

consumers in the economy
 vigorous competition drives productivity growth, innovation and value for all
 innovation
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 and value for all consumers
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productivity
 growth,
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productivity

Advisory Group on Media Mergers

Submission of the Competition Authority

S/08/006

May 2008



The Competition Authority
 An tÚdarás Iomáíochta

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1. INTRODUCTION

- 1.1 This submission is a response to the recent call for submissions by the Advisory Group on Media Mergers ("the Group"). Specifically the Group has been asked to examine the provisions in the Competition Act 2002 ("the Act") in relation to media mergers and, in particular, the 'relevant criteria' specified in the Act under which the Minister for Enterprise, Trade and Employment, Micheál Martin T.D. ("the Minister") may consider media mergers. The Competition Authority's ("the Authority") response focuses on how media mergers are reviewed by the Authority under the provisions set out in Part 3 of the Act as well as setting out the Minister's role under the legislation.
- 1.2 The Terms of Reference of the Group are:
- To review and consider the current levels of plurality and diversity in the media sector in Ireland;
 - To examine and review the "relevant criteria" as currently defined in the Act;
 - To examine and consider how the application of the "relevant criteria" should be given effect and by whom;
 - To examine the role of the Minister in assessing the "relevant criteria" from a public interest perspective and the best mechanism to do so;
 - To examine international best practice including the applicability of models from other countries; and,
 - To make recommendations, as appropriate, on the above.
- 1.3 Section 2 of the submission provides an overview of the Authority's merger review procedure and must be read in conjunction with (i) the Authority's published merger guidelines¹ which set out guidelines on the substantive competition analysis undertaken during a merger review by the Authority; and, (ii) the Authority's published mergers procedures² which set out in detail the process and procedures undertaken by the Authority in the course of reviewing a notified merger.
- 1.4 Section 3 provides data on the number of media mergers reviewed by the Authority since January 2003, i.e. when the Authority assumed responsibility for merger control in the State under the Act.
- 1.5 Section 4 considers issues related to future policy and debate.
- 1.6 The Competition Authority would be happy to discuss these issues further with the Group, if that was thought useful.

¹ Competition Authority, 2002, *Notice in Respect of Guidelines for Merger Analysis*, Decision No. N/02/004 – available at www.tca.ie

² Competition Authority, 2006, *Revised Procedures for the Review of Mergers and Acquisitions*, February – available at www.tca.ie

2. THE REVIEW OF MEDIA MERGERS BY THE COMPETITION AUTHORITY

The Merger Review Process

- 2.1 In January 2003, the Authority assumed full responsibility for merger control in the State. In accordance with the provisions of Part 3 of the Act the Authority follows a two-stage process – Phase 1 and Phase 2 – when forming a view of whether notified mergers would substantially lessen competition (“SLC”) in markets for goods or services in the State (section 20(1)(c)).
- 2.2 The Authority has issued guidance³ on how to apply the SLC test which is interpreted in terms of consumer welfare, i.e. the effect on consumer welfare is measured primarily by whether prices in the market will rise post merger.
- 2.3 Under section 21(2) the Authority has one calendar month⁴ from the “appropriate date”⁵ as defined in the Act to undertake a preliminary investigation (“Phase 1 investigation”), at which stage, it may, under section 21(2)(a), determine that the merger may be put into effect.
- 2.4 Where the Authority is unable to determine that the proposed merger will not lead to a SLC it may, under section 21(2)(b), determine that a more detailed full investigation (“Phase 2 investigation”) be undertaken under section 22 of the Act. On completion of the Phase 2 investigation the Authority may, in accordance with section 22(3) determine that the merger: (a) may be put into effect; (b) may not be put into effect; or, (c) may be put into effect subject to conditions to be complied with.
- 2.5 A Phase 2 investigation must be carried out within four months of the “appropriate date”.
- 2.6 Figure 1 presents a summary of the mergers review procedure.

