Competition Authority

Competition Authority
annual report 2001

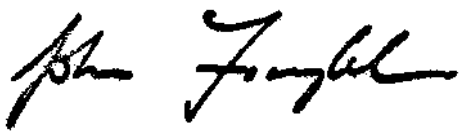
30th April, 2002

Mary Harney TD
Tánaiste and Minister for Enterprise, Trade and Employment
Kildare Street,
Dublin 2.

Dear Tánaiste,

I have the honour of submitting to you the Annual Report of the Competition Authority for 2001, in accordance with Section 12 of the Competition Act, 1991.

Yours sincerely,



Dr. John Fingleton,

Chairman.

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Foreword

Dr. John Fingleton, Chairman of the Competition Authority

The year of the Competition Authority's 10th Anniversary marked many new beginnings. The Authority enjoyed a stable staffing situation with approximately 24 staff over the entire year, and staff turnover fell to below 20%, compared with over 50% in the previous two years. It implemented a new internal management structure that explicitly recognises, and allocates resources to, the diverse functions that it performs. The Authority also appointed an external panel to advise on strategic, management and policy issues. Finally, the Authority was anticipating radically new competition legislation which, at the time of writing this foreword, had been enacted as the Competition Act 2002.

The difficult situation prevailing in 1999 and 2000 continued to affect the Authority's work in 2001 in several ways. First, as most staff had recently joined, a great deal of time and effort was spent on formal and on-the-job training. Second, the enormous backlog of complaints led (a) to difficult decisions about which investigations to prioritise and (b) to sometimes tedious and repetitive work for case officers on the enforcement side. Third, the Authority had lost a considerable accumulated experience and knowledge in investigation and litigation. Despite numerous management vacancies in the enforcement divisions, Paul Gorecki, assisted by David McFadden, has moved the Authority rapidly up the learning curve, especially in terms of investigative techniques. While the Authority did not bring any new proceedings in 2001, it did obtain satisfactory settlement terms in several matters and closed a large number of files. Many of the bigger investigations started during 2001 were still ongoing at the end of the year. Developing litigation experience to the same level as investigative tools and experience is the challenge for 2002.

Two new divisions created in 2001 explicitly recognised the important role of the Authority's non-enforcement work. Regulated Markets produced many analyses and comments on competition issues in regulated markets. Competition Policy dealt with a portfolio of matters including notifications, studies, modernisation of EU rules, mergers, and merger policy. It will become the division responsible for mergers.

Possibly the greatest new achievement during 2001 was in the area of competition advocacy, to which all members and divisions contributed. Raising awareness of the benefits of competition is central to building support and accounting for the Authority's work. I am pleased that this important function has been explicitly recognised in the Competition Act, 2002.

2001 also saw several important new international developments in competition policy such as the establishment of new organisations and the continuing plans to decentralise European competition policy. With the increasing globalisation of markets, consumers and business in Ireland benefit from stronger international cooperation and coordination, as illustrated by the international cartels uncovered in lysine and vitamins. The Authority will continue to be active in delivering the benefits of competition in international markets to consumers in Ireland.

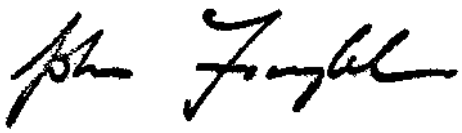
The end of 2001 found the Authority in a position to take on and meet new challenges. Work was concluding on a three year strategy statement setting out the Authority's own view of its role and priorities. Recruitment of the additional staff had commenced. The divisional structure and growing experience of existing staff form a solid basis for expansion, so that the overall work programme will step up a gear during 2002. While the Authority still faces challenges, particularly with regard to financial and physical resources, it enters 2002 in good shape.

The Authority owes a debt to many organisations and individuals for cooperation or assistance during the year. This includes the offices of the Director of Telecommunications Regulation, the Commission for Electricity Regulation, the Commission on Aviation Regulation, the Director of Consumer Affairs, the Director of Public Prosecutions, and An Garda Síochána. Thanks are also due to the Department of Enterprise, Trade and Employment both for the many core services (finance, personnel, etc.) that they provide and to the Competition Policy Section, headed by Brian Whitney, that is responsible for the mandate and resources of the Authority. The Authority welcomes Gerald Fitzgerald, Gerard Hogan, Frances Ruane and John Travers to the Advisory Panel, and thanks them for agreeing to assist the Authority.

Within the Authority, I would like to thank my fellow Members, Isolde Goggin, Paul Gorecki and Declan Purcell for their hard work, wise counsel, and ongoing commitment to our common goals, and the Secretary of the Authority, Ciaran Quigley, for his efficient and calm management. The Authority is fortunate to have attracted talented, bright and enthusiastic people. Rather than thank each person individually here, I refer to the full list of staff in the Report itself and thank one and all. I would like to thank also staff of the Authority who left during the year to take up other employments and to wish them success in their careers.

At a personal level, I would like to thank a number of individuals who have given valuable time and/or counsel: Margaret Bloom, Damian Collins, Michael Collins, Joe Brosnan, Eoin Gahan, Etain Doyle, Paul Haran, Frederic Jenny, Michael McDowell, Austin McNally, Simon Nugent and John Vickers.

Finally, I would like to thank the Tánaiste and Minister for Enterprise, Trade and Employment for her committed support, both for the Competition Authority and for its broad mission in promoting competition and economic efficiency in all sectors of the Irish economy.



John Fingleton,
Chairman.

Summary

Introduction

In recent annual reports of the Competition Authority, much has been written about the difficulties that it encountered over recent years in retaining staff and the consequent difficulties for the Authority in carrying out its statutory duties. In the annual report of 2000 in particular, the Authority reported on how it had had to suspend consideration of new complaints received because of the haemorrhage of staff to other employments in both the public and private sector. The trend of staff departures was arrested in the latter part of 2000 with the recruitment of many new staff with the result that in 2001 the Authority was in a position to resume fulfilling its statutory mandate. The Authority is happy to report that in 2001 it did not face the problems of staff retention as in previous years.

While the easing of staff retention difficulties is in no small way attributable to the recruitment of the majority of the staff in the previous year, the fact that the Authority restructured itself at the beginning of 2001 into five new distinct divisions, each one directed by an Authority Member, had a huge bearing on job satisfaction for staff of the Authority. The newly structured Authority provided staff with a new sense of clarity of purpose and direction and set the foundations for what the Authority believes is a reinvigorated organisation capable of carrying out its statutory function to the highest standard. This new organisational structure is also reflected in this report in that the main body of the report contains separate sections on the work of each division during 2001.

Staffing

2001 saw the departure of the Authority's longest serving Member, Mr. Patrick Massey. Mr. Massey was appointed to the Authority on its establishment in 1991 and became its first Director of Competition Enforcement with the creation of that post in 1996. Mr. Massey left the Authority in September to pursue a career in private practice following his decision not to seek reappointment for a third term. Mr. Massey's contribution to the Competition Authority and to the development of Irish competition policy generally was enormous and was recognised as such by the Authority on his departure. At the time of

writing of this report, the process of recruiting a new member to fill the position vacated by Mr. Massey as head of the Cartels Division is nearing completion.

There were a number of important developments affecting the Authority during 2001. One was the decision of the Government, sponsored by the Tánaiste and Minister for Enterprise, Trade and Employment, Ms. Mary Harney, T.D., to increase the Authority's staff complement from twenty nine to forty four. This followed a recommendation contained in the Deloitte & Touche Organisational Study of the Authority conducted in 2000 and reported on in last year's annual report. Of the fifteen new posts sanctioned, three involved the assignment of members of the Garda Síochána to the Authority to assist in the investigation of criminal contraventions of the Competition Acts. Two of these three positions were filled in early 2002. Another of the fifteen positions sanctioned in June was filled in October with the appointment of Mr. Vincent Clarke to the Authority as its Communications Officer. A recruitment process for the remainder of the new posts was commenced in November with a view to filling the positions in the first half of 2002.

Legislative Proposals

Another major development to occur in 2001 was the publication in December of a new Competition Bill, the major provisions of which were the proposals to transfer responsibility for deciding on mergers and acquisitions from the Minister for Enterprise, Trade and Employment to the Competition Authority, improvements in the Authority's enforcement powers and making the Authority more financially autonomous and accountable. At the time of presentation of this report, the Bill had been enacted by the Oireachtas (Irish Parliament) and signed by the President. The Competition Act, 2002 will be commenced by the Minister during 2002.

Strategy Statement

In the latter months of 2001 an enormous amount of time was spent by the Authority in preparing a Strategy Statement for the period 2002 to 2004. The purpose of the Statement is to define the major strategic management issues likely to face the Authority from January 2002 to December 2004. It elaborates the Authority's strategic priorities, provides a framework to address strategic issues and strengthens the Authority's capacity

to focus clearly on the overall direction of competition policy. The Strategy Statement 2002—2004 is available on the Authority's website at www.tca.ie.

Competition Authority Advisory Panel

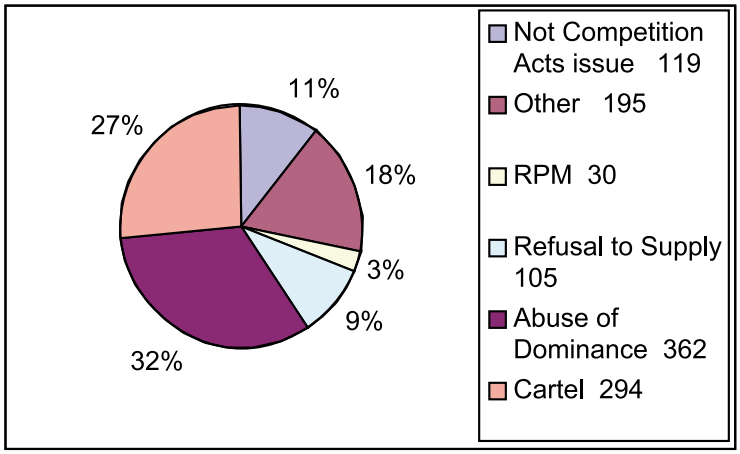
In October 2001, the Authority established an Advisory Panel to advise the Authority on legal, policy, management and strategic issues. The establishment of the panel followed a recommendation in the Deloitte & Touche Organisational Review for an external advisory board.

Enforcement Activities

The Authority opened 222 complaint files during 2001, all but 4 of which were opened on foot of complaints received by the Authority from the public. Of complaint files opened during the year, 146 were allocated to the Monopolies Division and 76 to the Cartels Division. Information as to the type of complaint files opened is given in Sections 2 and 3 of this report. Between the two enforcement divisions a total of 135 cases were closed by the Authority during the year as compared with 64 in 2000. Allowing for the 340 files carried over from 2000 to 2001, the new files opened and the number of files closed during 2001, there were at year's end 427 open cases between the two enforcement divisions.

Since the 1996 Competition (Amendment) Act came into force in July of that year the Authority has opened a total of 1,106 complaint files. Details of the classification of these cases are given in the chart below. The continuing high number of complaints made to the Authority about alleged anti – competitive behaviour in 2001 may be attributed in large part to the increased awareness about the Authority and its remit.

Figure 1 : All cases opened since 1996



Setting Enforcement Priorities

When the divisional structure was created on 1 January 2001, there were 340 open files that covered both of the enforcement divisions. This was in large part due to the staffing problems noted in last year's annual report. As stated above, in 2001, 222 new files were opened in both enforcement divisions. Given that there were only six case officers between both enforcement divisions, each officer had to deal with the equivalent of 94 cases. In view of the fact that most files require a certain amount of investigative work to ascertain the facts it was not possible for all files to be processed in 2001. Choices had to be made.

At the risk of some oversimplification of practice, it was decided to concentrate on the flow of new cases, rather than the stock of files. In new cases the evidence is likely to be fresher, memories have not faded and the complainant is more likely to be willing to co-operate with the Authority. This does not mean that the stock of files was ignored. Frequently the market complained of might have complaints dating back several years that would be reviewed. In other instances the complainant might inquire into the progress of their complaint indicating a willingness to continue to co-operate.

Beyond the decision to concentrate on new cases, further decisions had to be made concerning which cases should be prioritised in terms of resource allocation. Although no formal rigid set of rules was applied, those instances where there was good evidence of an offence under the Act, or where the sector was considered to be important, were

given priority. In the one case where searches took place in 2001 these conditions were fulfilled.

In 2002 both of the enforcement divisions will expand in accordance with the recommendations on staffing in the Deloitte and Touche Report. It is anticipated that progress will be made in reducing the volume of open files.

Notifications

The decline in the number of business agreements between undertakings notified to the Authority under Section 7 of the Competition Act, 1991 continued in 2001 with only 9 such agreements notified – the lowest level of notification since the establishment of the Authority. Parties to agreements may notify agreements to the Authority for a decision as to the compatibility of the agreement with competition law. The Authority may certify them as not being in contravention of the law, license them where whatever contraventions there might be are considered to be beneficial, or refuse them. The Authority dealt with 14 notifications during 2001 leaving 32 of 1,417 cases notified since 1991 awaiting a decision. The Competition Bill published in December 2001 proposed to abolish the notification system.

Merger Referrals

Under the provisions of the Mergers, Takeovers and Monopolies (Control) Acts the Minister for Enterprise, Trade and Employment may refer a proposed merger to the Competition Authority for an opinion as to the competition effects of the transaction. In December 2001, the Minister referred a proposed acquisition by GEHE of the Unicare pharmacy chain to the Authority for detailed investigation. The Authority's report to the Minister was expected at the end of January 2002.

