



The Competition Authority
An tÚdarás Iomáíochta

**Determination of the Competition Authority under
Section 22 of the Competition Act, 2002
Notification No. M/04/032 - Proposed acquisition by
IBM Ireland Limited of Schlumberger Business
Continuity Services (Ireland) Limited**

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SECTION ONE:

INTRODUCTION

THE NOTIFICATION

- 1.1 On 20th May 2004 the Competition Authority (“the Authority”), in accordance with Section 18(1) of the Competition Act, 2002 (“the Act”) was notified, on a mandatory basis, of a proposal whereby IBM Ireland Limited (“IBM”) would acquire the entire issued share capital of Schlumberger Business Continuity Services (Ireland) Limited (“SBCS”) (together “the parties”). The notified transaction is hereinafter described as “the proposed acquisition”.
- 1.2 The agreement for the proposed acquisition was entered into on 8th April 2004.¹ An initial presentation and submission was made by the parties on 27th May 2004. On 11th June 2004, the Authority required further information from the parties involved pursuant to Section 20(2) of the Act, to which a response was received on 29th June 2004. On 28th July 2004, the Authority determined to carry out a full investigation under Section 22 of the Act. On 9th September 2004, the Authority, in accordance with its published procedures, issued an assessment to the parties. IBM submitted a response to the Authority’s assessment on 1st October 2004. A hearing was conducted on 6th October 2004, for the purpose of allowing the parties to exercise their statutory right to make oral submissions to the Authority.
- 1.3 The proposed acquisition is part of a global acquisition by IBM Corporation of the international Schlumberger business continuity services business. The Schlumberger business continuity businesses

¹ The parties initially argued that it was not a notifiable transaction under Part 3 of the Act because the world wide turnover of one of the undertakings involved, SBCS, was under €40m. However, the Authority indicated to the parties that the target was not simply confined to the acquisition of one part – the Irish Schlumberger business – but included the other SBCS companies, which made up the global business. The basis for the Authority’s conclusion was that even though there were separate agreements for some countries, there was only one purchaser and the vendor was selling the country-by-country businesses as part of an overall agreement.

in the United States, Switzerland, Spain, France and the UK were also purchased by IBM as part of that global acquisition.

Commercial rationale

1.4 IBM stated that the commercial rationale for the proposed acquisition was that it would strengthen its offering in the business recovery sector (described below), and would complement IBM's existing strengths.

Scope of Investigation

1.5 In the course of its investigation, the Authority undertook two site visits and interviewed over twenty customers, Information Technology ("IT") service providers (including an industry consultant), and competitors of the parties. Sworn testimony was also taken from the parties, from one of the parties' competitors, and from two customers of the parties. Additionally, the Authority submitted a detailed questionnaire to about 70 users of business recovery services, including customers of the parties. The Authority considered 53 customer responses, which included responses to the questionnaire and interviews with customers. Subsequent interviews were conducted with several of these customers, as well as with potential suppliers identified by the parties, to clarify responses.

Record of Evidence

1.6 The record of evidence relied upon by the Authority for this Determination consists of the following:

- (i) Market interviews and responses of customers provided to the Authority, as well as those submitted by the parties;
- (ii) Internal business documents obtained from the parties and the [consulting firm for business recovery services] Report submitted by the parties;
- (iii) Sworn testimony from the parties, a business recovery services provider and certain customers; and,

(iv) Market interviews with business recovery services and IT providers in Ireland and the UK.

1.7 In analysing the evidence, the Authority took into account the views expressed by the parties, in their written and oral submissions, and expert reports.

THE PARTIES

IBM - the acquirer

1.8 IBM is incorporated in the State and is a wholly-owned subsidiary of IBM Corporation. IBM Corporation is active worldwide in the supply of computer products (personal computers, servers, storage systems, software) and IT services, including business continuity/disaster recovery (“business recovery”) services. IBM offers a broad range of IT products and services in the State, including business recovery services.

SBCS – the target

1.9 SBCS is incorporated in the State and specialises in the provision of business recovery services. SBCS traded for a number of years as Business Protection Services Limited (BPSL), before it was acquired by Sema Group Plc in 1999, which was then acquired by Schlumberger Limited, a US-based global oilfield and information services company, in 2001. In its various incorporations, SBCS has been operating in the State for over sixteen years.

SECTION TWO:

MARKET DEFINITION

INTRODUCTION

2.1 This section examines the relevant market for the proposed acquisition. The Merger Guidelines state that market definition *"...provides a basis for analysis in which existing competitors and consumers who are likely to provide the most immediate and timely competitive constraint are identified and distinguished from new entrants who may exercise a weaker or less immediate constraint."*² The Merger Guidelines' approach to market definition *"..is not mechanical, but rather a conceptual framework within which relevant information can be organised."*³ As such, establishing a market definition is not necessarily determinative in analysing whether a merger substantially lessens competition, but instead provides a useful framework and starting point for analysing the competitive effects of the merger.

PRODUCT MARKET

Nature of Overlapping Products

2.2 As provided in the Merger Guidelines, the first step is to consider the products of the parties.⁴ The parties overlap in the supply of business recovery services. The purpose of business recovery services is to ensure that, in the event of a sudden disruption of a business' systems and/or premises, due to natural or man-made disasters or events, the business will be able to continue running its critical functions. The parties provide a full range of business recovery services to customers, in locations known as "hotsites". These provide a direct 'back-up' to the customers' IT systems, which allows the customers to 'recover'

² Par. 2.1 of "Guidelines for Merger Analysis" ("The Merger Guidelines"), www.tca.ie.

³ Par. 2.2 of The Merger Guidelines.

⁴ Par. 2.4 of The Merger Guidelines.

- any data and operational computing ability, and enables them to continue operating their core business operations for the duration of the disruption. The parties can both recover from any IT computer system, ranging from what are known as low-end servers, up to mainframe computer platforms. A customer will also transfer key staff to the hot site, in the event of a disruption, giving them physical space in which to work, generally at desks equipped with PCs, telephones, chairs, printers and other typical office equipment, where they can interface seamlessly with their IT network and continue core operations. The term “business recovery hot site” will be used in this determination to describe the area in which the parties overlap.
- 2.3 The purpose of a business recovery hot site is to simulate, as closely as possible, the work environment in which a business’ personnel normally work. It is a form of risk protection for a business. There are two elements of a business recovery hot site. First, there is the replication of a customer’s IT systems, known as “IT recovery”, or more traditionally as “disaster recovery”. IT systems must be recovered onto similar systems. For example a mainframe computer must be recovered onto a mainframe computer, and an AS/400 server must be recovered onto an AS/400 server, and so on. Second, there is the provision of PCs and desks for a customer’s staff, known as “people recovery”, “work area recovery” or more traditionally as “business continuity”.
- 2.4 SBCS describes its business offerings as follows: *“The Company’s full service offering encompasses the entire ‘value-chain’ for business continuity and disaster recovery – spanning from the consulting and planning, through to the data centre and web hosting provision, and incorporating a complete supported infrastructure with seats at an operational desk in a networked and fully equipped office environment...If a business interruption denies access to office facilities*

or prevents the normal functioning of systems, customers can relocate their staff to a [SBCS] business recovery centre where they can continue delivering service to their clients in ready, fully equipped office accommodation. Each recovery centre offers private suites, fully equipped with desktop technologies and communications facilities.”⁵

2.5 At each of its hotsites, SBCS provides the following business recovery services:

- Office Facility Continuity: complete, mirrored office environments available on a shared or dedicated basis, including recovery positions, duplicate computer rooms, communications rooms, and staff support facilities;
- Computing Environment Continuity: hardware and software based systems, i.e., desktop technologies, dealer boards, financial market data feeds, and continuous power availability;
- Communications System Continuity: voice and data communications, networks, call centre systems;
- Mainframe/Mid-Range Disaster recovery: processing capability across all hardware platforms; and,
- Network Disaster Recovery: pre-loading of any network operating system, connectivity between customer site and hotsite, and duplicate systems to protect against network outage.⁶

2.6 Business recovery hotsite services provided by the parties cover a full range of possible offerings, from customers who require relatively limited technical support and limited numbers of business continuity

⁵ See Section 2.4.1 of Schlumberger’s “Tracer Confidential Information Memorandum”, November 2003 (“the Tracer Memorandum”), a confidential document prepared for prospective buyers of Schlumberger’s global business continuity services division, which describes that division’s business recovery operations and the business recovery industry in general.

⁶ Figure 1.2 of the Tracer Memorandum.

seats, up to customers who require a relatively large number of business continuity seats and extremely complex IT recovery.⁷

Demand for the products

2.7 There is considerable variation in demand for business recovery hot-site services across customers. Each customer has its own individualised IT systems, which must be replicated by the business recovery provider and may comprise a mix of one or more of the following: a range of servers from extremely powerful to less powerful processing abilities; PCs; IT communication systems and networks; and sometimes mainframe computers. In addition, customers' needs vary in terms of the speed of recovery required to service the requirements of their own customers and clients. Customers may require rapid recovery for key applications such as business conducted via website, customer billing etc., and less rapid recovery for other less urgent business processes such as human resources (HR) and payroll. The term "Recovery Time Objective" ("RTO") means the time it should take for a customer's business functions to be recovered by the service provider in the event of an invocation (i.e. when a customer decides to use the service provider's facilities following a disaster). For a rapid RTO, a customer may require a dedicated communications link between its premises and the hot-site, thus allowing for fast uploading of data to the service provider's facility. For a slower RTO, physical removal of tapes to the hot-site may suffice.