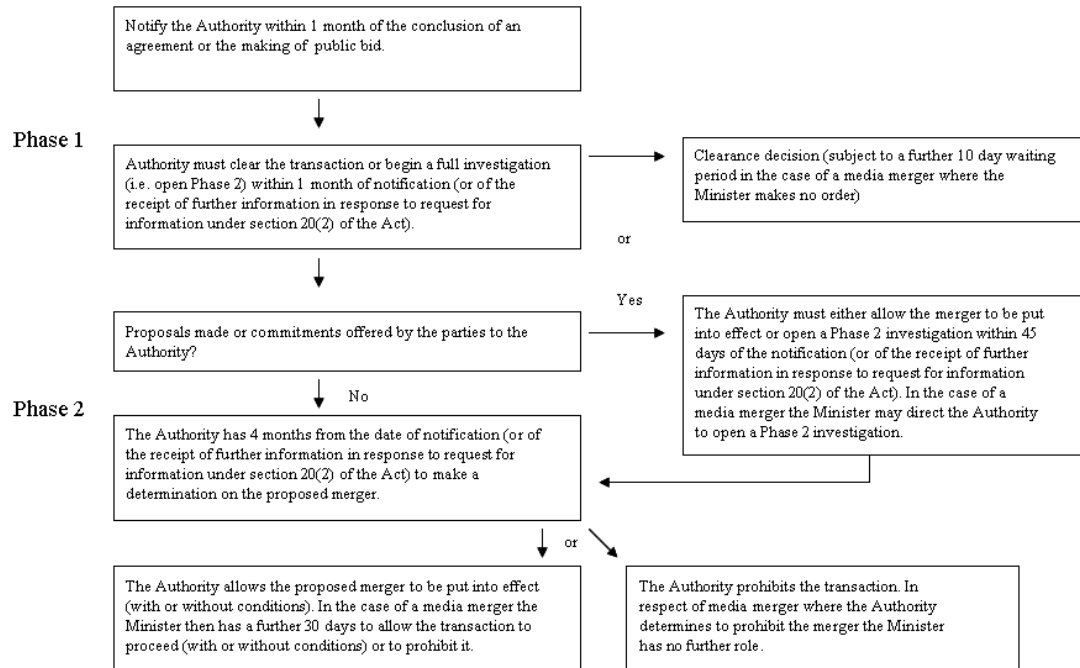
³ See footnote 1 above for details.

⁴ The period of one calendar month may be replaced by a period of 45 days where notifying parties, during Phase 1, offer proposals (i.e. measures which would ameliorate any effect of the merger on competition) to the Authority in accordance sections 20(3) and 21(4).

⁵ The “appropriate date” is the date of notification of the proposed transaction, unless a requirement to provide further information has been made under section 20(2). In that case, the “appropriate date” is either the date of receipt of the information or the deadline set within the requirement, if the information has not been supplied by that deadline

Figure 1

Overview of Merger Review Process



Source: The Competition Authority

Media Merger Review

2.7 The exception to the Authority’s determinative function in respect of mergers notified to it arises in relation to ‘media mergers’. Section 23 of the Act defines a media merger as “a merger or acquisition in which one or more of the undertakings involved carries on a media business in the State”.

2.8 As to what constitutes a ‘media business’, the Act expressly defines the term as meaning:

- (a) a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs;
- (b) a business of providing a broadcasting service; and,
- (c) a business of providing a broadcasting services platform.

2.9 The Minister has power to make a final determination in respect of a media merger. In exercising that power, he or she must base the decision solely on certain specified non-competition criteria. However, the Authority is obliged to form a view on how the application of these criteria should affect the exercise by the Minister of his or her powers to make a final determination in relation to the merger.

2.10 These criteria are referred to as the relevant criteria and are set out in section 23(1) of the Act:

(a) the strength and competitiveness of media businesses indigenous to the State;

(b) the extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings;

(c) the extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings;

(d) the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State; and,

(e) the share in the market in the State of one or more of the types of business activity falling within the definition of "media business" in this subsection that is held by any of the undertakings involved in the media merger concerned, or by any individual or other undertaking who or which has an interest in such an undertaking.

2.11 In accordance with section 23(1) the Authority, within 5 days after receiving a notification⁶ of a media merger, must forward a copy of the notification to the Minister and inform the notifying parties that it considers the merger to be a media merger.