The Competition Bill 2001 proposed that the merger function, save in the case of media mergers, would be transferred fully from the Minister to the Authority. As a result of this decision, the Authority was represented on the European Commission's advisory committee on concentrations and began to make initial preparations for assuming this function.

Competition Advocacy

Competition advocacy involves raising public awareness about the benefits of competition and championing competition both in public debate and within the various legal and administrative processes whereby markets are regulated. Advocacy of this kind underpins and develops a broad mandate for the Authority's work, and ultimately makes it more directly accountable to the public. Such advocacy varies from media appearances to publishing detailed written analysis of competition issues for particular markets or cases.

All of the Authority's five divisions contribute to its advocacy functions as described. The Regulated Markets Division takes a lead role in the area of preparing written opinions on new legislation and regulation under the Authority's general power (in Section 11) to study competition. During 2001, it produced a variety of policy papers relating to the energy, telecommunications and transport sectors and represented the Authority on the Liquor Licensing Commission and the Government's High Level Group on Regulation. The Competition Policy Division recommenced work on the Section 11 Study of the Casual Trading Acts, and commenced a new Section 11 Study into competition in certain professions. It also represented the Authority on the Pharmacy Review Group established by the Minister for Health and Children to examine the system of statutory regulation of the retail pharmacy sector. Staff from these and other divisions addressed numerous conferences and seminars, published newspaper and journal articles and gave TV and radio interviews.

International Relations

The Authority participated in a range of international fora during 2001. AT EU level, it represented Ireland at the European Commission Advisory Committee on Concentrations, the Advisory Committee on Restrictive Practices and Dominant Positions, the Council Working Group on the Reform of Merger Regulation and the Working Group on Modernisation of the Enforcement of EU Competition Law. At the OECD, the Authority was represented on the Committee on Competition Law and Policy and had a major input into the OECD report on Regulatory Reform in Ireland which was published in April 2001. Members and staff of the Authority addressed and participated

in a number of international conferences, details about which appear elsewhere in this report. The Authority hosted a meeting of Directors General of European Competition Authorities (ECA) in Dublin in September and hosted visits by a study group from the Estonian Competition Authority under the PHARE Programme and from the South African Competition Commission.

OECD

In April 2001 the OECD concluded a year-long, detailed review of progress on regulatory reform in Ireland. During 2000 and early 2001 the Authority had worked with the OECD and various Government Departments, providing factual information and responding to questionnaires prepared by the OECD team. In April 2001 the report was presented to the Taoiseach, the Tánaiste and the Minister for Public Enterprise. The report consisted of seven chapters:

(1) The macro-economic context for regulatory reform
(2) Government capacity to ensure high-quality regulation
(3) The role of competition policy in regulatory reform
(4) Enhancing market openness through regulatory reform
(5) Regulatory reform in electricity, gas, pharmacy and legal services in Ireland
(6) Regulatory reform in the telecommunications industry, and
(7) Conclusions and policy options for regulatory reform in Ireland.

The report concluded that there were many positive aspects of Ireland's regulatory reform regime, notably the openness of our markets to international trade and progress made in reforming the telecommunications, road freight, airline and airport sectors. However, it pointed out that policy biases of producer over consumer interests, and of control over competition, still lingered in some areas. The report recommended, inter alia, removing constraints on free entry, especially those with quantitative limits, and eliminating special –interest rules which restricted competition, such as the Groceries Order. It also recommended strengthening regulatory quality within the civil service, increasing transparency, and encouraging better regulatory practice at regional and local levels of government.

In response, the Government produced an Action Plan, which included:

- the preparation of a major national policy statement on Regulatory Reform;
- establishment of a High Level Group on Regulation;
- development of a new mechanism (Regulatory Impact Assessment) by which Government departments and public bodies would be required to analyse and measure the impacts on society of any regulations being proposed;
- requesting the Competition Authority to initiate a comprehensive study of the Professional Services sector;
- requesting the Commission on Liquor Licensing to produce further interim reports; and
- accelerating a review of the Health (Community Pharmacy Contractor Agreement) Regulations governing the award of General Medical Services contracts to pharmacies.

Several divisions of the Authority are involved in the implementation of these recommendations and details of their involvement are given in the respective sections on those divisions' work in this report.

Financial Statement

The Authority is funded by the Department of Enterprise, Trade and Employment with which it has a Financial Autonomy Agreement and under which it has its own subhead within the Department's Administrative Budget.

The Authority's financial allocation for 2001 was €2,010,000 of which €1,536,000 was allocated in respect of salaries, overtime, allowances and employers' PRSI contributions. The remaining €474,000 was allocated to non-pay expenditure such as building maintenance, heating/lighting, office and computer equipment, travel expenses, postal and telephone charges, advertising costs, training etc.

By the end of 2001, the Authority had used €1,854,000 of its budget allocation (92%) – €1,342,000 of its pay allocation and €512,000 of its non-pay allocation resulting in a total saving of €156,000.

Section 1 – Human Resources & Organisational Structure

Members of the Authority

Dr. John Fingleton	*Chairman*
	Director of Competition Enforcement
Ms. Isolde Goggin	*Member & Director of Regulated Markets Division*
Mr. Declan Purcell	*Member & Director of Competition Policy Division*
Dr. Paul Gorecki	*Member & Director of Monopolies Division*
	Acting Director of Cartels Division (from May 2001)

- One Member vacancy exists following the departure of Mr. Patrick Massey in September 2001 on the expiration of his contract.

John Fingleton was appointed Chairman of the Competition Authority and its Director of Competition Enforcement during 2000. Dr. Fingleton took a BA at Trinity College Dublin (1983-1987) and degrees of M.Phil. (1989) and D.Phil. (1991) at the University of Oxford. He was a lecturer in Trinity College Dublin from 1991 until April 2000 and continues as a research associate of the Department of Economics.

Isolde Goggin graduated from Trinity College Dublin with an engineering degree and worked for the following nine years with Telecom Eireann during which time she completed an MBA in University College Dublin. After working in Brussels with the European Commission from 1989 to 1991 she returned to Ireland to work as a Business Unit Manager with Ericsson Systems Expertise Ltd until her appointment to the Competition Authority in 1996. Isolde was reappointed as a Member of the Authority for a second five year term by the Tánaiste in November 2001.

Declan Purcell was appointed to the Competition Authority in April 1998 and was reappointed for a further five year term by the Tánaiste in November 2001. Declan

previously worked in the Department of Enterprise, Trade and Employment and in its predecessor, the Department of Industry and Commerce, for over twenty years. During that time he held a wide range of management positions that included responsibility, at various stages, for policy development in relation to industry, human resource development and company law.

Paul Gorecki graduated from University of London with a B.Sc. (Econ) in 1969 after which he took an MA in economics at Queen's University, Ontario, Canada and a PhD at the London School of Economics. After working for the Canadian competition authorities for several years, Dr. Gorecki joined the Economic Council of Canada in 1978 before becoming Director of the Northern Ireland Economic Council in 1992. He has published extensively on drug reimbursement programmes, Canadian competition policy and industrial organisation. Paul took up his appointment as a Member of the Competition Authority in June 2000.

Competition Authority Staff

Unlike recent years, employment levels in the Authority remained stable during 2001 following significant recruitment activity in the second half of 2000. In June 2001, the Government sanctioned fifteen additional posts for the Authority bringing from twenty nine to forty four the number of sanctioned positions in the Authority. The recruitment process for these additional positions began in the last quarter of 2001 with a view to filling the positions in 2002. Of major significance in this regard was the approval of the assignment of three members of the Garda Síochána (Police force) to the Authority to work on investigations of criminal contraventions of the Competition Acts. It is expected that these assignments will be made in early 2002.

Staff of the Competition Authority as of 31st December 2001

By the end of 2001, twenty five positions in the Authority had been filled, one on the basis of a job sharing arrangement between two members of staff. The majority of the unfilled positions were new positions sanctioned earlier in the year. The following list gives details of the staff of the Authority and when they were recruited.

Name	Position	Year joined
David McFadden	Legal Advisor	2000
*Philip Andrews	Legal Adviser	2000
Patrick Kenny	Divisional Manager	2000
Dermot Nolan	Divisional Manager	2000
Ciaran Quigley	Secretary to the Authority	1998
Vincent Clarke	Communications Officer	2001
Colette Hegarty	Economist	1999
Tressan McCambridge	Economist	2000
Vivienne Ryan	Economist	2000
John Evans	Economist	2000
Carol Boate	Economist	2000
David Hodnett	Solicitor	2000
Patrick Neill	Solicitor	2000
Ann Geraghty	Higher Executive Officer	1991
Catherine Ryan	Higher Executive Officer	1991
Maura O'Donoghue	Executive Officer	2000
Stephen Lalor	Clerical Officer	1996
Laraine Cooper (J/S)	Clerical Officer	1998
Sandra Rafferty	Clerical Officer	2000
Elizabeth Heffernan (J/S)	Clerical Officer	2000
Patrick Downey	Clerical Officer	2001
Sheila Dunne	Clerical Officer	2001

*Mr. Andrews resigned from the Authority on 31st December 2001 to take up employment in the private sector.

Training Programme

Arising from the arrival of a large number of newly recruited staff to the Authority in the latter part of 2000, the Authority committed considerable resources to providing training to its staff to assist them to carry out their duties in a professional and competent manner and to develop their expertise across a wide range of relevant competencies. In this

regard staff attended a variety of competition related conferences at home and abroad to learn about international best practice in relation to enforcement of competition law. A wide range of internal and external training courses were arranged in areas such as investigative interviewing techniques, media and presentation skills, forensic computer training and court proceedings. An intensive simulated investigation involving all of the staff of the Authority was undertaken with the assistance of officials from other competition authorities, the Garda Síochána and officials from the Department of Enterprise, Trade and Employment. This exercise included mock searches, court appearances and witness interviews. Direct training was also provided to staff of the Authority by the Garda Training College and by members of the National Bureau of Fraud Investigation.

1. Forensic Computing

During the year the staff of various divisions underwent training in computer forensics. This course involved training Authority officers in the secure collection of computer data. Staff were trained in disk imaging technology in order to enable officers to copy target computers' hard drives on site while ensuring that evidential integrity was maintained. The training also consisted of the examination and analysis of data held on computer for the purposes of presentation in a court of law.

2. Search Techniques

A number of in house training courses were conducted throughout the year in order to brief Competition Authority staff in effective search techniques, covering everything from obtaining search warrants to post search analysis. In addition, a practical exercise was conducted over a number of days where staff members had to carry out a simulated investigation, including a raid on a target premises. Competition law enforcement experts from the competition agencies in the UK and the Netherlands took part in this simulated investigation and the exercise was also closely monitored by a member of An Garda Síochána.

3. Investigative Interviewing

The Authority organised a week-long course aimed at developing and improving the investigative interviewing skills of Authority staff to allow them to extract effectively the

information needed from suspects, witnesses, complainants and victims. The course concentrated on developing interviewing techniques such as questioning strategies and listening skills and focussed on using different psychological techniques during the interview process. It taught staff how to interpret visual behaviour and how to recognise verbal indicators.

4. Garda Training

During 2001, a number of courses were given to Competition Authority staff by members of An Garda Síochána from the Garda Training College, Templemore and from the National Bureau of Fraud Investigation. These courses were aimed at training Authority staff on how to conduct a criminal investigation. Competition Authority officers were trained in such areas as court procedures, collection of evidence, computer fraud, search procedures, the swearing of informations in making an application for a search warrant and taking statements.

Formal Education

In addition to training courses, the Authority facilitated and funded the attendance by nine of its staff to participate in formal third level courses of education relevant to their duties.

Section 2 – Cartels Division

Introduction

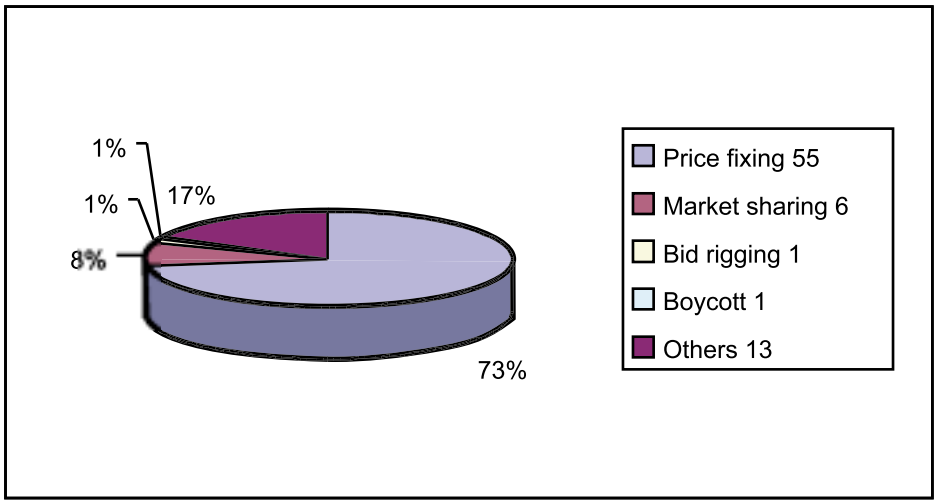
The Cartels Division deals with investigations into possible contraventions of section 4 of the Competition Acts 1991 and 1996, particularly horizontal cartel agreements. Competition specialists use the term **hard-core cartel** to describe (usually secret) agreements between competitors to fix prices, divide markets or rig bids. Cartels are generally recognised as the most serious form of anti – competitive behaviour because of the damage they do to consumers and the economy. The Authority may investigate an alleged cartel either on foot of a complaint or on its own initiative. Investigations of cartels are generally treated as criminal. Where the Division obtains sufficient evidence of a cartel, the Authority may decide to (a) initiate civil proceedings, (b) bring a summary criminal case or (c) refer a file to the Director of Public Prosecutions with a recommendation that the parties involved be prosecuted on indictment.