2.8 Customers can demand either dedicated or syndicated business recovery hot-site services. Dedicated demand is where a customer

⁷ There are other forms of business recovery apart from hot-sites. These include: "cold-sites", which take longer than a hot-site to get up and running due to the need to install IT systems and generally are not suitable for those critical business functions requiring immediate or rapid recovery; mobile recovery, which refers to a mobile vehicle equipped with IT systems and business continuity seats being transported into a customer's premises in the event of their IT system going down; and "quick-ship" solutions, which refer to an IT system being delivered to a customer's premises.

purchases an entitlement to a certain number of business continuity seats and IT services in a hot site for exclusive use. Syndicated demand is where a number of individual customers share access to the same business continuity seats and IT services in a hot site. In the event of a disaster hitting more than one customer of a syndicated service, hot site access will be distributed on a *pro-rata* basis. Both business continuity seats and IT hardware may be syndicated. Such shared or syndicated services are more cost-effective for the customer because the cost to the service provider of purchasing the IT systems and PCs/desks is spread amongst more than one customer.⁸ Some customers choose to purchase a combination of dedicated and syndicated services, ensuring that they have a minimum guaranteed recovery.

2.9 A potential customer of business recovery services will often invite tenders prior to entering a contract. Bids are submitted, and generally the terms of the contract will be negotiated between the customer and the selected service provider. Significant effort and financial investment is often required by both the customer and the supplier, in establishing communications links, purchasing equipment, and developing recovery plans and testing procedures: due to this business recovery service contracts typically run for relatively long terms of 3 to 5 years.

2.10 There is strong and growing demand for business recovery hot site services. The Tracer Memorandum⁹ identifies the main factors driving demand:

- Increased customer need for regulatory and financial compliance;

⁸ Suppliers will avoid a multiple invocation scenario by signing up a limited number of customers from a particular region (say within a quarter mile radius).

⁹ Referred to in footnote 5 above. See also [Internal analysis of the proposed acquisition for the IBM Board] and the “[consulting firm for business recovery services] Report on the Business Continuity Industry in Ireland” submitted by the parties.

- Cheaper cost of outsourcing;
- Capital and operational risks - financial institutions increasingly must be able to assess the risks IT exposes them to, *"and must be able to prove to the regulatory supervisors that they have sufficiently comprehensive and secure systems in place to assess operational risk. It is likely that the compliance process will expose weaknesses in the area of [business recovery] and should spur investment"*;
- 24/7/365 - *"In an electronic age, customers are increasingly looking to make their services available at all times, no matter what the circumstances - the key is to avoid damage to reputation"*;
- Terrorism - events such as 9/11;
- Technology changes - *"As bandwidth has increased and data storage capabilities have improved, real-time replication and support has jumped to a level whereby more companies see the viability of business continuity and disaster recovery and are addressing their needs"*;
- Infrastructure outage - *"The recent power failures in New York and London reiterated the need for full back-up supports and again highlighted the problems to senior staff level"*; and,
- Insurance premia - *"In an environment of increasingly risk averse insurance companies, a full BC/DR provision will, on a relative cost basis, substantially reduce the potential insurance payments."*

2.11 Another critical determinant of demand is customer preference for integrated and 'single vendor' business recovery solutions. SBCS states: *"In an environment where customers are increasingly looking to fewer service providers to provide "more for less", successful providers need to combine various skill sets to encompass a complete offering entailing planning, designing, building, testing and maintaining*

*the business continuity and disaster recovery operations*¹⁰. Likewise, IBM, explaining its rationale for the proposed transaction, makes the same point: “Customers are looking for single vendors to provide end-to-end solutions.”¹¹ The majority of customers interviewed indicated a preference for **a single supplier** for both IT recovery and business continuity seats. The following are illustrative:

- [Customer 8]: Issue of links is key here. Duplication of links would be an expense and an added complication - want it all in one location;
- [Customer 3]: Important that one company provides all services – the more people involved, the more confusion;
- [Customer 11]: Seating and hardware goes hand-in-hand and it is easier to deal with one company; and,
- [Customer 5]: More than one provider is less than satisfactory - this is due to the speed needed to get back up and running.

Customer characteristics

2.12 The requirements of customers are heterogeneous and customers will have different degrees of willingness to pay for business recovery services. A customer’s required RTO, the nature of the data and IT systems being handled, and a customer’s willingness to accept syndicated rather than dedicated facilities, all determine the particular solution catering for that customer. Some businesses, by their nature, are less sensitive to a disruption, and so will have less demand for business recovery services. Other businesses would see their business damaged by not being able to resume operations almost immediately after a disruption.

¹⁰ Par 5.4 of the Tracer Memorandum.

¹¹ [Internal analysis of the proposed acquisition for the IBM board] referred to in footnote 9.

2.13 Nevertheless, market investigations have established that customer demand for business recovery hot-site services depends predominantly on the following observable characteristics:

- (a) **The characteristics of the market into which the customer is selling.** For some customers, being unable to continue business operations will have a higher cost than others. For example, the Tracer Memorandum estimates the following costs of business continuity failure:

Brokerage: US\$ [...]m/hr

Call Centre: US\$[...]k/hr

Airline reservations: US\$[...]k/hr

Customers who sell financial products during fixed time periods, and who depend heavily upon their computer systems to buy and sell products, are particularly vulnerable to an inability to continue operations. Hence such customers will usually have higher demand for high quality business recovery services, as expressed through more rapid RTOs (usually within 24 hours of invocation) and greater numbers of dedicated seats.¹²

- (b) **The types of IT systems the customer uses.** While all customers will use some IT system, some use less powerful and less complex servers (generally known as “low-end” servers) such as are manufactured by Intel; others use more powerful “high-end” computers, such as the AS/400, RS/6000, HP servers and mainframe computers, e.g. IBM S390. Mainframe computers and other high-end IT systems are more complex and expensive, generally denoting a high degree of customer dependence on the IT system, and requiring an equally complex business recovery service to recover their data. Overall, most customers use a mix of IT systems, and the more complex the

¹² Par. 5.3 of Tracer Memorandum.

system the more comprehensive and specific will be the customer's demand for business recovery hot site services.

- (c) **The number of sites the customer has.** The more dependent a customer is on one centre of operations, the greater its need for a reliable and comprehensive business recovery hot site. A customer with multiple sites may be able to reduce its dependence on any one site, and in the event of one site going out of operation, may be able to continue at one of the other sites. A customer with a single site will have less flexibility and will be more dependent on external hot site services.
- (d) **Regulatory and insurance requirements.** Some regulated customers are required to have business recovery plans in place. For instance, banks are required by the Irish Financial Services Regulatory Authority (IFSRA) to have business recovery plans in place. Customers without explicit regulatory requirements may face insurance requirements, where, unless they have a business recovery hot site available, their insurance premiums will rise. In general, the more exacting regulatory and insurance demands are, the higher demand for business recovery services will be.

2.14 Customers with significant regulatory and/or insurance burdens, high-end IT systems, and a high cost of lost business, are those with the highest and least flexible demand for business recovery hot site services. Customers with multiple sites, low-end servers and lower financial losses from being non-operational, may be prepared to pay less for services and may have a greater range of market options available to satisfy their demand.

2.15 One sector where customers have high and less flexible demand for services is the financial services sector. Such customers face

regulatory requirements, place a high value on uptime and data availability, and often use mainframe computers or other high-end IT systems. This is confirmed by a report on business continuity in the financial services sector by *Datamonitor*, on Business Continuity in Financial Services,¹³ in which it was indicated that the development of business recovery has been driven primarily by the financial services sector. The nature of demand from these types of customer is also clear from the Tracer Memorandum, which stated "...[SBCS] highest penetration is in the global financial services sector (representing [...] % of total revenue) – the largest and most important in business continuity and disaster recovery." This factor was also cited by IBM as one of the 'drivers' for the transaction. In fact, of the 53 customers interviewed by the Authority, 41 are in the financial services and insurance sectors.

2.16 The customer characteristics that influence demand for business recovery services are generally observable by suppliers. The market process enhances this observability. A customer usually issues a tender detailing its requirements, including RTO, type of IT system, number of dedicated/syndicated seats, and any other features required. Potential suppliers then bid for the contract. The successful supplier offers a specific solution, based around its hot site, and tailored to the exact needs of the customer.

2.17 Given the varying demands of customers, together with their observable characteristics and customised needs, price discrimination could be practised in this market. A monopoly supplier could offer different prices to different customers: offering a particular customer, with lower, flexible demand, a lower price does not mean that a supplier would have to lower the prices offered to other customers,

¹³ Datamonitor "Business Continuity in Financial Services", Reference Code: DMTC0882 of January 2003, submitted by IBM to the Authority on 6th August 2004.

including those with higher demand. The observed characteristics mean that the supplier would have significant knowledge of whether the customer is willing to pay a higher price. Business recovery hot-site contracts are usually for periods of 3-5 years, and the rarity with which services are purchased by each customer also potentially facilitates price discrimination.

2.18 The ability of business recovery service providers to set prices by individual customer means that customers with relatively low demand, who might easily switch supplier in the event of a price rise, do not protect customers with relatively high demand, who cannot easily switch supplier in the event of a price rise, or who have far less choice of supplier when switching. In many markets, suppliers do not raise price because they charge the same price to all and would lose too many customers to make the price rise profitable. Here, however, suppliers can charge higher prices to high demand customers while offering lower prices to low demand customers who might otherwise switch.

Relevant Product Market

2.19 Based on the observable market characteristics described above, and the parties' view of the market, as described below, the appropriate product market in which to commence an analysis of the competitive effects of the transaction is business recovery hot-site services. Of the 53 customer responses considered by the Authority, the vast majority stated that they bought business recovery services via the medium of a hot-site, with a significant number stating that, in the event of a 5-10% price rise, they would still choose to buy their services in this manner.¹⁴ Overall, business recovery hot-site service can be

¹⁴ Par. 40 of the European Commission's Market Definition Notice recognises the evidentiary value of "*reasoned answers of customers and competitors as to what would happen if relative*

considered as a separate product market for the purpose of merger analysis.