2.12 Apart from this additional initial procedural element the Authority conducts its merger review as it would the investigation of any notifiable merger. There is no difference in terms of the substantive analysis undertaken by the Authority between investigations carried out by the Authority in a media merger vis-à-vis a non-media merger. The Authority applies the same competition test, i.e. whether the proposed transaction will lead to SLC.

2.13 There are, however, a number of additional procedural steps that need to be undertaken in the case of media mergers. We consider four distinct possibilities under the Act

Phase 1 Determination by the Authority to Clear the Media Merger

2.14 If the Authority makes a determination under section 21(2)(a), (i.e. concludes after a Phase 1 investigation that the merger will not lead to SLC), then, in accordance with section 23(2) it must immediately inform the Minister of this determination. The Minister then has 10 days in which to decide whether to direct the Authority to conduct a full investigation of the merger under section 22 (i.e. a Phase 2 investigation).

2.15 The Authority also informs the notifying parties and any third parties who have made submissions of its determination. However, it does not publish that determination unless 10 days have elapsed without the Minister having issued a direction to the Authority, notwithstanding its determination, to carry out an investigation under section 22 of the Act. During this period the Authority publishes notice of the fact that the determination has been sent to the Minister on its web site.

⁶ Many media mergers which do not satisfy the financial thresholds in the Act are nonetheless mandatorily notifiable, as a result of the provisions of SI No. 122 of 2007, in which the Minister defined certain classes of media mergers to be mandatorily notifiable.

- 2.16 In a Phase 1 clearance the Authority is not required – nor does it – come to any view or express any opinion or undertake any investigation concerning the application of the relevant criteria to the instant media merger case.

Phase 1 Determination by the Authority to Undertake a Phase 2 Investigation

- 2.17 Where the Authority makes a determination under section 21(2)(b), (i.e. concludes after a Phase 1 investigation that it intends to undertake a full investigation) then the Authority has no obligation to the Minister and the Minister has no role.
- 2.18 The relevant criteria play no role whatsoever in the Authority’s decision to go to Phase 2.

Phase 2 Determination by the Authority to Clear the Media Merger

- 2.19 Where the Authority conducts a full investigation of a media merger either by direction from the Minister under section 23(2) or by its own determination under section 21(2)(b) and concludes at the end of that full investigation either that merger may be put into effect (section 22(1)(a)) or that the merger may be put into effect subject to conditions (section 22(1)(c)) then in accordance with section 23(4) it must immediately inform the Minister of this determination.
- 2.20 In these circumstances the Minister has the final decision and under section 23(4) within 30 days may make an order to: (a) clear the media merger unconditionally; (b) clear the media merger with conditions; or, (c) prohibit the media merger. It is at this point that the Minister must have regard to, and only to, the relevant criteria set out in section 23(10). Where the Minister makes an order under section 23(4) he must publish his reasons for doing so within 2 weeks of the order according to section 23(5).
- 2.21 The Authority informs the undertakings involved and any third parties who made submissions of the nature of the determination it has made and publishes notice on its web site that the determination has been sent to the Minister. If at the end of 30 days the Minister has made no order pursuant to section 23(4) of the Act, or if, during that period, the Minister has stated in writing that he or she does not intend to make such an order, the Authority will inform the undertakings involved.
- 2.22 During the Phase 2 analysis of a media merger the Authority is required under section 23(7) to form an opinion, as to how the relevant criteria in section 23(10) should affect the exercise by the Minister of his or her powers under section 23(4). The Authority is required to inform the Minister of this opinion only where the Minister requests it to do so under section 23(8) of the Act.
- 2.23 When the Minister makes an order under section 23(4) the Minister does so having regard to, and only to, the relevant criteria.

Phase 2 Determination by the Authority to Prohibit the Media Merger

- 2.24 Where the Authority conducts a full investigation of a media merger either by direction from the Minister under section 23(2) or by its own determination under section 21(2)(b) and concludes at the end of that

full investigation to prohibit a media merger the Minister has no further role and specifically does not have the power to assess the media merger.