Dr. Paul Gorecki became acting director of the Cartels Division following the departure from the Authority of the former Director of Competition Enforcement, Mr. Pat Massey during the year. Mr. David McFadden took on responsibility for the day-to-day management of the division over this period. The division had four staff members during the year.

Complaint Profile

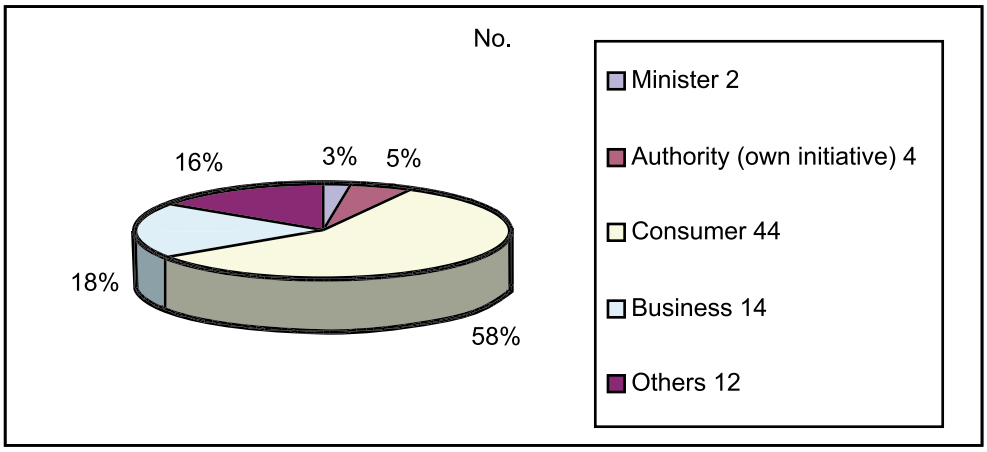
Details of the cartel cases opened in 2001 are given in the chart below. The most common single complaint involved alleged price fixing (55 cases).

Figure 2: Breakdown of Cartel Cases opened in 2001



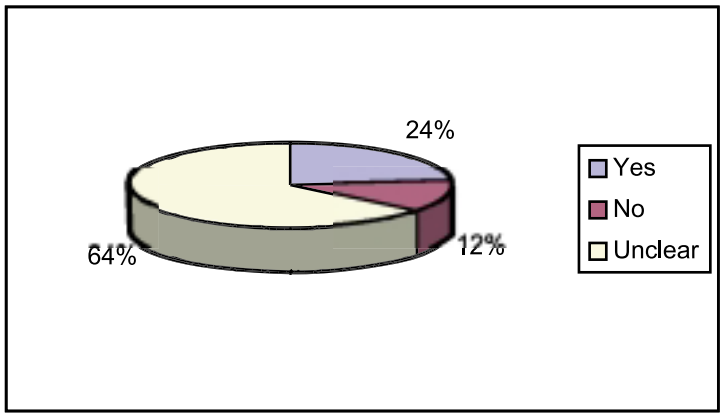
As indicated above the Competition Authority receives complaints from many quarters, particularly industry and consumers. These two groups are most likely to feel the effects of anti-competitive practices. As one may see from the chart below, over the course of 2001, consumers provided the bulk of the complaints received by the Authority.

Figure 3: Source of cartels cases 2001



Having regard to the nature of the complaints received, one may see from the chart below that they are not all clear cut cases of anti-competitive practices. Sometimes it is difficult, especially for a consumer, to differentiate between hard edged competition and a concerted practice.

Figure 4: Cases with reasonable grounds to suspect breach



Enforcement Activity

The Authority is extremely cautious about identifying the parties, or even the markets, that are subject to investigation in order to protect the integrity of the investigations themselves and to avoid prejudicing subsequent proceedings. During 2001, the Authority conducted two extensive investigations that merit specific anonymoused mention.

- One complaint brought to the Authority by a large business alleged collusive bid rigging. Searches were carried out by the Authority on two premises in different regions of the State and thousands of documents were copied.

- In a second case, arising on foot of a complaint from a member of the public, eleven companies were summonsed to appear before the Authority to answer questions in relation to price-fixing allegations concerning an everyday consumer product.

These investigations are ongoing. Staff from the division conducted many other investigations of a smaller scale. Such investigations often involve interviewing potential witnesses and other interested parties, taking statements and gathering information generally. During 2001, the Authority reached an agreement with An Garda Síochána whereby Gardaí would accompany authorised officers on searches.

A number of complainants attended at the Competition Authority offices to meet with staff of the Cartels Division to outline their complaints in person or to follow up on their

complaints by providing further information. The planning, implementation and execution of the investigative processes, as indicated in the examples given above, has taken up the majority of the time of the Cartels Division's staff over the course of 2001.

Arising from the assignment of so many newly recruited staff to the Division in the latter part of 2000, a considerable amount of time was spent by staff familiarising themselves with and reviewing existing older files and following up on previous Authority decisions to bring legal proceedings.

Authority Legal Proceedings

No new cartel proceedings were started in 2001 and no files were sent to the Director of Public Prosecutions. A substantial portion of the Division's time was, however, expended on follow-up work in respect of proceedings or files referred in previous years.

On 4th September 1997, Guinness Ireland Group (GIG) notified the Authority of the arrangement whereby it would acquire 69.24% of the total issued share capital of United Beverages Holdings (UBH), bringing its total shareholding in the company to 100%, with a request for a certificate. This request was subsequently amended to one for a certificate or alternatively a licence. On 17th June 1998, the Authority, in decision No. 512, granted a licence to the agreement subject to certain conditions. These conditions were that GIG would, not later than 15th January 1999, reduce its shareholding in Cantrell and Cochrane (C & C) to below 10%; relinquish all rights to representation on the board of C&C; and waive its first option on C&C shares. The decision was subsequently appealed by Murphy Brewery Ireland Limited, M & J Gleeson & Co., Comans Wholesale Limited and J. Donohue Limited – the first time that an appeal had been lodged against an Authority decision. The same parties also applied for judicial review of the Authority's decision. These matters were joined and heard over 23 days in the High Court before the case was settled between the parties, excluding the Competition Authority, in March 1999. The Competition Authority subsequently appealed the judgement on costs in these joined cases and the matter was set down for hearing in the Supreme Court and listed for hearing in January 2002. In preparation for the appeal hearing, a certain amount of preparatory work was done on the case by the Authority during 2001.

As stated in the annual report of 1998 an investigation was initiated in 1998 into the wholesale distribution of packaged beer and soft drinks. This followed a number of newspaper and magazine reports, including one that an employee of one of the companies had instituted proceedings against his employers claiming, inter alia, that he had been unfairly treated for refusing to participate in price fixing arrangements involving other wholesalers. A separate complaint was also received from a retailer in Munster. Authority officers conducted searches of 11 wholesalers premises located throughout Connacht and Munster in March 1999. A number of individuals were subsequently interviewed. The Authority subsequently issued proceedings against six licensed wholesalers alleging that they had directly or indirectly fixed prices of packaged beers and soft drinks and engaged in other practices contrary to section 4(1). A file on the matter was also sent to the DPP. Pending a direction from the DPP to prosecute the matter, the proceedings in the civil side of the case have been stayed. A considerable amount of work was done within the Division on this matter during 2001.

International Cooperation

2001 was marked by a number of international surveys on the enforcement of competition law both within the European Community and worldwide. The Cartels Division replied to the survey conducted by the Danish Competition Authority. Similarly, the Division replied to the Informal Survey on Enforcement Authority conducted by the Canadian Competition Bureau. The results of this survey, which runs to 136 pages, were presented at the International Cartels workshop in Ottawa, Canada on November 25th, 2001. This is a valuable forum for investigative agencies to share investigative techniques in respect of hard core cartels. The conference was attended by Paul Gorecki and David Hodnett. Both texts are now useful reference works for comparative perspectives on competition law enforcement.

Paul Gorecki, David McFadden and David Hodnett met with Sir Anthony Hammond QC and Mr. Roy Penrose OBE, consequent to the latter's remit in the United Kingdom to review the legislative and procedural changes that would be necessary to enable the Office of Fair Trading to operate a regime in which criminal sanctions would be applied against individuals who had been found to have knowingly engaged in cartel activity. The

subsequent report prepared for the Office of Fair Trading by the two authors entitled, "Proposed Criminalisation of Cartels in the U.K." is available on the Authority's website.

In December, the Authority hosted a week long study visit by a member of staff of the OFT. Mr. David Troy, who works in one of the enforcement branches of the OFT, visited the Authority to see how the Authority went about conducting criminal investigations.

The Cartel Immunity Programme

On December 20th 2001, the Competition Authority, in conjunction with the Director of Public Prosecutions, introduced a "Cartel Immunity Programme", the text of which is contained in Annex 5 of this report. The introduction of this programme followed on from an extensive consultative process during which a consultation document was published on January 4th 2001 and similar type programmes in other jurisdictions were examined. The final document took into careful consideration the various submissions received on foot of the consultation process.

The Authority has identified the pursuit of cartels as a top priority. Cartels are by their very nature conspiratorial. The participants are secretive and hard-core cartels are notoriously difficult to detect and prosecute successfully. The "Cartel Immunity Programme" is intended to encourage self-reporting of cartels by offenders at the earliest possible stage.

The European Competition Authorities (see page 69 below) agreed a set of principles for Leniency Programmes at a meeting in Dublin in September. This occurred following lengthy negotiations between member states on the text of the document. The principles agreed reflect the experience of several competition authorities around the globe over the last five years who have found that the offer of lenient treatment to members of cartels, who come forward to cooperate with the authorities, has been of great benefit in facilitating the effective investigation of cartels. The European Competition Authorities recognised that anything that facilitates effective investigation will also serve to deter undertakings from forming cartels in the first place and that it is clear that in many jurisdictions the possibility of offering lenient treatment in return for significant and

substantial co-operation will lead to significant benefits for the economy. The ECA principles are put forward to advance the debate on the structure of leniency programmes that is taking place within Europe. The ECA statement of principles is available on the Authority's web site. This marked the first major decision of the newly founded ECA organisation.

The Advisory Committee On Restrictive Practices And Dominant Positions

The Advisory Committee on Restrictive Practices and Dominant Positions is the body which the EU Commission is required to consult before enforcing EU competition policy in relation to enterprises. Articles 81 and 82 of the EC Treaty set down the basic principles of EU policy in this regard which the European Commission is responsible for enforcing and under Regulation 17/62 the Commission is required to consult with the Advisory Committee. Staff of the division represented the Authority at a number of Advisory Committee meetings, including the Graphite Electrodes and Vitamins cases.

- In Graphite Electrodes, the European Commission imposed a fine totalling €218.8 million on eight companies, European, American and Japanese, for price fixing and market sharing in the graphite electrodes market. This was a worldwide cartel. One of the participants in the cartel cooperated with the Commission investigation and became the first company to benefit from a substantial reduction of fine (70%) under the terms of the European Commission leniency notice.

- In November, the Authority took a lead role in the Vitamins case when David Hodnett acted as Rapporteur for the Opinion of the Advisory Committee. This involved an eight company worldwide cartel in vitamins A, E, B1, B2, B5, B6, C, D3, Biotin(H), Folic Acid(M) and Beta Carotene. This complex cartel comprised eight separate market sharing and price fixing agreements. Fines imposed on the companies involved totalled €855.22 million, the highest fine ever imposed by the European Commission for breaches of competition law. The case was also notable as one of the companies involved was granted full immunity in recognition of the level of cooperation and decisive evidence given to the Commission in relation to the vitamins A and E markets. This was the first

time an undertaking was granted 100% reduction of fine under the terms of the European Commission Leniency Notice.

New Investigative Techniques

During 2001, the Cartels Division employed new investigative techniques including surveillance and co-operation with An Garda Síochána. Though placing suspected cartel members under surveillance is time consuming, important information on cartel meetings was gathered and used in subsequent investigations where the powers of the Authority were invoked.

Collaboration with members of An Garda Síochána is a major step forward for the Authority in conducting cartel investigations. The Gardaí are professional investigators in criminal matters. They bring with them a body of knowledge and experience in the conduct of criminal investigations. During 2001, Gardaí, from the Garda Bureau of Fraud Investigation, for the first time, assisted the Authority in the conduct of a criminal investigation. Officers from the Fraud Bureau with specialist training in computer forensics were of particular assistance to the Authority in its investigations.

Section 3 – Monopolies Division

Introduction

The Monopolies Division is responsible for administering and enforcing competition law issues covering:

- Abuse of a dominant position;
- Vertical restraints, such as resale price maintenance (RPM), refusal to sell and so on; and,
- Non-cartel horizontal agreements covering subjects such as R&D, group purchasing, standard setting and copyright.