The Parties' view of the product market

2.20 The parties have argued that business recovery hotsite services do not constitute a separate product market and instead form part of the broader IT services market. IBM states: *"IT services encompass a wide range of services supplied to business users in the context of their overall computer hardware and software requirements. While the precise nature of the services may vary from customer to customer, typical services include IT management services, business management services, software development and integration, IT and business consulting, software maintenance and support, hardware maintenance and support, and education and training."*¹⁵

2.21 The parties' view is not supported either by the parties' own internal documents or by extensive market enquiries. Customer views consistently show that business recovery hotsite services are purchased separately from other IT services. Customers generally have separate contracts for business recovery hotsite services that are not tied into other IT services contracts. As mentioned above, when purchasing business recovery hotsite services, customers may put out a Request for Proposal ("RFP")¹⁶ specifically for these services.

2.22 Internal documents provided by the parties show that when each party's management assesses threats and competition to its business,

*prices for the candidate products" increased. In **SCA/Metsa Tissue** (Case COMP/M.2097, 31 January 2001) the Commission used customer responses to support its finding that private label tissue products formed a distinct market from branded tissue products, whilst in **BASF/Eurodiol/ Pantochim** (Case COMP/M.2314, 11 July 2001) the Commission gave evidential weight to customer views that certain types of chemical solvents were not substitutable.*

¹⁵ Section 4.1A of the notification, page 7.

¹⁶ An RFP is put out by a customer who invites interested parties to submit bids.

the competitors identified are business recovery hot site providers, and not providers of wider IT services. For example, IBM documents specifically address opportunities for, and threats to, its business recovery business arising from players within that sector alone, not the wider IT sector.¹⁷ In an internal analysis of the proposed acquisition for the IBM Board, management stated that, post-acquisition, [business recovery services will continue to be provided as a separate offering within IT services].¹⁸ Similarly, documents provided by SBCS refer to specific business recovery service providers and not to other providers of general IT services, as its competitors.¹⁹ Moreover, SBCS provides business recovery services exclusively. It does not provide other IT services and has established itself as the largest provider of business recovery services in Ireland without having a broader IT services portfolio.

2.23 With regard to the parties' internal documents, as referred to above and elsewhere in this determination, the Authority agrees with the established principle that such documents, prepared by undertakings in the course of their ordinary business, provide a strong clear indication as to where an undertaking views itself in an industry, i.e. what its business is, who its customers are, and with whom it mainly competes. In *FTC v Cardinal Health*²⁰ and *FTC v. Staples*²¹, the U.S. District Court of Columbia considered it imperative (for defining the relevant market) to consider the commercial realities of the industry and in both cases the Court noted the contents of the respective parties' internal documents when defining the market. The Court in *Cardinal Health* expressed its opinion thus: "[Determination] of the relevant market in the end is 'a matter of business reality – of how the

¹⁷ [Internal IBM document].

¹⁸ [Internal IBM document].

¹⁹ "SchlumbergerSema – Global Recovery Services business Plan 2002-2003, Ireland" submitted in response to the section 20(2) request for information of 11th June 2004.

²⁰ *Federal Trade Commission v Cardinal Health* (Case No. 98-595 – July 1998).

²¹ *Federal Trade Commission v Staples, Inc. and Office Depot, Inc.* (Case No. 97-701).

market is perceived by those who strive for profit in it ...' Moreover, it should be noted that internal documents presented at trial reveal that the Defendants themselves do not view the other forms of distribution to be viable competitors or substitutes." Similarly, the European Commission has attached increasing importance to internal documents of parties that may provide insight as to how those parties view the market in which they compete.²²

- 2.24 Nearly all customers reject the concept that business recovery services are simply part of the IT services market. For example:
- [Customer 3]: Business recovery services are purchased separately from IT and have never considered purchasing together
 - [Customer 5]: the starting point for Business Recovery is business, not IT
 - [Customer 4]: Business Recovery is separate and not purchased as part of a broader IT package.
 - [Customer 21]: the suppliers of IT and business recovery tend to 'sell/market' these services separately
 - [Customer 29]: Business Recovery is stand alone and not part of IT.
- 2.25 The parties submit that, if a market definition of IT services generally is not accepted, then there should be a distinction between IT recovery and business continuity services. They suggest that IT recovery, or disaster recovery, relates primarily to the recovery of IT systems and that this is distinct, although complementary, to business continuity which relates to the provision of office space and seats. On this basis, they contend that a market definition of business recovery hot site services is misplaced.

²² See *Lagardère/Natexis/VUP* (Case COMP/M.2978, Commission decision of 7 January 2004) and *Coca-Cola Enterprises/Amalgamated Beverages GB* (Case COMP/M.794) and European Commission Market Definition Notice (OJ C 372 of 9 December 1997).

2.26 Some customers may require IT recovery services separately from business continuity seats. For example, customers may recover IT services themselves, and require business continuity seats provided externally. However, there is still an identifiable customer demand for integrated hot-site recovery services, i.e. IT recovery plus business continuity seats. This is evidenced by the needs and observed buying patterns of certain customers and their stated responses that they would continue to buy hot-site services in the event of a price rise. It is very unusual for a customer to contract with one supplier for business continuity seats and another for IT recovery.

- [Customer 1] said that it would not break up business continuity seats and IT recovery because this would duplicate its costs: separate network connectivity would have to be established between the customer and each supplier;
- [Customer 2] said that one supplier was preferable because it was easier to manage just one in the event of a disruption;
- [Customer 3] said that receiving business recovery services from other than a single provider is “less than satisfactory”, due to the speed required to get back up and running and it would not like to be controlling multiple providers; and,
- [Customer 4] said that it is better that the service be provided by the same company, otherwise there is a risk that one provider is taking the blame for another’s lack of performance.

2.27 As such, the Authority is satisfied that a product market combining both elements of business recovery hot-site services is appropriate.

Relevant geographic market

2.28 The geographic market is the State. In the event of a price increase in business recovery hot-site services, customers with IT systems

headquartered in Ireland would only consider an Irish-based business recovery supplier. As such, any increase in price would not be met by a sufficient number of customers switching to foreign-based suppliers so as to render the price increase unprofitable; the State is therefore the appropriate geographic market.

2.29 The main reasons why customers will not purchase services from abroad include:

- High costs of communications links or flying tape back-ups to overseas locations;
- High costs of flying people to the UK for testing and for an invocation; and,
- Risk of delay in gaining access to a UK site, and huge inconvenience for business staff to be flown to the UK in the event of an invocation (e.g. separation from family).

2.30 These reasons are backed up by strong customer evidence. Some comments below are illustrative:

- [Customer 1] - There would be a very high level of communications costs if business recovery services were to be located abroad;
- [Customer 2] - Recovery from abroad has been considered, but in practice the logistics of doing so presented difficulties, there are increased travel and telecommunication costs, and also personal inconvenience to staff forced to spend prolonged periods away from home;
- [Customer 5] - It would have to have a local recovery capability;
- [Customer 6] - With regard to getting services from abroad and putting people on a plane, this would be seen as problematic;
- [Customer 7] - Seeking a DR service provider in the UK is workable in theory, but is not really viable given the longer recovery timeframes and the expense and logistics of moving personnel to the UK; and,

- [Customer 8] - They would not go with a provider from overseas because you could not be flying people over to the UK – in a September 11th scenario, this would not be possible.

2.31 The [consulting firm for business recovery services] Report,²³ provided by the parties, concurs with customers' views and states in paragraph 4.6: *"The use of UK based locations [by Irish customers] would definitely have a location based advantage, however the business processes they support would normally be based in Ireland and the staff required would also be Irish based so there is unlikely to be any practical advantage, rather there is likely to be a practical disadvantage in testing etc and in speed of recovery."*

2.32 Further evidence is provided by customers with Ireland-based IT systems who once obtained their recovery services from abroad. Those customers stated that they decided that it was not feasible for their business recovery requirements to continue doing this. [...] in the past obtained its IT recovery for its mainframe computer from IBM's hot site in Warwick, UK. It stated that obtaining its IT recovery from the UK took a day out of its recovery time and that the decision to cease obtaining IT recovery from the UK, and to obtain it from within Ireland instead, was purely down to the time factor and was not a cost consideration. [Customer 3] stated that, prior to 2000, it used Assurity in London; this involved flying people to the UK and it was not feasible to continue this. From a testing point of view, it stated that having a provider in the UK was "ridiculous." [Customer 3] now uses IBM's site in Mulhuddart for its business recovery.

2.33 Supply substitutability does not alter the conclusion. Business recovery hot site providers in the UK do not provide services in Ireland. The main

²³ Submitted by [...], a consulting firm for business recovery services, on behalf of the parties.

competitor to the parties' business recovery businesses in the UK is Sungard, which is larger than both of the parties in the UK, and provides a full range of business recovery services in that country. Sungard does not directly offer services within the State, unless requested by existing European/US customers. For some of these customers, Sungard provides a service that involves sending an IT system over to Ireland, in which case it cannot guarantee the same speed of recovery, or independence from bad weather and other travel disruptions, as it could if it supplied its services from within the State. For the remainder of these customers, Sungard subcontracts the business recovery services to a local supplier such as SBCS and so is not an independent provider in Ireland.

Conclusion

- 2.34 The relevant market definition is business recovery hotsite services in the State. Customer characteristics, backed up by internal documents of the parties and direct evidence from customers, suggest that there are different levels of demand for business recovery hotsite services, but that a sufficient number of consumers would not switch in the event of a price rise such that hotsite services constitute a distinct product market. This conclusion is strengthened by the way in which demand is expressed, which facilitates price discrimination by suppliers.
- 2.35 While the definition of the relevant market presents a basis for analysing existing market participants, there may be other suppliers of IT and other business recovery services who may offer a competitive constraint to those in the market. As such, in accordance with the Merger Guidelines²⁴, the Authority analyses the impact of any such suppliers in Part 3, on competitive effects.