- 2.25 The Authority's decision to prohibit a media merger is based solely on the application of the competition test and no consideration is paid to the relevant criteria whatsoever.

3. MEDIA MERGERS SINCE 2003

Introduction

- 3.1 Table 1 provides summary statistics with respect to notified media mergers. There were 89 media mergers notified to the Authority in the period January 2003 to December 2007. All these mergers were cleared by the Authority: 86 at Phase 1, and three at Phase 2.⁷
- 3.2 While the Authority has not blocked any of the 89 media mergers notified to it a number have been cleared with commitments at Phase 1 (e.g. M/05/206, *SRH/Highland Radio* and M/07/022, *TCH/South East Broadcasting*) and with conditions at Phase 2 (e.g. M/03/033 *SRH/FM104*, M/05/025, *UGC/NTL*, and M/07/040, *Communicorp/SRH*).

Table 1
Notifications Classified as Media Mergers, Ireland, 2003-2007

Year	Media Mergers Notifications	Media Mergers Cleared at Phase 1	Media Mergers Cleared at Phase 2
2003	13	12	1
2004	14	14	-
2005	23	22	1
2006	22	22	-
2007	17	16	1
Total	89	86	3

Source: Competition Authority, *Annual Reports*, various issues

The Competition Authority's Role

- 3.3 The Authority has provided, at the Minister's request, its opinion on the relevant criteria to the Minister in the three Phase 2 investigations listed in paragraph 3.2 above.
- 3.4 The Authority's view of the application by the Minister of the relevant criteria is drawn from the evidence, views and findings received by the Authority during its review of the competition aspects of the proposed transaction. The Authority does not undertake a separate or concurrent investigation relating to the relevant criteria.
- 3.5 Annex 1 provides the Authority's opinion – redacted – in one of the three Phase 2 media merger investigations referred to in paragraph 3.2 above.
- 3.6 The Authority's approach to expressing its opinion on the relevant criteria is consistent with a legal opinion it has obtained from Senior Counsel on the Authority's role in relation to section 23(7) of the Act.

The Minister's Role

- 3.7 As can be seen from Table 1, 86 of the media mergers notified to the Authority were cleared at Phase 1. A number of these mergers (e.g. M/07/021, *TCH/WKW FM*) involved issues of cross media ownership. In

⁷ The Authority's *Annual Report* provides full details of all media mergers and contains summaries of the major media mergers. The published determinations are available on the Authority's website: www.tca.ie.

no case did the Minister direct the Authority to carry out a Phase 2 investigation.

- 3.8 In the three media mergers which were the subject of a Phase 2 investigation, the Minister asked the Authority to provide its opinion on the relevant criteria. In none of these cases did the Minister vary the determination of the Authority.

4. FUTURE POLICY AND DEBATE

4.1 The Competition Authority takes the view that it is not within its expertise to develop a definitive opinion with respect to the relevant criteria. The Authority outlined its position in this regard in its recent submission to the Department of Enterprise, Trade and Employment on the Public Consultation on the Operation and Implementation of the Competition Act 2002.⁸

4.2 More specifically the Authority stated at paragraph 3.42 of its submission that:

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

In the merger conference sponsored by the Authority in early 2007 two papers were presented that presaged this position.⁹

4.3 The Authority also notes that this view is supported in a number of other submissions to the Department of Enterprise, Trade and Employment on the Public Consultation on the Operation and Implementation of the Competition Act 2002. For example the Law Society in its submission notes:

The CA Submission recommends the amendment of section 23(7) of the Competition Act so as to abolish the requirement for the Competition Authority to form an opinion as to how the application of the "relevant criteria" should affect the exercise by the Minister of his or her powers in relation to media mergers.

The Committee agrees with the analysis of this issue contained in the CA Submission and agrees with the suggested amendment. (pp. 10-11).

4.4 To assist the Authority in considering media mergers against the relevant criteria the Authority commissioned a study by a number of academics from the University of East Anglia.¹⁰ The Report concluded that there is a significant body of work which still requires to be

⁸ The Authority's submission may be found on its website: www.tca.ie.