Such breaches of the Competition Acts, 1991 and 1996, are classified as rule of reason rather than per se offences. In other words, the alleged breach has to be examined on its merits, taking into account the specific context within which it takes place, in order to determine if it damages the competitive process and damages consumers. In contrast, per se offences always damage the competitive process and tend to be unjustifiable regardless of any mitigating circumstances.

The Monopolies Division liases with other Authority Divisions. Joint cases are conducted with the Cartels Division where issues of common concern are involved. Although the Competition Policy Division has primary responsibility for processing notifications, the Monopolies Division processed four in 2001.[1] Finally, the Monopolies Division developed a joint paper with the Regulated Markets Division on the Synergen joint venture in an unsuccessful attempt to get the Minister for Public Enterprise to discontinue the involvement of ESB in the joint venture.[2]

Complaint Profile

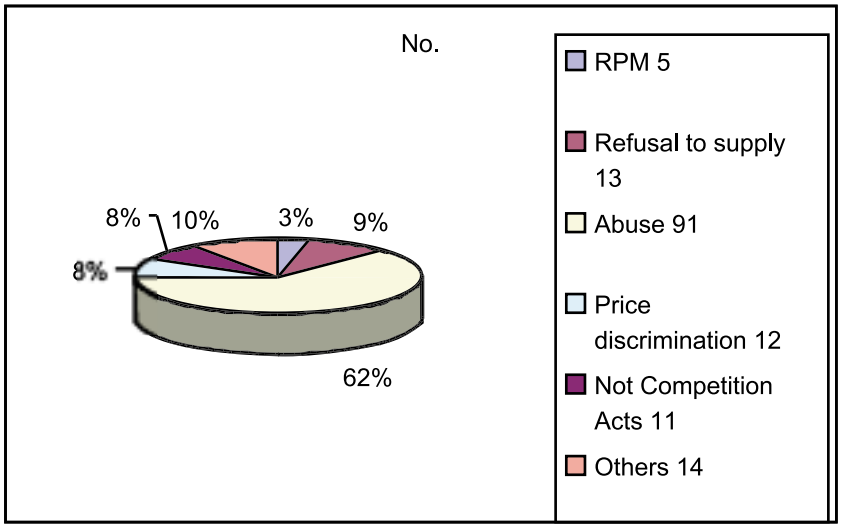
In 2001 the Monopolies Division received 146 complaints that resulted in files being opened. This accounts for 66 per cent of all enforcement files opened in 2001. A detailed

1 These are decisions 586, 587, 588 and 590. These may be found at www.tca.ie/AuthorityDocuments/Decisions.

2 Full details may be found in the chapter on Regulated Markets in this Annual Report.

breakdown of Monopolies Division cases is shown in Figure 5 below. Abuse of a dominant position is the most important category. It should be noted that an allegation of an abuse might include refusal to supply.

Figure 5: Monopoly cases, by Category 2001



Not all complaints lead the Authority to conclude that there is a breach of the Act. In some cases the allegations fall outside the Act, in others there is insufficient evidence. Based on the investigation conducted on the complaint files, in only 31 % of Monopolies Division cases were there reasonable grounds for suspecting a breach of the Act. (Figure 6). More detail is provided of these cases by alleged breach in Figure 7. The high proportion of complaints for which there was no clear evidence of a breach of the Act suggests that attempts need to be made to create a better understanding of the Act.

Figure 6: Reasonable grounds for evidence of a breach, Monopoly Cases, 2001

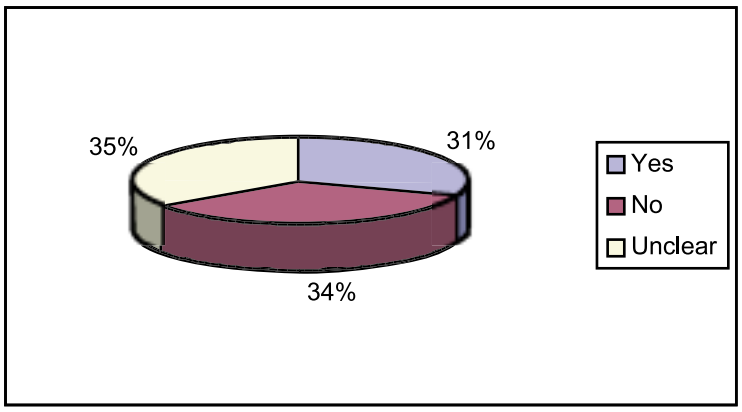


Figure 7: Reasonable grounds for evidence of a breach, Monopoly Cases, by Category, 2001

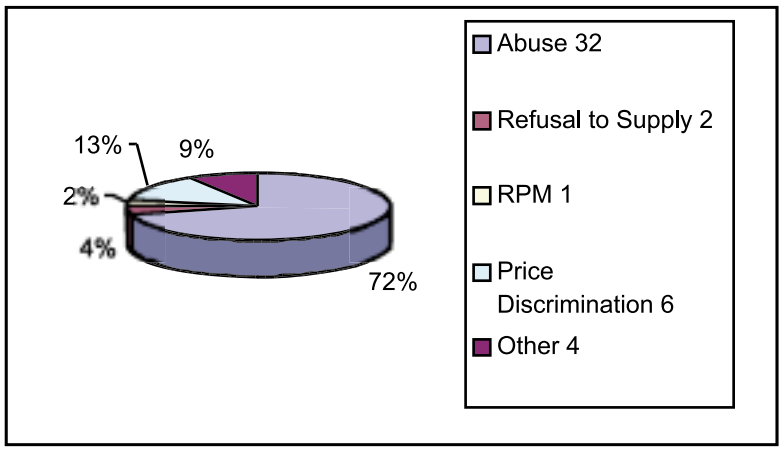
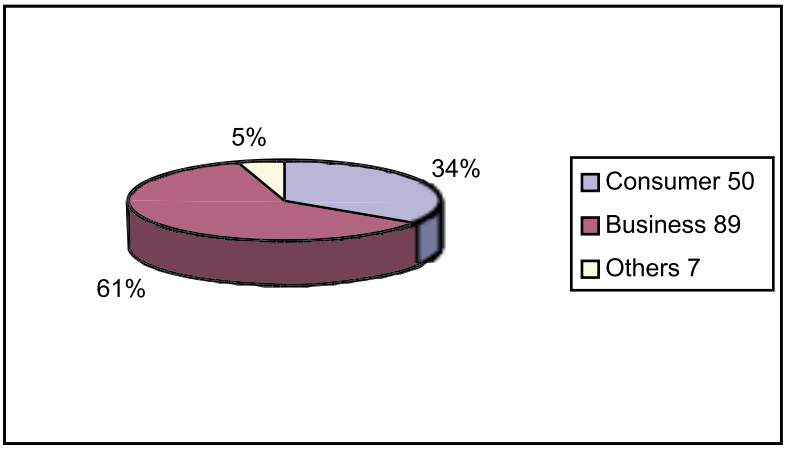


Figure 8: Source of Complaints Monopolies Cases, 2001



The largest sources of Monopolies Division cases were from businesses rather than consumers. (Figure 8).

Legal Matters

It was not necessary for the Division to exercise the enforcement provisions of the Competition Act – witness summons and search of business and other premises – in investigating complaints. Undertakings and others contacted during such investigations complied with the Division's requests for information and documents. However, the Division did play a major role in assisting the Cartels Division in the conduct of its searches.

There is one Monopolies Division civil case currently before the Courts, being the Authority's High Court action, under s.6 of the Competition Act 1991 as amended, against Eircom with regard to the introduction of local loop unbundling in the Irish telecommunications market. The Authority, as plaintiff, has sought a declaration that the defendant abused its dominant position in the particular market by refusing to make certain essential facilities available to a competitor, or, in the alternative, a declaration that the local loop is an essential facility. The Authority has also sought injunctions restraining Eircom (formerly Telecom Eireann) from refusing to grant Esat Telecom access to the local loop, and directing that Eircom permit Esat Telecom unbundled access to the local loop.

This action, which commenced in May 1999, may now prove unnecessary, as it has been largely superseded by legislative changes and regulatory initiatives, introduced by the European Parliament in December 2000, and by the intervention of the Office of the Director of Telecommunications Regulations (ODTR). It would thus appear that the declarations and injunctions that the Authority seeks have been, or are in the process of being, achieved by the Regulator. However, the matter currently stands before the Court.

Distribution and Supply Agreements

An important source of complaints is the impact of supply and distribution decisions by firms that are allegedly in a dominant position. Complaints arise when an allegedly dominant firm decides to change its channel of distribution or its distributor for a particular good or service. In other instances, the allegedly dominant firm refuses to list the complainant as a supplier of certain goods or services. Such decisions, it is claimed,

adversely affect the complainant who may experience a sharp reduction in sales and profits. Furthermore this may damage the competitive process by reducing the number of competitors.

In cases involving supply and distribution agreements examined by the Monopolies Division there was no case where an alleged breach of the Act could be sustained. Frequently the complaint transpires to be grounded in a contractual dispute between the allegedly dominant firm and the complainant. The allegedly dominant firm was not always dominant in the relevant product market. Even if it was held to be dominant, the firm's supply or distribution agreement may be objectively justified, in accordance with the Division's rule of reason approach, described above. These justifications may explain that the behaviour complained of can in fact enhance the efficiency with which the business is run, thus strengthening the competitive process to the benefit of consumers.

In one instance an alleged dominant undertaking limited the number of suppliers of refrigerator equipment to its retail outlets. A potential supplier complained that it was being excluded from the market for this equipment. However, it became apparent that the alleged dominant undertaking had objectively justified criteria to select suppliers. For example the supplier must have attained a certain technical proficiency and be capable of providing customer support service across the State. Although claiming to satisfy these criteria, it appeared that the complainant had not in fact applied to be included on the allegedly dominant firm's list of suppliers. When he did so he was included on the list. This increased the number of suppliers from two to three and is likely to result in increased choice and more competition for the supply of the equipment.

The case of window-screen repair/replacement in cars also illustrates this point. The Authority received a large volume of complaints from firms that replace window-screens in motor vehicles. It was claimed – correctly – that the insurance companies came to arrangements with certain firms for the supply of window-screen replacements at standard rates that other firms could not match on a profit-making basis. Typically the firms with which the insurance companies entered into arrangements were large well-established groups with a State-wide presence, while the complainants tended to be

smaller operators. The insurance firms negotiated standard rates with those groups that are able to provide a standard and relatively less expensive service that covers the State. The resultant savings are likely to act to the benefit of the consumer.

Refusal to Supply/Deal

A constant source of complaints concerns firms that refuse to supply certain services or goods. These cases typically revolve around the relationship between the manufacturer/wholesaler and a retailer. The Authority is particularly concerned when the manufacturer/wholesaler is dominant or the reason for the refusal to supply reflects pressure by a retailer on the manufacturer/wholesaler not to supply a competitor. The first instance may be an abuse of a dominant position, contrary to section 5 of the Act, whereas the latter behaviour may constitute an agreement or collusive behaviour that breaches section 4 of the Act.

In 2001 several of the complaints made to the Authority concerned such refusals to deal. However, in a large number of cases, it was found that there was no breach of the Act and the file was closed. Often there were legitimate reasons for not supplying, such as the receiving firm being a bad credit risk or the retailer failing to meet certain objectively set criteria of the manufacturer/wholesaler. However, vigilance is needed to ensure that apparently legitimate reasons are not used as masked attempts to restrict or distort competition.

In several instances there appeared to be pressure brought to bear on manufacturers/wholesalers by a retailer not to supply a competing retailer with goods. One such case involved a retailer which owned a large number of outlets and put pressure on two of its suppliers not to supply another retailer which had a smaller number of outlets, was operating in the same geographical area and was in direct competition with the larger retailer. The Authority conducted an extensive investigation. This led to the manufacturer/wholesaler resuming supply to the complainant.

In a separate matter, it was alleged that a leading industry magazine refused to carry an advertisement on behalf of a firm because pressure was brought to bear on the publishers

by a competitor of that firm. In that instance the offending behaviour was corrected when the Authority informed the publisher that such behaviour might contravene the Competition Act. The matter was thus resolved, to the satisfaction of the Authority and the complainant.

Discriminatory Pricing

A small number of complaints were received concerning discriminatory pricing. These related in particular to the case of a new pricing schedule introduced by a milk producer in 2000. The producer's revised pricing schedule charged different prices to separate categories of retailers leading to a greater price increase to small retailers than to larger retailers such as supermarkets and symbol groups. The categories identified in the pricing schedule were defined according to the volumes of the product purchased by each individual retailer.

The Authority recognised the importance, in this case, of distinguishing between discriminatory pricing which is pro-consumer rather than anti-competitive. Discriminatory pricing may breach the Act where it discourages customers from switching to a competing supplier. However, in general, pricing that discriminates between different classes of customer on the basis of the costs incurred in distributing a product/service would not.

State Intervention

State intervention is pervasive in economic activity. There are a wide variety of legislative and regulatory instruments that can be used to affect such State intervention. Some of these instruments are beyond the remit of the Authority, such as taxes and state aid, although the latter can be referred to the European Commission when the aid distorts competition. Numerous Articles of the Treaty of Amsterdam, particularly Article 86, are also directly applicable in this area, though not by the Authority itself. However, in other cases, such as those involving various semi-state bodies that can be defined as undertakings, the instrument is within the remit of the Authority. In other instances there is room for debate as to whether or not the Act applies despite the fact that the behaviour complained of is likely to distort or restrict competition.

