more than one party.

		Bar Council has implemented 5 (minor) recommendations, Law Soc has implemented or progressed 4 (minor) recommendations. **Minister has implemented none** to date.
2007	**Private Health Insurance**	16 recommendations, primarily to Minister for Health & Children, also to the HIA, Financial Regulator **Minister addressing/implementing 5 key recommendations via VHI (Amendment) Bill 2007.** HIA addressing 2 more.
2007	**Dentists Profession**	12 recommendations – 6 to Minister for Health and Children, 5 to the Dental Council, 2 to the Department of Social and Family Affairs and the HSE. **None implemented yet**, but Competition Authority very hopeful that most/all of the recommendations addressed to the Minister will be implemented in a new Dentists Bill in 2008.



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