⁹ See (i) 'The Curious Tale of Pig, Papers and Peru: Media Mergers in Ireland', by Ibrahim Bah and Linda NiChulladh; and, (ii) 'Improving Merger Control in Ireland: Proposed Legislative Reforms Four Years On', by Noreen Mackey. Both papers were presented at the Authority's Mergers Conference in April 2007 and are available at www.tca.ie

¹⁰ S Hargreaves Heap, A. Scott, A. Gaudeul, and P. Akman, 2006, *Consultation on the Assessment of Media Mergers under the Competition Act 2002: An Analytical Framework for Media Mergers in Ireland*, A study prepared for the Competition Authority. Norwich: UEA.

undertaken before the relevant criteria can be properly assessed, irrespective of which body is required to carry out that assessment.

- 4.5 In particular the Report suggests the development of a framework which consists of (1) a 'media map' (i.e. a description of the media landscape in Ireland); and, (2) a set of structured questions to be answered in the case of a particular proposed merger which would enable an assessment to be made with respect to how any merger might affect the relevant criteria.
- 4.6 The full Report is provided in an accompanying document to this submission (Annex 2 below reproduces the executive summary of the Report) so that it might assist the Group in its deliberations in relation to media mergers as well as encouraging debate and discussion as to the meaning and assessment of the relevant criteria.

ANNEX 1: ILLUSTRATIVE EXAMPLE OF THE AUTHORITY'S OPINION ON THE RELEVANT CRITERIA IN A PHASE 2 MEDIA MERGER

Re: M[.]

Opinion of the Authority of [.] in accordance with Section 23 (7) of the Competition Act 2002

The Authority has formed the opinion, pursuant to Section 23 (7) of the Competition Act 2002 ("the Act"), that having due regard to the relevant criteria set forth in Section 23 (10) of the Act, it is not necessary for the Minister to make any order in the exercise of her statutory powers, for the following reasons:

Section 23 (10)(a)

There is no change in competitiveness and the undertakings involved will continue to operate in the State;

Section 23 (10)(b)

The merger does not raise any cross-media ownership or control concerns since the undertakings involved in the merger provide only [.] services in the State;

Section 23 (10)(c)

The conditions set out by the Authority in its Determination of [.] address any and all concerns that may arise in relation to ownership and control, and ensure that ownership and control of [.] services is spread amongst individuals and other undertakings;

Section 23 (10)(d)

Licensing requirements which provide for diversity of content remain unaffected by the merger and, therefore, the diversity of views prevalent in Irish society will continue to be reflected through the activities of the undertakings involved in this merger; and,

Section 23 (10)(e)

[.]'s increased share in the [.] services market in the State does not raise concerns.

ANNEX 2: EXECUTIVE SUMMARY OF REPORT COMMISSIONED BY THE COMPETITION AUTHORITY - AN ANALYTICAL FRAMEWORK FOR MEDIA MERGERS IN IRELAND

EXECUTIVE SUMMARY

[1] Under the Competition Act 2002, the Competition Authority can be asked to advise the Minister for Enterprise, Trade and Employment on how a media merger might affect the diversity of views, the concentration of ownership within and across media businesses, and the strength and competitiveness of indigenous media business. This is a rough summary of the so called 'relevant criteria' in the Act. While it is unusual to charge a Competition Authority with such a task, most jurisdictions require some agency to assess potential media mergers in a similar way.

[2] In this report, we propose a Framework for making these assessments that consists of two parts. The first requires the construction of a 'media map'. This is a description of the media landscape in Ireland that would minimally contain details of who owns what media businesses, who uses what media outputs, what degree of trust users accord to such outputs, and an understanding of the influence of regulation on these businesses. Ideally, the media map would also provide evidence on the practices of ownership and the orientation of particular media outlets with respect to major political, social and economic issues.

[3] The second part of the Framework consists of a set of structured questions to be answered in the case of a particular proposed merger. The answers would be drawn from the 'media map' as well as information provided by the parties to the merger. They would enable an assessment to be made with respect to how any merger might affect the 'relevant criteria'.