In 2001 the Division received a number of complaints that concerned alleged breaches of the Act that arose indirectly or directly because of State intervention. These included a consideration of the role of the National Lottery regarding its alleged refusal to grant sufficient agency licences in isolated rural areas. It was claimed that the National Lottery, as a body established by statute with a legal monopoly, was failing to provide an adequate service to such regions. The Authority held that there was nothing to indicate an abuse of dominance. The criteria used by the National Lottery were objectively justified and proportional.

The Monopolies Division also investigated a complaint involving the closure of a bookmaker shop, where the Garda and judicial authorities had concluded, in accordance with the relevant legislation, that the geographic market in question was already serviced by a sufficient number of bookmakers, and thus refused the granting of a licence. The Authority cannot forcibly intercede in or influence the judicial process and closed the investigation on the basis that there was nothing to indicate any abuse of a dominant position and because the specific conduct complained of complied with the legislative provisions. However the Authority remains concerned with the statutory restrictions on entry to the bookmaking market and, in particular, that the regulations would be applied to prevent new entrants from challenging incumbents.

Officers of the Division were also involved to a degree in the Nestor v. Bus Eireann High Court action that questioned the present system of regulating new entry onto bus routes. The case was subsequently settled without judgment of the Court in October 2001. The Division however is continuing its investigation into the coach transport industry, following receipt of several complaints of related type.

Investigations continue in other markets where it is alleged that entry is severely curtailed and trading conditions rendered unfair by the policies of Government Departments. With regard to these matters, the Division would hope to apply its advocacy role where it is necessary.

Regulation

In an increasing proportion of the economy Government ownership and control is substituted by independent regulators of undertakings, with the undertakings sometimes still owned by the State (e.g. Aer Rianta) and in other instances being owned by private undertakings (e.g. Eircom). Although many of the key decisions of such undertakings are constrained by the sector regulator, the Competition Acts still apply to those decisions that are not so constrained. In many instances these decisions have led to complaints to the Authority.

A number of complaints received by the Authority concerning the telecommunications sector did not, however, fall within the scope of the Act. For example, the Authority received a number of complaints with respect to the provision of cable services. These complaints from consumers related to the licensing of service providers for different areas. These consumers claimed that granting a 'local monopoly' to these providers had unfairly restricted their options for cable service providers. The Authority also received complaints with respect to the quality of service provision by licensed cable service providers. The Authority decided that such complaints either did not constitute competition issues or were beyond its remit. Where confidentiality permitted, such matters were referred to the ODTR as the relevant regulatory body.

The Authority did receive complaints concerning activity in the telecommunications sector during this period that raise concerns from a competition law perspective and these will be examined in further detail. However, the potential for application of competition legislation to mobile telecommunications in particular was constrained in 2001 by the High Court judgement in Meridian v. Eircell.

On 5th April 2001 Mr. Justice O'Higgins delivered a judgement in this case in which he stated that despite the fact that Eircell enjoyed a 60% share in the market it was not dominant in the context required by competition law. In making this ruling O'Higgins J. relied upon the definition of dominance as the ability of an undertaking to act independently of its suppliers, competitors and ultimately its customers. The judge ruled that the pattern of development and competition in the market in the preceding 3 years,

which had seen Eircell's share of the market fall from 100% to 60%, and the absence of any barriers to expansion in the market, meant that Eircell could not act independently of its suppliers, competitors and consumers and therefore could not be considered to hold a dominant position within the meaning of the Competition Acts.

While the judge's decision in this case does not preclude the Authority from pursuing suspected breaches of competition legislation in the mobile telecommunications market it does create an additional hurdle. The most significant implication of this judgement for the Competition Authority is the fact that in order to succeed in any action concerning abuse of dominance by one or more firms, the Authority would have to present a new set of facts or arguments for the market that demonstrate the presence of dominance or collective dominance in that market. On a positive note, this judgement demonstrates how Irish High Court decisions are based on a rule of reason analysis that incorporates economic thinking.

Consumer Inertia

The Monopolies Division has had a number of complaints about the abuse of a dominant position because a firm increases its price or in some other way changes its product offerings so as to disadvantage an existing purchaser. In any investigation, an obvious first question concerns whether the complainant has sought alternative suppliers. In one particular case, several retailers complained to the Authority following the rise in the price of a staple product without verifying whether or not there were alternative suppliers. The Monopolies Division was able to determine that there were alternative suppliers who had not raised their price as much and were suitable suppliers. The existence of alternative sources of supply was pointed out to the complainants and the complaints were closed.

This example raises the importance of consumers being able to switch between suppliers and its importance to the competitive process. In this example, as in many markets, switching was relatively easy but those complaining to the Authority had not always explored those possibilities.

However, in other markets switching may not be easy. In electricity and natural gas, for example, uncertainty over the regulatory environment and the position of the incumbent as supplier of last resort may contribute to consumers' reluctance to favour new entrants.

Consumer inertia can remove the incentive for firms to compete with each other if consumers are unwilling to switch suppliers in response to differences in price. Thus, the willingness of consumers to explore their options fully and avail of lower price options when they observe them is an important factor in creating competition in the marketplace.

This suggests that consumers can themselves contribute to the promotion of competition and facilitate enforcement of competition by demonstrating that they are willing to explore new options. Such behaviour would render markets more transparent and give firms the incentive to actively compete for consumers. However, in some instances institutional, legal, informational and other barriers can discourage consumers from switching. This can damage the competitive process and harm consumers.

These issues were addressed in a paper presented by Michael Waterson, University of Warwick, at the annual meetings of the European Association for Research in Industrial Economics held at Trinity College Dublin in 2001. Waterson argues that consumer' behaviour matters significantly in determining how well an industry performs in terms of price, innovation and profitability. For example, over a five-year period, while 53% of consumers switched motor insurance policy, the corresponding number for personal banking was only 6%[3]. Despite the fact that both industries were fairly concentrated, profitability was much higher in banking than motor insurance. Waterson argues that a key reason for the differences in profitability was the very different behaviour of consumers across the two markets. In conclusion Waterson argues that it is important that in promoting competition in some markets, solutions such as standard setting and making pricing behaviour more transparent are particularly appropriate.

3 Note that these data refer to the UK, not the State.

Section 4 – Regulated Markets Division

Introduction

Many serious restrictions on competition result from State intervention and these cannot be addressed through the direct application of the competition laws. In recognition of the importance for the economy of vibrant competition in all sectors, the Authority established the Regulated Markets Division to put the case for competition and to monitor its application in sectors where it is being introduced. The Division is headed by Isolde Goggin and during 2001 had a staff of 2.5 – a Divisional Manager, a case officer and a clerical officer shared with Competition Policy Division. The Division also had the benefit of the services of Philip Andrews, Legal Advisor, on a shared basis with Competition Policy Division. Since its establishment the work of this division has concentrated on three main areas – liberalising markets, restricted markets and advising on new legislation. In each case it seeks to ensure that legislation prioritises, or gives due weight to, consumer choice and benefits over producer interests and that any restrictions on competition are strictly proportionate to the benefit they are intended to produce. In addition to studying and commenting on specific sectors, it works with the Monopolies Division to help ensure that competition legislation is enforced in recently liberalised areas such as telecommunications, transport and electricity and to liaise closely with sectoral regulators in dealing with issues which may fall under competition rules or sectoral rules or both.

Representation

One of the ways in which the Regulated Markets Division carries out its function is by representing the Authority at various fora. During 2001 it represented the Authority on the Liquor Licencing Commission and on the High Level Group on Regulation.

Liquor Licensing Commission

The Liquor Licensing Commission was established in December 2000 by the Minister for Justice, Equality and Law Reform, Mr. John O'Donoghue T.D.. Its remit is to:

> "Review the Liquor Licensing system in the light of all relevant factors, including systems for the licensing of alcohol in other countries, and to make recommendations for a Liquor Licensing system geared to meet the needs of consumers, in a competitive market environment, while taking due account of the social, health and economic interests of a modern society."

The full Terms of Reference of the Commission are available on the Department of Justice, Equality and Law Reform's website at www.justice.ie.

The Competition Authority is represented on the Commission by Ms Isolde Goggin, who is also chairing a sub-committee established to examine the issue of licences for interpretative centres and other areas where the sale of alcohol is ancillary to the main business carried out.

The Competition Authority made two submissions to the Liquor Licensing Commission in 2001. The first (January 2001) dealt solely with off-licences, since the Commission was required to submit a report within three months on this issue. In this submission[4], the Authority pointed out that entry into the drinks trade was still practical in most cases only by purchasing an existing licence. Thus market entry and exit remained inextricably linked and barriers to entry in one area were gained at the expense of increased barriers to exit in others. The off-licence trade differed from the on-licence trade in many respects, including differing consumer demands and preferences and differences in supply (including the range and type of beverages available in the on- and off-licence sectors. Entry restrictions were not an effective or proportional way in which to control the consumption of alcohol as they distorted competition, were not geographically neutral, and ultimately might have little or no effect on consumption as they were so indirect. Policy objectives in relation to the sale of alcohol could be better achieved by measures that were far less restrictive of competition. The submission called for the reconstitution of the licensing laws with the following features:

4 "Competition Authority Position Paper on the Nature of the Off-Licence and the Method of Access to the Off-Licensed Trade in the Interests of Promoting Competition", available at www.tca.ie.

- the repeal of the prohibition on the granting of new licences (as contained in Section 2 of the Licensing (Ireland) Act 1902);
- the retention and possible enhancement of only those legal barriers which related to quantitative criteria directly relevant to the social dimension of the sale of alcohol such as:
    - the suitability of the applicant (to be addressed through a licensing scheme);
    - the suitability of the premises;
    - compliance with fire and safety and health regulations and with all applicable planning provisions.

In its second submission in October 2001[5], the Authority argued that the existing legislative framework restricted competition and at the same time had failed to limit alcohol consumption. It argued that the effects of the restrictive licensing system were:

- where demand had increased, an increase in the size of pubs to meet it, resulting in the demise of the traditional pub and the emergence of very large drinking establishments;
- where demand had fallen, existing licences had become unprofitable but appeared to have been retained because of their asset value;
- limited consumer choice, quality and value;
- margins on the sale of alcohol, thus encouraging retailers to focus more on the sale of alcohol exclusively than on its sale in association with other activities;
- higher prices for consumers where licences were scarce, resulting in a total cost to consumers in the region of €2,000m.

The submission rejected arguments that the restriction of competition was justified because, by raising prices, it reduced alcohol consumption, pointing out that, if higher prices were desired for policy reasons, direct taxation was more efficient, equitable and effective. It recommended that:

5 "Submission of the Competition Authority to the Liquer Licensing Commission", available at www.tca.ie.

- the licensing laws be amended to remove the prohibition on granting new licences, thereby allowing the number of licences to be determined according to consumer needs. Somewhat paradoxically, this might actually lead to a fall in the total number of licences;
- the Licensing Acts be amended to remove the references to the adequacy of existing supply as a criterion for the District Court in deciding whether or not to grant a new licence;
- direct taxation be used to influence the price of alcohol;
- some fixed proportion of the tax revenues from alcohol be earmarked for programmes designed to tackle programmes associated with the consumption of alcohol;
- the Commission consider whether targeted taxation is a useful instrument.;
- the Commission examine other policies that reduce demand;
- the Commission consider measures that would place a greater positive duty or liability on the vendor, especially at the point of sale – for instance, by licensing individuals to sell alcohol; through compulsory training in the sale of alcohol; by requiring an accredited qualification in the responsible sale of alcohol; or by increasing the legal liability of vendors;
- the Commission examine international experience in the use of targeted policies to address social problems at the point of sale;
- measures to improve the enforcement of existing laws be strengthened.

2. High Level Group on Regulation

In April 2001 a major OECD Report on Regulatory Reform in Ireland was launched. This concluded, inter alia, that

> "…reform of Ireland's regulatory governance lags behind dynamic market and social changes, and hence could be a bottleneck to sustained growth. Irish regulatory reform policy is broad and includes most of the OECD's recommended regulatory quality tools, such as regulatory review, but implementation is still weak… RIA (Regulatory Impact Assessment) has not yet been implemented effectively, and economic assessment of proposed rules is

missing. Alternatives to regulations, such as economic instruments, have replaced few traditional 'command and control' approaches. Implementation and enforcement of the Reducing Red Tape policy may need to be stronger to make a real impact on administrative burdens."

In response, the Taoiseach announced the establishment of a High Level Group on regulation with representation from a variety of government departments and agencies, to monitor implementation of Ireland's response to the OECD report and develop appropriate regulatory reform proposals for the Government's consideration. The Competition Authority is represented on the High Level Group by Ms Isolde Goggin. The group is expected to initiate consultation processes for a National Policy Statement on Regulation and for a system of Regulatory Impact Analysis. The Authority intends to make submissions to both these consultation exercises.