²⁴ Par. 2.11 of the Merger Guidelines state: "*Supply substitutes are only included in the relevant market if there is identifiable output that can be brought into market share*"



calculations ... Where there are supply substitutes that exercise an immediate competitive constraint but whose units of output cannot meaningfully be added, the producers of these are considered under effects on rivalry". The Authority therefore postpones discussion of whether suppliers of related business recovery services can impose a competitive constraint on suppliers in the market until the next section.

SECTION THREE:

COMPETITIVE EFFECTS

INTRODUCTION

- 3.1 The central issue in considering the proposed acquisition is whether the parties would be able to raise prices for business recovery hot site services in the State post-acquisition, or whether there are competitive constraints within or outside the relevant market, which would restrict the ability of the merged entity to raise prices. This section examines the competitive effects of the proposed acquisition, given the parties' dominance in the relevant market. The focus is on unilateral effects, where it is considered whether the merged firm would find it profitable to raise price, irrespective of the reactions of its competitors or customers.²⁵ The Authority does not consider that the proposed acquisition is likely to give rise to co-ordinated effects, where competitors would be facilitated to engage in co-ordinated behaviour to raise price.
- 3.2 The approach taken throughout this section is to consider whether the proposed acquisition will lead to increased prices for purchasers of business recovery hot site services. This analysis *"...eschews a structural approach, and focuses directly on whether the merger increases short-run market power"*.²⁶

MARKET STRUCTURE

- 3.3 As set out in the Merger Guidelines, the first step in considering unilateral effects is to describe the market structure. *"First, the market structure is examined and described, possibly including:*

²⁵ Par. 4.4 of the Merger Guidelines: *"Unilateral effects arise where, as a result of the merger, the merged firm finds it profitable to raise price, irrespective of the reactions of its competitors or customers."*

²⁶ Par 4.12 of the Merger Guidelines.

- a. *Market concentration, including the market share of the merged firm relative to the market shares of its competitors;*
- b. *The stability of market concentration over time;*
- c. *The level of vertical integration;*
- d. *Cost and technology factors;*
- e. *Product differentiation; and,*
- f. *The intensity of research and development.*²⁷

The market for business recovery hotsite services in the State is characterised by a limited number of players. In addition to the parties, there are two smaller players that provide business recovery hotsite services.

MARKET PARTICIPANTS

IBM

- 3.4 IBM is an IT hardware and services undertaking, which also provides a full range of business recovery services. It is the second largest provider of these services in the State and has been in business since the 1980s. In 2003, IBM generated business recovery revenue of €[5-8]m. IBM operates two hotsite facilities in Dublin, located in Mulhuddart and Airton Road, and operates a third facility in Cork. IBM provides business recovery services for all systems including IBM and non-IBM systems, ranging from mainframe computers and other high-end systems to low-end systems, wide area networks (WANs), local area networks (LANs) and workstations. In addition, it provides call centre continuity and dealing/treasury continuity, with high speed communications and interconnectivity options. It offers IT systems and workstation recovery on both a syndicated and dedicated basis.

²⁷ Par. 4.5 of the Merger Guidelines.

Its total number of business continuity seats in its three hotspots in the State is 540.

SBCS

- 3.5 SBCS was founded in 1988 and is the leading supplier of business recovery services in the State. Its 2003 revenue was €[6-9]m, which was all generated from the supply of business recovery services. It operates five hotspots in the State (four in Dublin and one in Cork), which between them have 1,300 business continuity seats. Like IBM, SBCS provides business recovery hotspot services for a full range of IT systems and equipment, from mainframe computers and other high-end systems to low-end systems and PCs, in addition to providing call centre continuity, dealing/treasury continuity and high-speed communications links.

Synstar

- 3.6 Synstar is the largest competitor to the parties in the relevant market. Synstar operates throughout Europe in the provision of IT services. In the State, it has provided IT maintenance services, and business recovery services, since 1997. It has one hotspot located in Swords, Co. Dublin and its most recent annual sales turnover from the supply of business recovery services was approximately €[<2]m. Synstar informed the Authority that it could accommodate 600 users (i.e. for business continuity seats). Like the parties, Synstar provides recovery for some limited high-end systems and for most low-end systems, call centre recovery and dealing/treasury continuity. Unlike the parties, it does not provide recovery for mainframe computers.²⁸ With respect to other high-end systems, it does not have the range or number of IT systems on its site in Swords, comparable with either of the parties.

²⁸ [...].

In fact, many of its customers supply Synstar with some of the IT systems that would be used for recovery.²⁹

Network Recovery

3.7 Network Recovery is a fourth provider of business recovery hotsite services in Ireland. Network Recovery is relatively new, having established its business three years ago. It has a recovery centre in Baldonnel, equipped with 230 business continuity seats, and its most recent annual turnover was approximately €[<1]m.³⁰

MARKET CONCENTRATION

3.8 Market concentration is described below from a number of different perspectives. First, it is analysed from the perspective of the parties' revenues, compared with the revenues of the other hotsite recovery services providers. Second, the parties' own estimates of market shares are described. Thirdly, the Authority estimates market shares on the basis of the capacities of the various providers.

3.9 The combined revenues of the four business recovery hotsite providers in the State is approximately €[15-20]m³¹.

3.10 In addition to their revenues, the parties' internal documents indicate the concentrated nature of this market. In its 2002-2003 Business

²⁹ [...].

³⁰ A fifth small supplier, General Systems, provides primarily a mobile solution and has a small hotsite consisting of 30-35 seats and IT equipment, which General Systems says includes some high-end. It says that its customers are different from those of the merging parties and tend to come from the manufacturing industry.

³¹ This revenue includes a small proportion of non-hotspot recovery services consisting of the provision of a mobile recovery service or delivery of an IT system to the customer's premises. However, since the four business recovery hotsite suppliers provide the vast majority of the business recovery services to their customers directly from their hotsite facilities, the percentage shares set out above are a proxy for the market shares for business recovery hotsite services.

Plan, SBCS provided details of estimated shares for Business Continuity and Recovery Services in Ireland.³²

3.11 IBM's internal documents also reference revenues for business continuity and recovery services. For 2002, IBM refers to it having a total revenue for "business recovery services" of €[5-8]m, SBCS having €[6-9]m, and Synstar having €[<2]m.³³ IBM's estimate of total revenues for "Business Recovery Services" in 2002 is €22.5m, which includes consultancy revenue of €1.6m and HP/Compaq³⁴ revenue of €2.4m (including revenue from the UK). Even including the other providers listed (who do not provide business recovery hot-site services), but excluding consultants, dealers, and HP/Compaq, (which subcontracts to both SBCS and IBM) gives the parties a combined market share of [70-90]% for business recovery services.

3.12 Hewlett Packard, an IT services company whose activities are further described below, produced its own internal estimates of the parties' and other suppliers' market shares to the Authority. These were 60% for SBCS, 30% for IBM, 5% for Synstar, 2.5% for Network Recovery and 2.5% for itself. Table A below sets out the market shares of the parties and their competitors based on their revenue and also provides the parties' estimates:

³² "SchlumbergerSema – Global Recovery Services Business Plan 2002-2003, Ireland", presented by the General Manager of SBCS, and provided to the Authority in response to the section 20(2) request for information of 11th June 2004.

³³ [Internal IBM document].

³⁴ HP provides some IT recovery, but not business continuity seats, as described below.

Table A: Estimated market shares of the parties and their competitors

Provider	Business Recovery Revenue³⁵	Share³⁶	SBCS estimates	IBM estimates	HP estimates
IBM	€[5-8]m	[30-40]%	40%	[32-42]%	30%
SBCS	€[6-9]m	[45-55]%	55%	[38-48]%	60%
Combined parties	€[11-17]m	[75-95]%	95%	[70-90]%	90%
Synstar	€[<2]m	[<15]%	2.5%	[<10]%	5%
Network Recovery	€[<1]m	[<10]%			2.5%
Others			2.5%	[10-15]%	2.5%
Total	€[15-20]m	100%	100%	100%	100%

3.13 Another way of measuring market share is by way of capacity³⁷. The best available measure of capacity is the number of business continuity seats. The parties have approximately 1,840 business continuity seats out of a total of 2,670 in the State. The parties' industry expert [consulting firm for business recovery services] provides a similar estimate of business recovery capacity, limited to these four providers. Table B below outlines market shares by capacity:

Table B: Market shares by capacity

Provider	Number of business continuity seats	Percentage shares³⁸
IBM	540	20%
SBCS	1300	49%
Combined parties	1840	69%
Synstar	600	23%
Network Recovery	230	9%
Total	2670	100%

³⁵ See footnote 31.

³⁶ Rounded to one decimal place.

³⁷ Par. 3.5(b) of the Merger Guidelines.

³⁸ Rounded to the nearest whole number.

Stability of market concentration over time

3.14 Market structure has been relatively stable. The market shares described above have been stable for a number of years.³⁹ SBCS has testified that it regards the market shares set out in the 2002-2003 Business Plan as being current. IBM's estimates of business recovery revenues for 2002 set out above are largely comparable with their estimates for 2001 and 2000.⁴⁰ That market shares have been relatively stable for some years is indicative that this market may not be changing that rapidly, and as evidenced by the comments of customers, that the two firms are considered the major providers. It is particularly noteworthy, in this regard, that they are the only providers of business recovery hotsite services for mainframe users.

3.15 Shares in bidding markets and in IT markets can change relatively quickly. The Merger Guidelines state: "*Some markets are particularly subject to dynamic and rapid change. In such markets, high concentration in general, or high market shares of one or two firms, may be a relatively temporary phenomenon, and how competition is likely to develop in the future is closely examined rather than a specific focus on concentration. The same may be true of bidding markets characterised by auctions for contracts.*"⁴¹ For that reason, the Authority does not rely strongly on market shares and instead examines competitive effects directly.