[4] Any assessment is bound to require judgements in relation to the relevant available evidence, but the burden of judgement in this sense will vary across the 'relevant criteria'.

On matters of concentration, the minimum version of the 'media map' should supply reasonably clear answers. It is in relation to the criteria that are concerned with diversity of view - and to a lesser extent the strength of indigenous businesses - where the role of judgement is keenest and where its exercise goes beyond the existing competence of the Competition Authority. In these cases, the purpose of the structured questions in the Framework is to build an appropriate evidential base upon which what are often political judgements can be made.

[5] The architecture of the questions in the second part of the Framework, and hence the information they will garner, essentially depends on two factors. The first is an approach to market definition that is likely to distinguish between two broad markets in 'diversity of view'. In part, this reflects two widely-accepted different understandings of how diversity might be achieved. One is a so-called 'internal' type of diversity that comes from each media outlet providing a balanced account of all views. This kind of diversity has been pursued historically through regulation of the broadcasting media. The other 'external' type is achieved when each media outlet expresses a particular view and the market contains an adequate range of such views. This corresponds to a familiar notion that media markets might operate as a 'marketplace for ideas'. Historically, this idea has historically associated with the relatively unregulated print industries.

[6] Platform convergence could combine with deregulation to dissolve this distinction between two markets in diversity. Although the future of regulation in broadcasting is a matter of much public policy debate, we doubt that this will lead to significant deregulation within any meaningful policy horizon. In this context, platform convergence *per se* (and the associated rise of the internet) is more likely to blur the traditional mapping of the two markets in diversity onto, respectively, the television and radio and print industries. Thus the internet, for example and for the moment, is probably best thought of as containing participants in both kinds of diversity market.

[7] The second architectural factor is an understanding of how media industries operate. In this respect, the crucial insights relate to:

- a) the possible particular influence on behaviour of the significant incidence of privately owned/controlled businesses in media markets (as opposed to businesses that are more widely owned and controlled through stock markets and where performance can be reasonably assumed to be driven by profit maximisation);
- b) the effect of regulation;
- c) the two-sided nature of competition in media markets; and
- d) the advantages of size in these markets.

[8] Thus, when the two parts of the Framework are combined, they should generate the following structured evidential base for the development of advice in relation to the relevant criteria:

- a) the merger will either relate to i) the market for internal diversity, or ii) the market for external diversity or iii) both and it will be possible in each case to describe how the spread of ownership and control is affected.
- b) In the case of i) and iii), it will supply information on the effectiveness of regulation and this is important for the assessment of the merger's effects on 'internal' diversity and the strength of indigenous business.
- c) In the case of ii) it will supply information concerning whether the merger involves material and distinct view points: that is whether the parties materially contribute a viewpoint and whether, when they do, they are different; and whether the strength of indigenous business is affected.

[9] The final element of our proposed Framework considers what might be said on the difficult issue of diversity of view when the information provided by the media map is minimal, so that there is no information on the material and distinctiveness of the parties' views. In effect, in such cases and when the concern is with 'external' diversity, the extent of external diversity will be judged by a simple count of the number of voices. This is the approach of the US Federal Communications Commission, which has developed various 'bright-line' rules for media mergers. We regard this approach as second best in two senses. First, it is always better where possible to treat mergers on a case-by-case basis

because information will often be available about the position of the potential parties that will enable a more informed judgement with respect to diversity than is possible when diversity is simply associated with the number of voices. Nevertheless, we anticipate that the media map may not always be rich enough to move beyond a numbers approach to diversity.

[10] In these circumstances, and secondly, we are not persuaded that the precise rules propounded by the FCC are soundly based. Instead, we consider under what circumstances the judgement that the Competition Authority makes with respect to whether a merger will lead to a 'substantial lessening of competition' can be projected on to the advice it develops with respect to whether there is a 'substantial lessening of diversity'. In particular, we find that this is more prone to error when regulation with respect to internal diversity is weak in its effects, and when two-sidedness significantly raises the threshold level of concentration beyond which there is a 'substantial lessening of competition'.