Recently Liberalised Markets

Energy (Electricity and Gas)

1. Authority response to Department of Public Enterprise's Gas (Interim) (Regulation) Bill 2000.

In May 2001 the Competition Authority provided its initial reaction to the major provisions of the Gas (Interim) Regulation Bill 2000, which it received on 21 May 2001. The Authority noted in its response that the Bill was an interim one, and that a more expansive Bill, to be entitled the Gas (Regulation) Bill, was planned to follow it, based on a broader re-examination of regulation in the natural gas sector, including a public consultation. The Authority questioned the wisdom of this approach, as it could lead to regulatory uncertainty (if the final form of regulation differed substantially from that proposed in the Interim Bill) or reflect a lack of transparency (if it did not).

On the detail of the Bill, the Authority noted that it contained no obligation comparable to that set out in Section 9(4)(a) of the 1999 Act (concerning the promotion of competition in the electricity sector) in relation to competition in the gas sector. This was a potentially critical flaw in the proposed approach of the Bill. The Authority strongly

recommended that there be a clear statutory obligation on the Commission to act with a view to promoting competition in the gas industry. The Authority also raised concerns about:

- apparent differences between the conditions applied to Bord Gáis Éireann and to other parties regarding the grant or refusal of permission to construct a pipeline;
- the possible prohibition of the construction of pipelines which would in fact operate efficiently;
- the imposition of certain obligations on all operators where they appeared more appropriate to incumbent or dominant operators only;
- third-party access rules;
- the discretionary power of the Minister to raise the annual rate establishing which customers can negotiate with BGE to self-transport gas;
- uncertainty in relation to distribution tariffs;
- rights of way;
- lack of vertical separation of BGE.

2. Synergen

Synergen, a 70:30 joint venture between Dublin Bay Power, a wholly owned subsidiary of ESB, and Statoil Dublin Bay, a wholly owned subsidiary of the Norwegian state oil company Statoil, was established prior to the liberalisation of the electricity sector with the intention of generating electricity for supply to the eligible market, i.e. that portion of the electricity market open to competition. On the 1st December 1999, the Minister for Public Enterprise, the Minister responsible for overseeing the liberalisation of the electricity sector and key shareholder in the ESB, wrote to the Chairman of ESB expressing concern over the proposed Synergen generation plant at Ringsend, Dublin:

> " … I could only consider giving approval in relation to expenditure for the turbine after I have received a written undertaking from ESB that if I am of the opinion that competition law makes it appropriate, the ESB would sell its interest (including any consortium having interest) in any generating station to be built at Ringsend on appropriate terms."

On the 29th June 2001, the Authority wrote to the Minister expressing its concerns about the state of competition in the electricity sector, mentioning in particular the " … need to ensure that the regulatory environment is focussed on encouraging greater competition in generation, both in the public interest and to comply with Ireland's commitments under EU liberalisation." In the opinion of the Authority, the swiftest and most effective means for achieving this end was for the Minister to call in the undertaking required of the ESB in her letter of the 1st December 1999. The Authority concluded that the Minister's view seemed to be so excessively narrow as to rob it of all practical use and meaning. Indeed, it would effectively limit the Minister's role to endorsing reliefs already ordered by an Irish Court and/or by the European Commission. The Authority continues to keep developments in the electricity industry, both nationally and at European level, under review.

The Minister responded in a letter dated the 7th August 2001, indicating that in the absence of any definitive finding or ruling by an independent body competent in the field of competition law, she would not require the ESB to sell its interest in Synergen.

3. *Infrastructure Agreement*

Statutory Instrument No. 445 of 2000 provides for a statutory separation of functions between the ESB as electricity transmission network owner and a new State owned company, EirGrid as network operator. In order to enable EirGrid to discharge the functions of TSO, the SI requires that the ESB and EirGrid enter into a contract known as the Infrastructure Agreement, which was subject to the approval of the CER. On the 1st June 2001, the CER issued a consultation document entitled "Transmission Infrastructure Agreement Principles Paper" which outlined the Commission's thinking on the principles to be enshrined in the Infrastructure Agreement and invited comment from market participants and other interested parties. The Authority submitted a document to the Commission outlining its views on the proposed agreement. In the Authority's view, the best outcome for the promotion of competition was that which would maximise the Eirgrid's independence and control of the transmission and distribution systems. To that end there should have been an attempt to come to a contractual arrangement that would have allowed the Eirgrid to act as if it were the beneficial asset owner.

On the 26th September 2001, the CER issued its "Draft Direction on Commission Industry Requirements for Infrastructure Agreement" and sought[6] the views of the Authority. On the 17th October 2001, the Authority submitted it views on the Draft Direction to the Commission. The Authority expressed its view that the "rules" as described in the Draft Direction were sub-optimal and would most likely produce an excessively costly system of contractual relations between the ESB and Eirgrid. In addition, in the Authority's view, the proposed terms of the contractual relationship leaned heavily toward that State-mandated monopoly provider, ESB rather than the purchaser Eirgrid and that the likely outcome would be that new entry into electricity generation would be impeded to the detriment of competition and ultimately the consumer. Relevant documentation is available on the Authority's website.

Telecommunications

1. Authority response to Department of Public Enterprise's Draft General Scheme of Communications (Regulation) Bill.

In January 2001 the Authority submitted comments on the Department of Public Enterprise's Draft General Scheme of the Communications Regulation Bill (the "Draft General Scheme") of December 2000. The Authority had already commented on an earlier version of the same Draft General Scheme in August 2000, and referred the Department to those earlier comments[7] to the extent that they had not been addressed in the latest Draft General Scheme. The Authority expressed concern that the regulatory framework for telecommunications was undergoing fundamental change at EU level, and that this was a bad time to introduce new legislation in Ireland, as it was likely that it would have to be further changed when the new European framework was completed. For instance, it was not yet clear what criteria would be used to define "markets" for the purpose of applying ex-ante regulation to entities with Significant Market Power. Given that doubt remained at EU level as to how Significant Market Power would be defined, and that the final outcome of this controversy was not likely be known for at least a further year, it seemed premature for a version of the test to be incorporated into Irish law at this stage.

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6 In accordance with Regulation 18(1)(d) of SI No. 445 of 2000 which provides that the CER may consult with the Authority.
7 In Particular, the Competition Authority would refer the Department to its earlier comments in relation to the appointment and term of Commissioners, the appointment of Chairman of the Commission, and cooperation between the Commission and the Competition Authority.

The Authority also raised queries about the independence and functions of the proposed Commission for Telecommunications Regulation, the circumstances under which the Commission could impose obligations on SMP operators, the proposed levy on service providers, the specification of public service requirements, and dispute resolution procedures.

2. OECD

The Regulated Markets Division acted as examiner for the telecommunications chapter of the OECD country review of Italy and participated in the country review of Ireland.

The Regulated Markets Division made joint submissions to OECD roundtables on access pricing in network industries with the ODTR and CER and also on specific issues on telecommunications with the ODTR.

3. Authority response to ODTR consultation on numbering for Internet access

In January 2001 the Authority responded to a consultation paper, "Allocation of additional access codes and number ranges for Internet access (ODTR 00/94)", issued by the ODTR on 14 December 2000. The paper dealt with the possibility of opening up new specific access codes and number ranges for Internet traffic. In particular, it asked respondents (Question 3.2) whether they felt it would be useful to constrain the range of tariffs that can be associated with each specific access code. In its response, the Authority noted the Director's concerns in relation to customer recognition of relevant tariffs, and the importance of consumers' ability to compare offerings from all operators. The lack of transparency of pricing models employed in many sectors of the economy, including telecoms, ensured that customer churn rates were below those expected. This had the impact of limiting the degree of price competition as many consumers would not expend the effort required to make comparisons.

The Authority expressed concern that the setting of maximum limits on charging under any given access code might act to ensure that all prices converged to this maximum. This might work to erode the competitive process whereby each participant in the market competes for customers vigorously. For this reason, the Authority suggested that some measures be taken to assist consumers in comparing the various offerings on the market

place on the basis of some normal consumption patterns. Another concern was to ensure that the association of particular tariff régimes with specific access codes should not restrict or discourage service providers from developing new, innovative tariff structures. For this reason, it suggested that it might be useful to allocate a third access code and number range, besides the two proposed in the consultation document (for "pay-as-you-go" and flat-rate Internet access models), which could be used for other tariff structures as they developed in the marketplace.

4. Co-ordination and co-operation with ODTR

Regular co-ordination meetings are held between the ODTR and the Competition Authority, at which both current, "live" issues in the telecommunications sector, and longer-term issues such as the future regulatory framework, are discussed. At present these meetings are informal, in the sense that they do not have a statutory basis, but both sides have found them extremely useful. A more formal basis for this co-operation is proposed in the Competition Bill, 2001.

Both organisations have also co-operated on submissions to, and attendance at, the OECD's Competition Law and Policy working group on Competition and Regulation. The ODTR involved the Competition Authority in the European Commission's review of the status of the telecommunications market for the purposes of the Seventh Implementation Report. With the assistance of the ODTR, the Authority participated in meetings in Brussels and Dublin, and subsequently wrote to the Commission to clarify some points raised during the meetings.

The ODTR consulted the Authority on Guidelines to bidders for the third-generation (3G) mobile licences on infrastructure sharing. This document gave a brief description of the various 3G infrastructure sharing options, the regulatory background that should be considered by operators when considering these infrastructure sharing options and indicative guidance with regards to the interpretation of the regulatory issues.

5. Miscellaneous

The Authority participated in the European Commission (DG Competition/DG Infosoc) process of developing a new telecommunications regulatory framework, through the

Advisory Committee on Restrictive Practices and Dominant Positions. The Authority provided input to the Department of Public Enterprise for their response to a Questionnaire from the European Commission on the assessment of network infrastructure sharing by national competition authorities.

Transport

1. Transport Study

In June 1999 the Authority had initiated a study under Section 11 of the Competition Act, 1991, as amended, to analyse the structural barriers affecting the rail and bus passenger transport market. The terms of reference of the study were:

> "To undertake a study and analysis of the licensing restrictions and other barriers and restrictions to entry into the rail and bus passenger transport market within the State, and their impact on the delivery of passengers by intercity rail, intercity buses and urban buses."

Owing to staff shortages the Authority was obliged to suspend work on the study towards the end of 2000. Meanwhile, the Department of Public Enterprise developed proposals for institutional and regulatory change in a number of areas, culminating in the publication of the policy paper, "A New Institutional and Regulatory Framework for Public Transport" in August 2000. The Authority submitted an initial version of this study to the Department in response to the consultation exercise associated with the policy paper, and published a slightly revised and updated version as the Transport Study in June 2001. For a description of the conclusions and recommendations of the study, please see the Authority's annual report for 2000. This document is available on the Authority's website.

2. Transport (Railway Infrastructure) Bill

The Authority submitted comments to the Department of Public Enterprise in response to its consultation paper on the Transport (Railway Infrastructure) Bill, which was published on 3rd January 2001. The Bill proposed the creation of an independent commercial statutory public body, the "Railway Procurement Agency" (RPA), to

provide, or to secure the provision of, railway infrastructure through the Public-Private Partnership (PPP) approach. The Minister for Public Enterprise will determine the projects to be procured by the RPA. The Bill will allow the RPA to negotiate, sign and manage PPPs for the design, construction, operation, finance and maintenance of rail-based infrastructure. It provides for a statutory process for private-sector participation in infrastructure procurement by extending the right to apply for a Railway Order (currently reserved to CIE only) to the RPA or any person having the consent of the RPA. A public inquiry will be required prior to the making of a Railway Order. The Bill also contains provisions related to rail safety, to specific legal aspects of the on-street operation of light rail and to penalties for various offences.

In its comments, the Authority raised concerns as to the actual and perceived independence of the agency. It pointed out that information flows either from the RPA to CIE or vice versa could have a detrimental effect on the development of competition for PPP projects. Information flowing from CIE towards the RPA might unduly influence the project design so as to favour CIE. Information flowing in the opposite direction might give CIE an unfair advantage in the bidding process. The Authority suggested a statutory requirement for the ring-fencing of the RPA. It also pointed out the importance of ensuring that all possible bidders for a project, including CIE, start from a “level playing field” as far as technical information about the existing railway infrastructure is concerned. The commercial rationale for the Agency was not clear from the general scheme of the Bill. Some competition concerns could arise from the possession by a single agency of dual quasi-regulatory and commercial functions in the sector. The Authority also proposed that criteria for the selection of projects should be set out in legislation, as this would increase investor confidence and reduce the possibility of apparent bias in the selection of projects.

Overall, the Authority welcomed the setting up of the Railway Procurement Agency as a timely and important step in the development of a modern, effective and competitive transportation system in Ireland. Representatives of the Authority subsequently met officials from the Department of Public Enterprise to discuss these matters.

3. Taxis

On the 21st November 2000 the supply of taxi services in Ireland changed dramatically. Previously, entry to the market was seriously restricted to replacing an existing licence holder or acquiring one of the rare additional licences issued by local authorities. S.I. 367 of 2000 provided that any suitably qualified individual may provide taxi services. Immediately following deregulation, Local Authorities were inundated with applications for the newly available licences. Over the course of 2001 the number of licences supplying taxi markets around the country increased both steadily and rapidly. In Dublin, for instance, the number of taxis supplying the market tripled. The Competition Authority has long argued for this freeing of entry and welcomes the development wholeheartedly.