3.16 A level of vertical integration is present. The parties are full-service suppliers of business recovery hotsite services, with considerable expertise and skills in this regard. Any other suppliers who either provide business recovery solutions for themselves, or for others, do not have the same degree of upstream inputs which would allow them

³⁹ Par. 4.5(b) of the Merger Guidelines.

⁴⁰ See further document referenced in footnote 33 above.

⁴¹ Par. 4.16 of the Merger Guidelines.

to compete with the parties, or they may in fact be dependent upon the parties for such inputs.

COMPETITION BETWEEN THE PARTIES

- 3.17 The next step is to analyse whether the parties are in direct competition in the sense that they offer similar products to customers. If firms offer products that are each other's best substitutes, they are in a stronger position to raise price after a merger, as purchasers who would have gone to the other firm when one firm attempted to raise price, will no longer have this option.⁴²
- 3.18 The parties in this transaction are in direct competition with each other, offering similar products to customers. Their products are close substitutes for buyers.
- 3.19 The first source of evidence for this is through direct examination of the products offered. Both parties offer business recovery hotsite services for any type of IT system. They can both supply services to customers with mainframe computers, as well as those with high-end and low-end servers, all within the framework of a hotsite offering integration between the IT systems and business continuity seats.
- 3.20 Secondly, each views the other as its closest and largest rival. In a presentation made by IBM to senior IBM management⁴³, it lists its main competitors as SBCS and Synstar. At the end of the presentation in the summary section, it specifically singles out SBCS as being "tough competition". In another management presentation document submitted by IBM,⁴⁴ SBCS is highlighted under "Threats" in

⁴² Pars. 4.4 & 4.6 of the Merger Guidelines.

⁴³ [Internal IBM presentation by management].

⁴⁴ [Internal IBM presentation by management].

a SWOT⁴⁵ analysis. In the IBM Board presentation cited above, IBM explicitly identifies SBCS as its “largest competitor”. The content of the parties’ documents, as well as sworn testimony, make it unquestionably clear that each regards the other as its principal competitor.

3.21 Further evidence of the close degree of competition between the two parties comes from the group of customers interviewed by the Authority. These are currently users of business recovery hot site services, with the majority being customers of the parties, and include companies whose business recovery contracts the parties bid for in the past three years. These are the customers who would be most affected by any price rise. The majority of customers contacted who use a tendering procedure consider IBM and SBCS to have either the only, or the most viable, offerings. With regard to ascertaining the degree of closeness with which the customers view the parties and the extent to which they play them off against each other, customers were asked who submitted the best tender and the next best tender. Some examples of customer views are:

- [Customer 3] selected IBM and SBCS in its tendering process as the only two viable candidates, and played one off against the other to obtain the lowest price;
- [Customer 9] (a customer for high-end business recovery hot site services) and which is a customer of IBM received its next best tender from SBCS;
- [Customer 14] only considered IBM and SBCS as capable of meeting its requirements and was able to lower its cost by [...] % by negotiating between the two;
- [Customer 10] (mainframe and AS/400 requirements): bids were only received from IBM and SBCS;

⁴⁵ SWOT, i.e. “Strengths, Weaknesses, Opportunities and Threats”

- [Customer 11] stated that it knows of no-one else in Ireland that can provide AS/400 recovery apart from IBM and SBCS; and,
- [Customer 37] (high-end recovery requirements): said that IBM and Schlumberger were the only bidders: there were no other choices available at the time.

3.22 Further evidence of the parties competing directly with each other comes from bidding data requested from the parties. The Authority asked the parties to provide details of all RFPs in relation to business recovery services to which the parties responded over the last three years, including details of the successful bidders.

3.23 The parties provided a list of [...] companies to whom they submitted bids, in addition to listing to whom they understood the contract to have been awarded, and what they understood to be the annual value of the contract. The parties claimed that they both bid on only [...] out of these [...] contracts. Using this data, the parties claimed that the combined share, by value, of the contracts won by the parties was only [20-30]%.⁴⁶ However, following direct enquiries carried out by the Authority, it was ascertained that IBM's claim is substantially inaccurate. In fact, the Authority's analysis suggests that the parties bid against each other head to head on [...] out of [...] contracts, or [60-70]% of the value of the contracts bid for.

3.24 Market enquiries revealed evidence of strong price competition between the parties, particularly for high-end customers, i.e.

⁴⁶ In a briefing note submitted by IBM to the Authority on 29th June, IBM argued that it won only [...]% of the business (by value) of the contracts included in response to question 1, and that SBCS won [...]% and other competitors (including in-house solutions) won [...]%.

customers who require recovery for high-end IT systems.⁴⁷ The comments below are illustrative:

- [Customer 13]: went through a difficult process to try and get the pricing right for the recovery of its call centre. Only by using IBM as a bargaining chip (against SBCS) was this possible;
- [Customer 1]: was able to negotiate down the price paid for business continuity seats from c. €[...] to c. €[...] in 2001 as a result of competition between the parties, the only two providers for its mainframe requirements;
- [Customer 2]: prices have dropped and quality of service has improved over the years as a direct result of the parties being “at each other’s throats.” It estimates that the cost of [its]’s first contract with IBM, in 1991, was about €[...] (adjusting for the Euro changeover and inflation), but for a far more limited service than that currently provided by Schlumberger. It is now paying €[...];
- [Customer 11] said that having two parties, i.e. IBM and SBCS, helped in the negotiations. It was able to play the two off each other. IBM reduced the ‘get-out’⁴⁸ costs – IBM’s original quote was [...]k and [it] was able to reduce it to [...]k.

3.25 Even for low-end customers, i.e. customers who require recovery for low-end systems, there is also evidence of strong price competition. For example, internal IBM documents relating to a tender, which [Customer 14] awarded to SBCS and not to IBM, estimate that the SBCS tender was “circa [...]% cheaper than IBM”. On this point, many respondents to a specific question in the questionnaire, regarding their concerns with the proposed acquisition, answered as follows:

- [Customer 42]: “We believe it could have an adverse effect on the quality of service, the price of the service, our ability to negotiate

⁴⁷ One of these customers made a complaint to the Authority in relation to the proposed acquisition and has now withdrawn its complaint after being contacted by IBM in the course of the investigation.

⁴⁸ The termination fee paid for being let out of the contract prematurely.

with the merged entity. We also believe it could restrict access to the services if there is a consolidation of the recovery sites”;

- [Customer 26]: “Yes, we have concerns particularly on the pricing aspect”;
- [Customer 31]: “I would be concerned at the lack of competition in the market, and the possibility of there being a reduced number of DR sites”;
- [Customer 46]: “the proposed acquisition raises concerns since it will have “an effect on prices and quality of services”;
- [Customer 21]: “Yes considerable concerns, there are few enough suppliers of these services in Irish market place.”

3.26 The strength of competition between the parties is also evident from the reaction of customers to a hypothetical, non-cost justified, price increase, post-acquisition, of at least 5%.⁴⁹ The majority of high-end users replied they would not switch providers, or accept lower levels of service in return for a lower price, following such an increase.⁵⁰ Several customers indicated that price was not a major concern for this service and others indicated that such an increase was too small to consider switching provider, given switching costs and/or established working relationships with their current providers.

3.27 There is thus a clear pattern, from the parties’ own internal documents, the views of their customers, and the patterns of their bidding, that the parties are the closest substitutes for each other. As a result, the merged entity would be in a good position to raise prices.⁵¹ Such a price rise would only be profitable if customers cannot easily switch to another provider who, in the new competitive

⁴⁹ Par. 4.6 of the Merger Guidelines, which calls for a 3% threshold, but a higher 5% threshold was used as the benchmark.

⁵⁰ High-end users, i.e. users who require recovery for high-end IT systems, constitute 43% of customers queried. Of these, over 60% said that they would not change supplier pursuant to a price increase.

⁵¹ Pars. 4.9 & 4.11(a) of the Merger Guidelines.

equilibrium created by the proposed acquisition, could easily supply them at a lower price. We now consider whether the reactions of other firms provide sufficient competitive constraints, to ensure that a price rise, post-acquisition, would not be profitable.

COMPETITION FROM OTHER HOTSITE PROVIDERS

3.28 Both Synstar and Network Recovery provide some business recovery hotsite services. Based on the evidence gathered in the investigation from the parties, customers and other providers, these suppliers lack the requisite capability, capacity, industry reputation and experience to constrain a short-run exercise of market power post-acquisition.

Network Recovery

3.29 Network Recovery does not provide recovery services for mainframe computers or high-end servers. This means that any attempt by the parties to raise prices to customers who use mainframe computers or high-end servers could not be constrained by customers looking to Network Recovery as an alternative.

3.30 Network Recovery is capable of meeting the requirements of some low-end customers who might choose to switch in the event of a price rise. However, the number of business continuity seats it has limits its capacity to do so. It may be able to expand capacity by increasing the number of business seats or acquiring a second facility. Moreover, market enquiries indicate that many customers would not regard it as a significant competitor in the market and would be reluctant to use it.

3.31 Network Recovery identified the parties and Synstar as its main competitors, and stated to the Authority: "*Our competitors are*

*generally much larger companies than ourselves and as publicly traded companies and multinationals they rank amongst the largest companies in the world. **Their range of offerings in the computer services area is significantly more diverse than ours**⁵² and in the case of manufacturers allows them to add BCDR [Business Continuity and Disaster Recovery] services as a larger component of hardware sales.” Network Recovery identified its weaknesses as being: depth of personnel; depth of resources; experience level (years in business); perception as a minor player; and limited financial resources. Customer views support Network Recovery’s perception of itself as a minor competitor, as most did not identify Network Recovery as a realistic alternative and indeed many had never heard of the company.⁵³*

Synstar

- 3.32 Synstar does not provide recovery services for mainframe computers. Synstar, in addition to not having mainframe recovery capabilities, does not have the same degree of high-end IT systems on its site as each of the parties. [...]. Synstar has only one site, which is based in the north of Dublin, the location of which may not offer a conveniently rapid RTO for some customers based on the other side of the city. In the event of a price increase, post-acquisition, Synstar would not have the capabilities to absorb a significant proportion of the lost sales of the merged entity should the latter raise prices. Overall, for customers requiring high-end business recovery hotsite services, Synstar would not be a strong competitive constraint on the merged entity.