In the Authority's view however, the deregulation of entry was only a first step toward the efficient regulation of taxi markets – free entry has not solved all problems. The Authority expressed its views on these matters in August 2001 in a meeting with representatives from Goodbody's Economic Consultants who were preparing a report on post-deregulation taxi markets for Dublin Corporation. In November 2001 the Authority met with representatives from the National Taxi Drivers Union and following that meeting an article was drafted for publication in the Irish Independent (7th February 2002) which outlined in some detail the steps which, in the Authority's view, are necessary for the effective regulation of taxi markets.

In brief, the Authority made three broad recommendations concerning: fare regulation; quality regulation; and the system of regulation itself. With regard to fare regulation the Authority recommended the implementation of systematic fare control which would require: (a) periodic reviews of fares; (b) a reliable means of gathering information about demand and supply; and (c) suitable technical expertise. With regard to quality regulation we recommended a strengthening of quality standards that might involve raising driver qualifications, regular maintenance checks, spot checks, meaningful penalties for offenders and a responsive customer-led complaints system. With regard to the system of regulation itself we recommended handing responsibility for regulating all aspects of the taxi market to a single politically-independent agency, preferably one with responsibility for regulating transport generally.

4. Aviation Regulation

In March the Division made a submission to the Commission for Aviation Regulation (CAR) in relation to CP2/2001: Consultation Paper on the Maximum Levels of Airport Charges to be levied by an Airport Authority under the Aviation Regulation Act, 2001. Airports have over the years moved on from providing purely aeronautical services alone. Most airports now provide a large range of services that enable passengers to carry out everyday transactions on the way to and from destinations. These two sets of activities are complementary to each other. If a monopoly controls both the aeronautical and non-aeronautical elements of an airport it will exploit this complementarity by lowering the prices of aeronautical services. The submission pointed out that commentators have argued that the complementarity of the airport's offerings and the countervailing power of airlines mean that the potential and incentive for an airport to abuse its monopoly power is limited. In light of this they argue that, as in New Zealand, there may be no real need for an intrusive regulatory regime. This may be especially true in jurisdictions where there is a strong body of competition law to police any potential abuses.

In common with many other airport regulation regimes there is no explicit requirement that the CAR foster competition in the provision of airport services. However, the Division in its submission made it clear that many of the choices that the Commissioner will have to make in coming to a determination will have implications for competition. Competition concerns can arise inter alia in relation to the nature of competition between airports, the potential for competition between terminals in airports and in competition for the right to provide some of the services that airports may rationally decide to outsource.

The Division's submission made the point that it is well recognised that regulation can often be a poor substitute for competition, where competition is feasible. However, the Division recognises that unlike many network industries/utilities there is no clear consensus about which areas within an airport that are best provided by a monopoly. The Division noted the emerging view that it may well be that terminals that are constructed and run as joint ventures between the airport authority and the airlines provide the correct

incentive structure to maximise efficiency. This view must be tempered with the potential that such an arrangement may have in terms of foreclosing access to the terminal to new operators. The submission looked at the issue of discounts and expressed a concern that if there is no objective justification in terms of costs, they may tend to ossify the position of the largest carriers operating out of an airport. This may hinder the introduction of new carriers onto routes, notwithstanding any discounts given in the short term to new entrants. The submission also looked at the position of low cost carriers who make much less intensive use of airport resources and demand a much lower level of service than may be acceptable to traditional operators. The submission suggested that where there were real cost differences low-cost operators should be able to un-bundle the services and only pay for those that they in reality use. The submission went on to address the potential impact of low-cost airlines on investment choices (where due to various reasons an airport operator may be unwilling to build tailor made infrastructure for low-cost operators). It was suggested in the submission that this may be overcome by the building of competing terminal infrastructure or by some joint venture arrangement between the airline and the airport operator. These options may in themselves raise competition concerns (in relation to access by new entrants etc.).

Other

Miscellaneous Submissions

Groceries Order – Responses to Joint Committee on Enterprise and Small Business

Other Publications

“Legal Arguments against State-Induced Distortions of Competition” by Philip Andrews, article for Competition Press.

“California Experience” by John Evans, article in Irish Times, February 2001.

Section 5 – Competition Policy Division

Introduction

The Competition Policy Division is headed by Declan Purcell. During the year, the Division had a staff of 3.5 – one divisional manager, 2 case officers and a clerical officer shared with Regulated Markets Division. The Division also shared with Regulated Markets Division the services of one of the Authority's legal advisors, Philip Andrews. The Division's work can be grouped under three main classifications: Notifications under Section 7 (of the Competition Act 1991, as amended); Studies under Section 11; and mergers and merger policy. In addition to these core areas, the Division continued to represent the Authority at the EU Council Working Group meetings on Modernisation of European Competition Law Enforcement, and to support the Authority's competition advocacy role, particularly in relation to pharmacies.

1. Notifications

At the start of 2001, the Authority had dealt with 1,371 of the 1,408 cases notified to it since October 1991, leaving it with 37 cases on hand. During the year it received 9 new notifications, and closed 14, leaving it with 32 open notifications at the end of the year.

During the course of 2001, 9 agreements were notified to the Authority, compared to 10 notifications in 2000. A list of these notifications is contained in Annex 1. The agreements covered a shareholding agreement, franchise agreements, credit card affinity agreements, over the counter "OTC" bill payment agreement, share purchase, agency and services arrangements in relation to a copyright agreement, euro changeover arrangements and a standard operating procedure for the distribution of pharmaceuticals. By the end of 2001, a total of 1417 notifications had been made to the Authority under Section 7 since the commencement of the Act.

Many agreements, which would otherwise be notifiable, are now covered by the Authority's Category Certificate for Mergers and/or Sale of Business (Decision No. 489)

and the Category Certificate and Licence in respect of Agreements between Suppliers and Resellers (Decision No. 528). Businesses do not need to notify arrangements that are covered by these decisions in order to benefit from them. The existence of these category certificates and licence has contributed to the low rate of notifications to the Authority under Section 7.

The Authority made 10 formal decisions in respect of notified agreements in 2001 and disposed of a total of 14 notifications during the year. By the end of 2001, almost 98% of the notifications that had been received by the Authority since the commencement of the Act had been disposed of. A list of the decisions made and notifications disposed of during 2001 is contained in Annex 2. All of the Authority's decisions are available on its website.

The table below provides information on the annual level of notification by year since the Authority was established in 1991 and the number of notifications for each of those years that have subsequently been dealt with by the Authority. Finally, the table shows the number of the notifications received in respect of each year that are still awaiting a decision by the Authority. So, for example, of the 35 notifications received by the Authority in 1996, 34 had been dealt with at the end of 2001, leaving 1 notification awaiting a decision.

Figure 8: Summary of Notifications since 1991

Year	*1991*	*1992*	*1993*	*1994*	*1995*	*1996*	*1997*	*1998*	*1999*	*2000*	*2001*	*Total*
Received	*14*	*1,159*	*67*	*34*	*38*	*35*	*23*	*11*	*17*	*10*	*9*	*1,417*
Dealt with	*14*	*1,145*	*67*	*32*	*38*	*34*	*23*	*11*	*10*	*6*	*5*	*1,385*
On hand	*0*	*14*	*0*	*2*	*0*	*1*	*0*	*0*	*7*	*4*	*4*	*32*

Based on 31st December 2001

2. Studies

Casual Trading

On 31st March 2000, the Tánaiste requested the Authority, under Section 11 of the Competition Act, 1991, as amended, to undertake a study into the implementation by local authorities of the Casual Trading Act, 1995, with the following terms of reference:-

> "To undertake a study of the manner in which the provisions of the Casual Trading Act, 1995 have been implemented by local authorities with a view to assessing the impact of that legislation on competition in local markets and, in particular, whether the measures employed by local authorities can reasonably be regarded as necessary for and proportionate to the achievement of public interest objectives relating, for example, to public order and safety".

The Tánaiste's request to the Authority arose from concern regarding complaints received from casual traders about the operation of the Act by local authorities. In the main these complaints appear to have been concerned with the level of fees charged by local authorities and practical difficulties encountered by traders in complying with local authority conditions. While some preparatory work was carried out by the Authority on the study in 2000, the resource difficulties encountered during the year 2000 prevented the Authority from making any significant progress with the study in that year and in the first quarter of 2001.

In August 2001, the Authority engaged market research consultants MRBI Ltd to conduct much of the background research for this study. In the course of their research, MRBI conducted in-depth interviews with:

- The Irish Organisation of Market and Street Traders
- The Department of Enterprise, Trade and Employment
- 9 Local Authorities
- 9 Chambers of Commerce
- 12 Casual Traders
- 1 Special Event Trader
- 10 Garda Superintendents.

Through questionnaires, MRBI also gathered factual data and opinions from each of the 88 Local Authorities and from a representative sample of 326 casual traders and 154 local

businesses. MRBI delivered its final report to the Authority on 10 December 2001. The Authority is currently analysing MRBI's findings and will report to the Minister in 2002.

Professional Services

On 1st May 2001, the Authority launched a consultation process in connection with a proposed study of competition in a number of professions. The responses received under this process broadly confirmed the scope of the study the Authority proposed to undertake and informed the choice of professions to be examined. In November 2001, the Authority announced that it had formally decided to undertake, on its own initiative, a Study of competition in the professions of Architect, Barrister, Dentist, Engineer, Medical Practitioner, Optometrist, Solicitor and Veterinary Surgeon under Section 11 of the Competition Act, 1991.

The Terms of Reference for the Study are as follows –

> "To study and analyse methods and practices affecting competition in the provision of certain professional services, with a view to identifying any potential or actual restrictions on competition, whether arising from legal provisions, professional rules or customs, or otherwise, that have an appreciable effect on competition.
>
> To identify and evaluate any consumer benefits claimed for any such restrictions and to consider whether the restrictions are proportionate to the achievement of any such benefits.
>
> The Study will focus on professions in the medical, legal and construction sectors, specifically: medical practitioners, dentists, veterinarians, optometrists, solicitors, barristers, engineers, architects."

The Study will help the Authority to identify any unnecessary or disproportionate restrictions on entry, conduct or other impediments to competition in these professions. The Authority also hopes to increase information and understanding of how competition

operates in these markets. On conclusion of the Study, the Authority may seek changes to existing practices; present recommendations and, where appropriate, best practice guidelines to Government, relevant regulators, professional bodies and others with a view to the removal of unnecessary impediments to competition; and/or generally publish information about the market/sector/practice that improves knowledge and understanding of, or stimulates and improves competition generally in some or all of, these areas.

In December 2001, the Authority began the data-gathering stage of the Study. A detailed questionnaire was sent to representatives of the professions concerned and the Authority published a second Public Consultation document, details of which are on the Authority's website (www.tca.ie). The analysis of the information obtained from the data-gathering process will largely be carried out by external consultants and continue throughout much of 2002. The Authority aims to complete the study in 2002.

3. Mergers

The Division leads the Authority's investigation of proposed mergers referred to it by the Tánaiste under Section 7 of the Mergers, Take-overs and Monopolies (Control) Act, 1978, as amended. In December 2001, the Tánaiste referred to the Authority for detailed investigation a proposed take-over by GEHE plc of the Unicare chain of pharmacy outlets. The proposal involved firms operating both in the retail and wholesale pharmacy sectors. A report to the Minister was due at the end of January 2002.

Representatives from the Division travelled regularly to Brussels to participate in meetings of the EU Advisory Committee on Concentrations. This Committee evaluates proposed decisions by the Commission on whether to allow mergers (generally large-scale) with a Community dimension to proceed or not. The Division co-represented Ireland with the Department of Enterprise, Trade and Employment at four of these meetings, as well as attending a two-day hearing on the GE-Honeywell merger, a particularly high-profile case, which raised a number of interesting issues concerning merger policy. This merger, which involved two large American companies, had been permitted by the US antitrust authorities, but was eventually prohibited by the European

Union. The Division was very involved in the whole process, and learned some valuable lessons about merger procedures and evaluations.

The Division also participated, along with the Department of Enterprise, Trade and Employment, in a series of Working Group meetings in Brussels relating to reform of the EU Merger Regulation. The Authority made a submission concerning this, along with participating fully in the discussions, and the Commission produced a Green Paper on the issue in December 2001.

The Competition Bill, 2001 proposed that the merger function, save in the case of media mergers, would be transferred fully from the Minister to the Authority. As a result of this decision, the Authority was represented on the European Commission's advisory committee on concentrations, and began to make initial preparations for assuming this function.

4. Modernisation of EU Competition Law Enforcement

Declan Purcell continued to represent the Authority in discussions at EU Working Group level aimed at modernising the enforcement of EU Competition Law. This project will change the way competition law is enforced throughout the European Union, both by the European Commission and by National Competition Authorities. A Working Group of officials from the Member States continued, during 2001, to consider a draft Regulation which will, when adopted, alter the respective functions of the EU Commission and the National Authorities. The draft regulation is expected to be adopted in 2003, and will thus become part of Irish law.

While there are a number of novel features to the proposal, some are particularly worthy of comment here. For example, Article 3 of the draft deals with the difficult issue of the relationship of Community Law to National Competition Law. The original Commission proposal was that –

> "Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse

> of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws."

The Commission's intention was to ensure *consistent application* of the Community competition rules. Companies concluding agreements capable of affecting trade between Member States would face a single competition law test rather than up to 15 national competition laws in addition to Community law. The Article has been debated at length by the Council Working Group, and by Ministers, and a number of concerns have amerged. For some, the main difficulty has been that, by obliging national competition authorities to make a choice between national law and Community law, the exclusivity rule would expose national procedures to legal challenges. Others have been concerned that the proposal would hinder competition authorities from pursuing cases arising in their own territory that Community law might not be intended or equipped to deal with.