⁵² Emphasis added.

⁵³ Par. 4.7 of the Merger Guidelines, which state that when examining the reactions of existing competitors, “of central importance here is whether capacity or other constraints limit the ability of competitors to win sales if the merged firm increases its price”.

- 3.33 With regard to customers for high-end recovery services, an analysis of comments received by customers who have received bids from Synstar demonstrate that this supplier is either not considered at all, or that the parties submit the better bids and are a lot closer to each other in their offerings, even when Synstar offers a **lower** price. Again some customer comments are illustrative:
- [Customer 1] stated that Synstar is capable for people recovery but not for mainframe or HP platforms;
 - [Customer 13] has stated that it understands that Synstar has some AS400s, but these have to be rolled in from the UK, which is not satisfactory for its requirements.
- 3.34 For users who require rapid recovery of certain core business functions, i.e. ongoing IT back-up which is accessible in a number of hours, as well as the ability to transplant staff rapidly to a nearby off-site location where they can continue their functions in a replicated business environment, Synstar is not a viable alternative.
- 3.35 With regard to low-end servers, Synstar is better able to meet the requirements of customers switching to it. However, customers have indicated considerable doubt about the ability of Synstar to provide a strong check on the merged entity. For example:
- [Customer 3] (a low-end customer) received bids from IBM, Schlumberger, Synstar and Network Recovery. It knocked Network Recovery off the list first, as it was not “in the matrix” and too small. Synstar was ruled out as it was heavily reliant on the UK from a support point of view and they were not confident Synstar could support them;
 - [Customer 9] chose IBM above Schlumberger, Synstar, General Systems and Network Recovery. It said Synstar was in the frame but much of the service would have to be provided from the UK. It was not able to judge Synstar’s commitment to the Irish customer;

- [Customer 14] ruled Synstar out of bidding since Synstar's IT team was very small and it would have been required to purchase the necessary hardware to meet [Customer 14]'s IT structure, which cost would have been passed onto [Customer 14].

HP/Synstar

3.36 Hewlett-Packard recently announced its intention to acquire Synstar. The transaction is in a relatively advanced state but has not yet been finalised and therefore remains speculative. The parties have suggested that HP/Synstar would represent a stronger force in the business recovery services area, and would serve to constrain any price rise. As the HP/Synstar would not impose sufficient competitive constraints in the necessary timeframe, its affect on competition is addressed in the section on entry/expansion.

Combined Effect

3.37 Within the market for business recovery hotsite services, the overall effect of the proposed acquisition would vary for different types of customer. For high-end customers, i.e. customers recovering onto high-end or a combination of high-end and low-end systems, the effects of the proposed acquisition will be most strongly felt, since for many such customers there are no competitors to the merging parties. With regard to customers of mainframe recovery services, there are only two possible suppliers, i.e. the parties. These customers will have no choice apart from a single supplier, post-acquisition. With respect to this class of customer, therefore, the merged entity will be able to raise its price without the possibility that another supplier will be able to absorb the lost sales.

- 3.38 With regard to customers for non-mainframe high-end equipment, competitors offer limited competition for high-end business recovery hot-site services and for this class of customers, choice will effectively be removed from the market.
- 3.39 Even for low-end customers who require an integrated service, there is still a strong probability of the parties being able to raise prices, post-acquisition. Although Synstar and Network Recovery do supply such services, customer enquiries indicate that they are not regarded as significant players in the relevant market, certainly not on a par with the two established players.
- 3.40 Current customers of the parties, both low-end and high-end, have suggested they would not change supplier even if the parties raised price by 5-10%. This is clear evidence of an inability of other business recovery hot-site providers to constrain effectively a price rise by the merged entity.
- 3.41 As discussed previously, suppliers' ability to offer different prices to different customers would enable them to discriminate between different customers. Thus even if a significant number of low-end customers regarded Synstar or Network Recovery as suppliers to switch to, this would not prevent the parties from raising their prices to the remaining customers who would not be able to switch.

OTHER COMPETITIVE CONSTRAINTS

- 3.42 The section on market definition indicated that there might be other competitive constraints, from outside the defined market, on any enhanced market power of the merged entity.⁵⁴ These other possible

⁵⁴ Par. 4.7 of the Merger Guidelines provide that "this includes any firms identified during the market definition process as potentially able to supply the market at short notice (supply

sources have not acted as a constraint on the parties to date and, as the evidence below indicates, customers do not view these as suitable alternatives sufficient to constrain prices post-acquisition.

Competitive constraints exercised by in-house

- 3.43 A significant number of companies in Ireland currently rely on in-house provision.⁵⁵ This refers to a business creating a separate location with business continuity seats and IT systems, which it relies on in the case of a disaster and which it maintains itself. These tend to be manufacturing companies and others with less critical RTO functions.
- 3.44 The relevant question in this transaction, however, is whether customers who currently use externally provided services would switch to in-house provision in the event of an external price rise, and whether those customers who would switch can be identified.
- 3.45 In-house provision is inherently more costly, predominantly because it requires one party to allay the entire cost of construction and maintenance of a facility, while being the only potential user of it. Thus economies of scale in external provision, where costs of supply are spread among several potential users, are not available to in-house businesses.
- 3.46 Customers of the parties do not consider in-house business recovery to be a viable option. First, a company must own at least a second premises, located at a safe distance from its main premises where its IT systems and staff personnel are located; second, the cost of in-

substitution) but that were not ultimately included in the market as their output could not meaningfully be brought into market share calculations."

⁵⁵ The parties adduced information that between 46 and 60 of Ireland's largest 100 organisations relied in part of whole on in-house business recovery. Many of these do not have their IT systems based in Ireland and whose parent companies take responsibility for the purchase of business recovery services.

house provision is often prohibitive, as it is not spread amongst several (syndicated) users; and third, companies want the assurance that their business recovery systems will work, the experience and expertise offered by a professional business recovery provider is valued.

- 3.47 It might be possible for companies to spread the high costs of complex in-house provision. First, they could join or create co-operatives; or second, they could offer business recovery services to other customers.⁵⁶ The parties provide an example of a co-operative type arrangement: [...] and [...] companies, which use their parent company to perform business recovery in-house. The parties also submit that Eircom is an example of a company which moved within a few years from being a business recovery purchaser, to meeting its own needs in-house, and then to selling business recovery to third parties.
- 3.48 Customers overwhelmingly stated that, with regard to forming co-operatives and/or providing business recovery services to others, that they were not in the business recovery market themselves, nor did they wish to. They cited the advantage of external provision as the freedom it gave customers to concentrate on their core business, secure that quality of service was guaranteed. In particular, Eircom informed the Authority that it does not view itself as a competitor of the parties, nor does it foresee itself entering the market as a provider. Customers responses include:
- [Customer 48] (external provider): The main advantage is that a 3rd party business recovery provider's site is physically distant from its head office, as business recovery by definition is an "out of house" function. The business recovery provider's experience,

⁵⁶ Par. 4.7 of the Merger Guidelines.

calibre of personnel, and length of time in the industry are also factors;

- [Customer 45] (external provider): It is not a core competency of [Customer 45] to provide this kind of service, rather it looks for a supplier with that competency. There are not only the costs of doing business recovery internally, but also the risk of not doing it to the same high standard, plus it would cost at least as much if not more for [Customer 45] to provide the service internally;
- [Customer 47] (Schlumberger for external BC and internal DR): The main advantage of an external provider is that if one of its two buildings ceased to function then it would cause great disruption in moving personnel to the other building. An external provider prevents this. It is better to move personnel to a 3rd party site. The sister companies can provide their own IT recovery in-house;
- [Customer 3] (external provider): It defeats the purpose of business recovery to have the service provided in-house. One must provide for a circumstance where one's main building is unavailable;
- [Customer 9] (external provider): It took advice from [consulting firm for business recovery services] and other users, and the unanimous view was that business recovery services should be sourced externally;
- [Customer 16] (external provider): Depending on IT services, it would be preferable to provide business recovery in-house but this may prove to be too expensive or too risky. Also, providing an in-house business recovery solution does not mean having it in the same location as company headquarters;
- [Customer 5] (external provider): In Ireland it has a single building and has nothing to fall back on, i.e. it lacks a second site for any in-house business recovery; and,
- [Customer 28] (DR mainly in-house, external BC provider): It prefers doing technical work and configuration of business recovery

itself, as it is more familiar with its own specialised needs. Schlumberger manages physical office space (i.e. the BC service), which is a distinct advantage as it is one less thing to manage. It further states that internal business recovery is possible but it would probably be too expensive due to extra building costs and would also take more resources to manage.

- 3.49 This evidence indicates that some businesses currently use both external and in-house business recovery provisions. Those who use external provision are generally customers with higher, less flexible demands for business recovery hot-site services, with more complex IT systems and more rapid RTO's. [...] is a good example of a firm that in fact provides its own mainframe back-up, but still requires business recovery hot-site services from both Synstar and SBCS for its other IT platforms and for its critical business continuity functions. [...] recently did the same in outsourcing all its IT requirements, including its mainframe back-up [to a General IT services company] but still maintained IBM for its other recovery hot-site services.
- 3.50 The users of external services were asked how they would react if their external business recovery provider raised prices by 5%. Out of 51 relevant responses⁵⁷, over 90% either said they would not switch or would find it too costly; even those who said they would "consider" it, mentioned the cost factor. No customer said they would in fact do so.
- 3.51 The trend cited by both industry and the parties is away from in-house solutions to outsourcing for business recovery services. A recent report in the October 2003 issue of *Computerscope* magazine, a publication for IT professionals, entitled "Outsourcing and Disaster Recovery" discussed the issue of in-house provision. The publication

⁵⁷ In 51 of the 53 responses considered, customers purchased business recovery hot-site services externally.

conducted a survey amongst its readers on the Irish IT sector, and found that 62% of Irish IT departments use an in-house business recovery plan, while 38% outsource their business recovery requirements.

3.52 While *Computerscope's* article does contain the in-house/external percentage ratios cited by the parties, its front headline states "*Outsourcing on the rise*". While 62% of respondents to the magazine's survey expected their IT outsourcing requirements to stay constant over the then coming year, a further 35% expected to increase their level of IT outsourcing, while only 3% expected their IT outsourcing requirements to decrease. The survey found that the Irish IT sector was generally moving towards outsourcing. One of its main conclusions was: "*IT outsourcing is alive and well ... Further growth can be expected and the main reason IT managers look to outsourcing is to allow them to concentrate on their own core business ... Our survey found that the breakdown between those who actually do outsource some or all of their IT operations and those who don't, is split fairly evenly down the middle ... [This] suggests that the market is growing for specialists who will take the running of all or part of an organisation's IT requirements off it hands.*" The *Computerscope* article listed the four main benefits of outsourcing as freedom to concentrate on core business, guaranteed service, reduced costs, and reduced staffing concerns, i.e. the same factors cited by customers.⁵⁸

3.53 The Authority has found no evidence that the relative cost of in-house provision is falling more rapidly than the relative cost of external provision. If improved technology makes it cheaper to provide business recovery in-house, it should also make it cheaper to supply the source from an external supplier.

⁵⁸ See also Page 4 of [Internal analysis of the proposed acquisition for the IBM Board] referred to in footnote 9.

Conclusion on in-house provision

- 3.54 In-house business recovery provision is used by many companies. However, companies that use external hotsite provision consider that in-house provision would be considerably more expensive than external hotsites, and that in-house provision requires, as a minimum, a second site to be available when the main site is out of action. Therefore, while in-house business recovery may be reasonably straightforward, or at least more viable, for multi-site companies or groups of companies, but it is an expensive, or totally non-viable, option for single-site companies, which would need to acquire, equip and maintain a separate recovery site.
- 3.55 Most respondents who use an external business recovery provider opt for a syndicated service, where the same hotsite facility is shared between a number of customers and costs are therefore spread. This reduces the cost of external, compared with in-house, provision. Many respondents explicitly stated that the cost of business recovery is not the primary concern; rather they seek the assurance that the business recovery system used will actually work. For this reason, they seek the services of a professional full-time business recovery provider. Further, many respondents also state that a lack of internal resources and expertise is an obstacle to self-supply. For these reasons, most current business recovery hotsite customers in the State would accept a substantial price increase before choosing an in-house supply option.
- 3.56 In-house provision will not be an effective check on the ability of the merged entity to raise prices towards customers who use external provision.⁵⁹

⁵⁹ The OFT decision on this transaction, of 6th August, 2004, analysed the issue of in-house provision. It considered whether in-house provision was a competitive restraint and went so

Competitive constraints exercised by General IT Companies

- 3.57 General IT companies offering a range of IT services, i.e. computer hardware and software, maintenance and consulting services etc., may constrain the ability of the merged entity to raise price. General IT companies do not directly supply hot-site services to customers, but may be able to sell certain parts of business recovery services such that customers can manage to achieve the same combination of services at no increase in price. General IT companies may offer business recovery services as part of a more general IT services contract.
- 3.58 Although IT services contracts with a business recovery component could potentially constrain price rises for specific business recovery hot-site services, the relevant question is whether IT companies can offer the same combination of services within the business recovery portion of the contract such that business recovery customers will be able to switch to them if business recovery hot-site prices rise.
- 3.59 Hewlett-Packard (“HP”) is a worldwide corporation offering a diversified IT business involving the provision of hardware and IT services. HP’s revenues from its IT recovery activities in the State are approximately €[<1]m. HP offers a limited IT recovery service in the State whereby it can provide recovery services onto its own HP systems. However, it does not have its own site from which it can

far as to state that *“some customers identified in-house supply as an option, but it is not clear for how many this would be true, whether switching would be sufficient to render a universal price increase by external suppliers unprofitable, and whether price discrimination would enable a profitable price increase against a subset of IBM mainframe customers unable or unwilling to switch to internal supply”*. The OFT made no findings concerning in-house business recovery, because it established, relatively early in its investigation, that the acquisition by IBM of Schlumberger’s UK business did not raise any competition concerns in that jurisdiction, primarily because of the presence of Sungard and the lack of complaints by customers.

provide business recovery for these systems and has arrangements with both IBM and SBCS to place the systems on their sites. HP allows both IBM and SBCS to syndicate their own customers on this equipment also. HP has [...] IT business recovery contracts in Ireland, of which [...] are IT outsourcing contracts encompassing an IT recovery element. Where its customers require the provision of business continuity seats in addition to IT recovery services, HP must obtain these services for its customers from one of the BC providers. Currently HP uses either IBM or SBCS.

3.60 HP is not in a position to constrain the parties in the provision of hot-site services as it lacks the equipment and facilities to do so and HP only provides recovery services for its own machines. While this allows it to recover data for a large class of servers, it cannot recover data from mainframes or other mid-range systems, and would be unable to constrain any price rise by the parties toward such customers.

3.61 In order to meet the needs of customers coming to it, HP would still have to sub-contract the provision of recovery positions to the parties and will continue to locate its recovery equipment on the sites of the parties. As such, HP is a customer of the parties, and could find that the wholesale price for services charged to it may rise. Any such rise in its input costs – which it must meet, as it does not have hot-site seats itself – would be passed on to customers, with a corresponding inability to constrain any price rise by the parties.

Competitive constraints exercised by teaming specialists

3.62 The term “teaming specialists” describes companies who provide business recovery services by using a combination of their own assets and strategic partnerships with other providers, i.e. they team their

own expertise with services bought in from outside. They attempt to create solutions by integrating different elements of business recovery services.

- 3.63 Whilst telecommunications companies such as Eircom and Esat/BT provide some IT recovery facilities for their customers, essentially they are providing IT hosting services. This involves the provision of a secure facility for customers to locate their IT systems. They do not provide the same service as the parties, i.e. they are not offering a combination of IT recovery with business seats equipped with desks, telephones and desktop computers etc.
- 3.64 Teaming specialists have no ability to recover data from mainframes or high-end servers. Therefore they could not offer a credible alternative for customers requiring recovery onto such systems.
- 3.65 For customers with less complex systems, teaming specialists would not offer a strong competitive constraint. As stated above, they do not offer an integrated service including physical space for staff. It is possible that teaming specialists could sub-contract the hiring of office space from suppliers of such facilities, such as Regus. However, adding such space to IT hosting facilities is not analogous to the full provision of a hot site, which offers a fully integrated combination of IT recovery and business continuity seats. The strength of this constraint is further limited by the fact that a customer would have to itself purchase the equipment to be hosted (as opposed to the business recovery provider buying the equipment to supply a particular customer, and then recouping the costs over time by syndicating that equipment to several other customers).
- 3.66 Evidence from customers has indicated that they would not switch from the parties, even in the event of a 5-10% price rise. Moreover,

customer evidence indicates that many do not consider splitting the provision of business recovery services to be a viable option, given the importance and risk associated with the service. This is further supported by the parties' own internal documents which indicate that customers are increasingly looking for a single provider of services.

- 3.67 Eircom has stated that it is not in the same market as the parties and does "*not have any plans to enter in the traditionally defined business continuity market*". Neither does it bid for integrated business continuity and recovery contracts. Therefore, the Authority does not regard Eircom as being capable of absorbing lost sales for either high-end or low-end customers.

Competitive constraints exercised by aggregators

- 3.68 An aggregator is a company such as an IT consultancy firm which organises business recovery services on the customer's behalf and then out-sources these to a business recovery service provider such as one of the parties. Aggregators do not, as such, provide an independent service or any assets they own themselves.
- 3.69 The same analysis that applies to general IT companies and teaming specialists, i.e. that they are wholesale customers of the parties and thus customers on which a price increase may be levied, applies also to aggregators. Thus, aggregators would not be in a position to constrain the parties from raising price. Responses from customers indicate that many do not consider splitting the provision of business recovery services to be a viable option, given the importance and risk associated with the service. This is further supported by the parties' own internal documents which indicate that customers are increasingly looking for a single provider of services.

3.70 Overall, the competitive constraints that would be exercised by General IT companies, teaming specialists, or aggregators, post-acquisition, would not be an effective check on the ability of the merged entity to raise prices towards those customers who require a reliable, high quality business recovery hotsite service, from a single provider.

CONCLUSION

3.71 Having considered the above possibilities there are a substantial number of customers, particularly in the financial and insurance sectors, who demand business recovery hotsite services and will not be able to easily switch elsewhere. As discussed in Section 2, any incentive for the merged IBM/SBCS entity to raise prices will be further intensified by its ability to be aware of the needs of the customers. A customer must give a specific description of its needs in a tendering process. This technical description should allow a supplier to know the relative costs and capabilities of the customer, which should permit it to estimate the costs of self-supply. It can therefore gauge the price it would charge in order to relative to the cost of in-house provision.

3.72 The bidding process for customers can permit a supplier to price discriminate. The presence of customers who have alternative suppliers in the event of a price rise does not protect those for who these alternatives are not viable. The merged entity can offer different prices to these customers while still raising its price to customers who do not have alternatives. As such, even if some customers currently opt for in-house provision or might look to switch to in-house in the event of a price rise, this does not negate any harmful effect on customers who do not have that option, as the merged entity is able to set different prices for each customer, and, from the specifications

given to it, know what the options and competition from any alternative suppliers is likely to be.

- 3.73 Overall, after examining competition in terms of market structure and competitive effects, the Authority is of the opinion that there exist customers who would be harmed by the proposed acquisition. This is indicated by the lack of options for those who wish recovery onto mainframes, and, more generally, by the clear comments from customers that they would not switch from the parties even in the event of a 5-10% price rise.

Entry to the business recovery hotsite services market

- 4.1 This section examines whether entry would limit the ability of the merged entity to raise price. The Merger Guidelines state that “A merger is unlikely to substantially lessen competition in a sustained manner if entry into the market is sufficiently easy such that market participants, post-merger, could not maintain a price increase above pre-merger levels. Such entry would be timely, likely, and sufficient in scope to deter the competitive effects of concern”⁶⁰. The burden of establishing that entry will ameliorate any anti-competitive effects rests with the parties. “Timely” in this regard means within two years of the date of the merger, while “sufficiency” means an entrant of adequate size to compete effectively and return prices to at least their pre-merger levels.
- 4.2 Three factors limit the competitive constraint that future entry would exert on a price rise for business recovery hotsite services. First the reputation of the seller for reliability is critically important to buyers of these services. Second, entry to the market requires a high sunk cost investment. Third, contracts of 3-5 years in duration limit the share of the market that is available for competition in any given year.
- 4.3 The four most likely sources of competitive threat arising from entry are:
- a. A current business recovery hotsite provider operating in the low-end of the market could move into the high-end;
 - b. An overseas business recovery hotsite provider entering, either as a “greenfield” entrant or by acquiring an existing local competitor;

⁶⁰ Par. 5.1 of the Merger Guidelines.

- c. An IT company or teaming provider beginning to offer hot-site recovery services; and,
- d. A business recovery hot-site customer who decides to self-supply might also decide to supply others, in order to recoup costs.

The relevance of each particular entry barrier on each type of potential entrant is discussed below.

Reputation

- 4.4 The demand for business recovery hot-site services arises as a form of risk protection. For this reason, the ability of a provider to meet a customer's needs with high speed, certainty and reliability is crucial in the choice of provider. Where customers perceive that a particular supplier does not have the experience or scope to deal with an invocation, they will not opt to take the risk of selecting that supplier.
- 4.5 The reputation of the provider is critically important for some customers who, because of regulatory requirements or the nature of derived demand (see Par.2.10(a) above), place a premium on reliability. Other customers for whom the cost of invocation is lower may be willing to risk buying from a new provider in the event of a price rise, although the parties have presented no evidence to support how important an effect this is. In any case, given that these customers are generally identifiable and have different needs, their presence would do little to protect the former group from price rise, especially where price discrimination can be practised.
- 4.6 A reputation for quality is generally earned by experience in the market, and thus takes time to develop. It can be demonstrated by, *inter alia*, an established market presence, a client list including customers with similar requirements, proven invocation experience, a sufficient number of staff devoted to business continuity and recovery

activities and having the IT systems which are required for recovery on site.

- 4.7 Reputation in this case acts as a barrier to entry and expansion for new entrants to the market, for those seeking to reposition their business, and for self-suppliers seeking to supply. It may be less of a barrier to entry for a company with a strong presence and good reputation in another geographic market.

Sunk costs

- 4.8 The supply of business recovery hotsite services requires a considerable outlay of fixed costs that are specific to the market, and have little alternative use in the event of exit from the market. This is particularly the case for mainframes and high-end servers, where the cost of equipment is high, specific and irreversible. Other costs such as site acquisition, fit-out costs (computer rooms, generators, office suites, security) and staff may be partly sunk. Sunk costs would be greater for new entrants, but would also be incurred by low-end suppliers repositioning towards high-end (e.g. mainframe) provision. Sungard has stated that facilities, technology and staff account for approximately 65-70% of total costs of setting up and that very little of those costs can be recovered as *“these are very bespoke environments and would only be of use to like-minded companies”*.
- 4.9 Sunk costs act as a barrier to entry and expansion to *de novo* entrants, to existing suppliers repositioning in the market, and to suppliers in another geographic market seeking to enter the Irish market. It may be less of a barrier to entry for existing in-house providers.

Long-term contracts

- 4.10 Most business recovery hotsite service contracts are of 3-5 years duration. This means that approximately 25 per cent of contracts become available each year.⁶¹ A new entrant with an attractive service offering could thus take several years before it could build up its long-term equilibrium scale in the market. The presence of long-term contracts also affects the ability of existing suppliers to expand: even if entry or repositioning were to occur, sustained expansion would take several years.
- 4.11 The presence of long-term contracts compounds the reputation effect, in that it will take a new entrant longer to establish a reputation in the market. It also compounds the scale effect arising from syndicated provision: a new entrant will take time to build a portfolio of customers for a syndicated site.
- 4.12 Long-term contracts would, by slowing market penetration, make entry for all types of potential entrant less profitable and thus deter entry and expansion.

Application to potential entrants

- 4.13 The most likely entry from low-end to high-end business recovery hotsite services would come from Synstar and Network Recovery. As noted above, customers have stated that these existing providers do not have a sufficient reputation for them to switch, even in the event of a price rise by the merged entity. Neither company has evidenced any intent or present capability to expand into high-end recovery.

⁶¹ Contracts for business recovery services may contain break clauses; however, these will usually include a penalty payment for early termination.

- 4.14 The most likely foreign entrant would be Sungard, prominent in the UK and in other countries. Sungard has said that there would need to be a very significant price rise even to contemplate entry and that, given the maturity of the market, with high entry costs and customers already locked into long-term contracts, it would prefer to establish a presence by acquiring an established business. It identified SBCS and Synstar as the only two incumbents that it would consider purchasing and that otherwise it does not foresee itself entering the business recovery hot site market in the State.
- 4.15 For general IT service providers and current in-house providers, the costs of entry are, if anything, higher still, so that the effect of a threat of entry from those quarters would be even less.
- 4.16 The possible merger of HP/Synstar could see general IT providers combine with a smaller business recovery hot site supplier and be a more viable course of entry. First, the Authority cannot regard this transaction as more than a proposal, since it has not yet been concluded. Second, assuming that it will enter the market as a joint entity, it would not prevent any negative competitive effects arising from the proposed transaction.
- 4.17 HP has not directly provided business recovery hot site services in the past, but it does provide a limited IT recovery service for users of its IT systems, and has bid for some contracts, using the parties' hot sites to complete the offering. It has a strong reputation in IT services generally, and coupled with Synstar, it could decide to increase its offering and compete with the parties. However, a substantial outlay in IT hardware and software would be required to make HP/Synstar a strong competitor of the merged entity. For instance, HP/Synstar would not be easily able to recover from mainframes, and would thus offer no competition for customers requiring such services. HP has

stated recently to the Authority that the rationale for the acquisition of Synstar's European-wide operations was that Synstar has strong IT maintenance services capabilities. It does not have any current plans to expand Synstar's business to compete with the parties. Even if HP does decide to invest in Synstar, the Authority has seen no clear evidence that competition from a merged HP/Synstar will be timely to address any concerns arising from the proposed acquisition.

- 4.18 In conclusion, the evidence suggests that entry would not exert sufficient competitive pressure as to limit a price increase within a period of two years, if not longer.

SECTION FIVE:

EFFICIENCIES

- 5.1 The Authority is of the view that this transaction would not lead to any demonstrable efficiencies that would be passed on to consumers and that could ameliorate any negative competitive effects. Nor did the parties put forward arguments about efficiencies. The Authority did not consider it further.

SECTION SIX:

CONCLUSION

6.1 Having carefully considered all of the evidence (as set out in Par. 1.6 above), including the submissions of the parties, both written and oral, the Authority has reached the following conclusions:

- (i) The relevant market is the market for the supply of business recovery hotsite services in the State. The conclusion concerning the competitive effects of this transaction, however, is not dependent on the finding with regard to the definition of the relevant market.
- (ii) The parties are the two largest providers of business recovery hotsite services in the State, and compete directly and closely against each other.
- (iii) Neither of the other two providers of business recovery hotsite services in the State, Synstar and Network Recovery, nor the combination of both of them, would exert sufficient competitive pressure to discipline the combined market power of the parties.
- (iv) There is an identifiable group of customers in respect of whom in-house provision of business recovery services would not exercise a sufficient competitive constraint on the parties' ability to increase price.
- (v) There is an identifiable group of customers in respect of whom general service IT companies, teaming specialists and aggregators who supply some aspects of business recovery services would not exercise a sufficient competitive constraint upon the parties' ability to increase price.
- (vi) There is no evidence that entry to the market would likely to occur in sufficient time and scale to limit any increase in price.
- (vii) Taking all potential sources of competitive constraint together, there exist identifiable customers for whom the proposed acquisition would be likely to result in an increase in price. This effect is reinforced by the ability of suppliers to set prices for

individual customers with observable demand characteristics, so that customers negatively affected by the proposed acquisition would not be protected by customers who would be able to switch more easily.

SECTION SEVEN:

DETERMINATION

7.1 In the light of the foregoing conclusions, and having completed its full investigation in relation to the proposed transaction, the Authority, in accordance with Section 22(3)(b) of the Act, has formed the view that the result of the proposed acquisition by IBM Ireland Limited of Schlumberger Business Continuity Services (Ireland) Limited will be to substantially lessen competition in markets for goods or services in the State and, consequently the Authority hereby determines that the acquisition may not be put into effect. Before making a determination in this matter, the Authority, in accordance with Section 22(8) of the Act, had regard to any such relevant international obligations of the State, concluding that there were none such.

For the Competition Authority:

Dr John Fingleton, Chairperson and Member

Terry Calvani, Member

Declan Purcell, Member

28th October 2004