Ireland's concerns have been, first, the difficulty of establishing when a particular agreement or practice 'may affect trade' between, say, Ireland and another Member State (arguably, Ireland's position as a small and very open trading economy means that a significant number of agreements might be seen as having the potential to 'affect trade'). Second, as Ireland has criminal sanctions available to counter breaches of its competition law, and Community Law does not, the primacy of Community Law could lead to less deterrence in cases of cross-border breaches of the competition rules. Efforts are continuing, at the time of writing this Report, to find mutually acceptable solutions to these difficulties.

A second difficulty arising from the draft Regulation, affecting only a minority of Member States (including Ireland) involves the assignation of enforcement powers within Member States. The draft Regulation involves the decentralisation of enforcement powers from the EU Commission to the National Authorities, and Article 36 will require Member States to 'designate' the authorities in their jurisdiction competent to 'apply Articles 81 and 82' of the Treaty. In most Continental European Member States, this does not pose a problem, as their legal systems tend to allow for direct enforcement of

competition law by the National Competition Authority (for example by imposing fines directly), and these legal systems do not provide for either criminal offences for breaches of competition law nor for the sanction of potential imprisonment for such breaches.

In Ireland, however, a breach of competition law is a criminal offence, with imprisonment as a potential sanction. There is also a division of powers between the Competition Authority (as an investigative agency) and the Courts (as administrators of justice). Amendments to the draft Regulation will thus be required to respect this division of powers. Efforts continued through 2001 to seek such a solution, and there were encouraging signs by the end of the year that one would be found.

5. Advocacy

The Division has continued to study and lead advocacy for competition in the retail pharmacy sector. Its competition concerns in this field were reinforced during the year by the conclusions reached by the OECD in its study published in April, 2001 titled "Regulatory Reform in Ireland". In September 2001, the Minister for Health and Children set up a Review Group to consider the then current system of Statutory Regulation governing the sector, and Dermot Nolan represents the Authority on the Group. The Group met three times in the last 3 months of 2001, and should complete its work in mid-2002. As part of this work, the Division made a submission on the Authority's behalf to the Group on the retail pharmacy sector. This submission, which details why the Authority felt that the Pharmacy Regulations stifled competition by limiting new entry, thus leading to lower quality and higher prices for consumers, can be found on the Authority's website[8].

The submission argued that the 1996 Health (Community Pharmacy Contractor Agreement) Regulations had acted to protect incumbent pharmacists at the expense of consumers and that the regulations had made it exceptionally difficult for a new pharmacy to obtain a GMS contract, when it was located close to an existing pharmacy. This gave such incumbent pharmacies considerable market power, which allowed them

8 The Minister for Health and Children subsequently revoked one set of Regulations in this area - the Health (Community Pharamacy Contractor Agreement) Regulations, 1996, on 31st January, 2002.

to sustain high prices for consumers, and also prevented them from having to compete on service quality, opening hours, and productivity improvement. Other regulations which limited the ability of pharmacists trained outside the state to open their own pharmacy further protected incumbents, and the submission recommended the removal of such quantitative restrictions, arguing that any regulation should focus on directly improving the quality of service to the consumer.

In response to a public invitation to comment from the Minister for Health and Children, in January 2001, the Authority sent a detailed submission to the Minister on his proposals for the statutory registration of certain health and social care professionals. A system of statutory registration requires practitioners to be qualified to a certain level and to adhere to set standards and a code of conduct, coupled with disciplinary rules. The Authority's general concern in making the comments was (a) to test the hypothesis that a registration system of the breadth and scope proposed was warranted or necessary at all, and (b) to ensure that any new statutory registration system planned would be transparent, and would enhance the quality of service to consumers without restricting competition in the professions concerned.

Section 6 – Chairman's Division

Introduction

Like the other Divisions, the Chairman's Division was established following the Deloitte and Touche review, and became properly operational in January 2001. For most of the year, it had four staff in addition to the Chairman. Its activities during 2001 may be grouped under five headings as follows:

- Organisation of Authority meetings and coordination of policy, strategy and allocation of work generally;
- Management of the Authority's finances, personnel, including liaising with the Department of Enterprise, Trade and Employment on a range of issues including human resource management, finances and office accommodation;
- Provision of a variety of central administrative services such as office equipment, supplies, travel, publications/library, press summaries, information technology, asset register, bookkeeping, etc.;
- Raising awareness of competition policy and the benefits of competition, including press matters, speeches, advocacy and events;
- International representation of the Authority and of Ireland.

Authority meetings, strategy and work

Authority Meetings

During 2001 the Division organised 4 formal Authority meetings and 9 ad hoc meetings of the Authority at which formal decisions of the Authority were taken.

Internal Communications

As part of the new management structure established in the Authority at the beginning of 2001, the Division put in place measures to improve internal communication within the

Authority. While the Authority meets formally to take decisions under the Act, within divisions, frequent periodic team meetings involving all staff of the division are used to plan and execute work. Bi-monthly inter-divisional meetings are held to share information with other divisions and to ensure good coordination of all of the Authority's work. The Division was also responsible for driving, within the Authority, strategic and change management along the lines generally developed in the public service in recent years.

Competition Authority Advisory Panel

During 2001, and following a review of the relevant recommendations in the Deloitte & Touche Organisational Study report, the Authority decided to appoint an advisory panel. The Panel will advise the Authority on legal, policy, management and strategic issues. It has no executive role and will not discuss any individual enforcement cases before the Authority.

The Panel was formally established on October 1st 2001 and members have been invited to sit for a period of two years. The first Members of the Panel are:

- Mr. Gerard Hogan, Senior Counsel;
- Mr. Gerald Fitzgerald, Partner, McCann Fitzgerald Solicitors;
- Dr. Frances Ruane, Professor of Economics, Trinity College Dublin; and
- Mr. John Travers, Chief Executive of Forfás.

The first meeting of the Panel took place on November 22nd 2001.

Strategic Planning

The Chairman's Division was responsible for the co-ordination of the drafting of the Authority's new Strategy Statement 2002-2004 which was published early in 2002 but on which a considerable amount of time was spent preparing the document in the latter

part of 2001. The Statement defines the key strategic goals of the Competition Authority over the three year period which centre on:

- Enforcing and otherwise encouraging compliance with competition law;
- Advocating, promoting and raising public awareness and understanding of the benefits of competition; and
- Implementing Irish competition policy to the highest international standards.

New Legislation

The Final Report of the Competition and Mergers Review Group, published in April 2000, recommended a range of legislative changes in Irish competition law. Following from this report, the competition section of the Department of Enterprise, Trade and Employment began to draw up proposed new legislation. This work appeared in the public domain first at the end of July with the publication of the Heads of Bill and second at the end of December with the publication of the Competition Bill 2001. During all of 2001, the Authority spent a great deal of time examining and commenting on aspects of the proposed legislation, both before and after the publication of the Heads of Bill. This work, which involved all of the Divisions, was coordinated via the Chairman's Division.

Management of finances and personnel

The Authority's current legislative standing brings it within the ambit of the Civil Service Act and as such the Authority is not empowered to recruit its own staff. As a result Authority staff are provided to it by the Minister for Enterprise, Trade and Employment. Administrative staff are assigned from within the ranks of the Department whereas specialist staff are recruited by the Department on the Authority's behalf. Despite the Authority not having a formal role in recruitment, the Chairman's Division, on behalf of the Authority, involved itself in all aspects of the recruitment process commenced in 2001 to fill the 15 new positions sanctioned earlier in the year. The Chairman's Division also played a lead role in securing the necessary finances in the Government's Estimates exercise to meet the cost of the 15 new posts.

Raising Public Awareness

Media Relations

The Chairman's Division is responsible for the coordination of the Authority's relationship with the media. In that regard a new Communications Officer was appointed to the Authority in October with the purpose of centralising all media queries received by the Authority so as to ensure consistency in the Authority's dealings with the media. Given the importance that the Authority attaches to advocacy, this was seen as an important development in 2001.

Website

The Chairman's Division was responsible for reviewing and developing the Authority's website and coordinated and managed the new website launched in the middle of 2001. While outside expertise was engaged to design the site its content and subsequent maintenance is carried out within the Chairman's Division. Site content is managed to meet the information needs of the general public, journalists and competition practitioners.

The site was regularly updated during the year following its launch and received much favourable comment from users. The Authority also received suggestions from users as to how the site might be improved and in this regard it is intended to install a search engine on the site during 2002. The site offers immediate access to Authority documentation such as policy statements, decisions, notices, press releases etc. and allows users to communicate with the Authority electronically. During the latter part of the year notices regarding employment opportunities in the Competition Authority were posted together with down-loadable application forms etc. The receipt of applications for these positions from various parts of the world was an indication of the interest in the Authority and the positive impact of its website.

The Authority's site contains details of its organisational structure and contains the Authority's manual pursuant to Sections 15 and 16 of the Freedom of Information Act, 1997. Divisional responsibilities and contact details have been posted on the site to

ensure maximum transparency and accessibility for users. Links to other competition authorities and other relevant bodies have been created so that users have access to the widest and most authoritative range of information on competition matters. The links allow users to track national and international policy and legislative developments as they happen.

The references throughout this report to the availability of a range of documentation on the website is evidence of its importance to the Authority as a communication tool of its policy and operational developments. It is also a very useful vehicle for the Authority in carrying out its advocacy role. The website has become a highly effective method for the Authority for consulting its customer base, stimulating debate and eliciting feedback from interested parties on competition policy issues.

Speeches

The Chairman gave approximately 15 speeches or presentations to various organisations and bodies during 2001. These speeches dealt with subjects such as the importance of competition policy in the economy, the work of the Authority and specific issues of interest to individual groups. Bodies addressed included National Competitiveness Council, Macra na Feirme, Laois Rotary Club, IBEC Competition Council, Cork Chamber of Commerce, Students of the Law Society, Irish Small and Medium Size Enterprises, and Burren Law School. A full list of such engagements is given in Annex 4. The Chairman also gave a number of media interviews explaining the work of the Authority during the year.

Event Organisation

During 2001, the Division organised a number of seminars/conferences. As part of its ongoing consultative process in regard to an immunity programme, a lecture was organised in the Institute of European Affairs. Two events were organised in relation to the other main competition policy development of 2001 – the proposed new Competition Bill.

Scott Hammond Lecture

In May, the Authority arranged a seminar in the Institute of European Affairs, chaired by Assistant Garda Commissioner Eamonn Keating, at which Mr. Scott Hammond of the US Department of Justice offered a U.S. perspective on criminal enforcement of US antitrust laws, the challenges they face and the strategies that they employ. He pointed out that Ireland and the United States of America were in a minority in their treatment of antitrust offences as crimes, and those who commit them as criminals, but said that it was a growing minority as a global consensus developed that hardcore cartel activity is bad, harmful to consumers and must be punished. Mr. Hammond outlined the five core principles which underpin the US criminal enforcement programme in respect of antitrust:

- it prosecutes antitrust violations as crimes and treats antitrust offenders as criminals;
- it holds individuals, as well as corporations, accountable for their role in cartel activity;
- it imposes stiff sentences for corporate and individual offenders;
- it employs aggressive investigative techniques for detecting and cracking cartel activity; and
- it induces cooperation through its leniency programme, and other forms of lenient treatment, for cooperating conspirators.

Mr. Hammond described antitrust offences as among the easiest crimes to commit and the most difficult crimes to prove – easy to commit because collusive agreements could be reached literally and figuratively with a wink of an eye and difficult to prove because there were no innocent third party witnesses, no hard physical evidence and no obvious victim. Indeed Mr. Hammond described the absence of an obvious victim as the biggest hurdle to proving an antitrust crime as in most cases victims were unaware that a crime had been committed against them.

Mr. Hammond said that prison sentences provided the strongest deterrent to antitrust activity but that the availability of sentences on their own are insufficient. He said that if firms perceived the risk of being caught by competition authorities as very small then stiff maximum penalties would not deter cartels. Similarly, if cartel members did not fear detection, they would not be inclined to report their wrongdoing to authorities in exchange for leniency. Antitrust authorities therefore needed to cultivate a law enforcement environment in which business executives perceive a significant risk of detection if they enter into or continue to engage in cartel activity.

The final part of Mr. Hammond's lecture was devoted to the workings of the US leniency programme for antitrust offences. He said that its leniency programme had cracked more cartels than all of its other powers combined and recommended that Ireland proceed to introduce its own such programme. He cautioned that the introduction of an immunity programme would not yield results overnight but that through transparency and even handed application of the programme, the legal and business communities would gain faith in the programme. When weighed against the possibility/probability of getting caught, and the consequent likelihood of a jail sentence, cartel members would use an immunity programme and the programme would become an important tool in the detection of cartels.

Paul Boateng Lecture

On October 10th, the Right Honorable Mr. Paul Boateng, MP, Financial Secretary to the UK Treasury delivered a lecture entitled "Competition Policy – driving productivity and growth" which led a roundtable discussion on the same subject. The lecture, to an invited audience of competition and policy experts, was hosted by the Institute for European Affairs.

His address centred around the interrelated topics of the proposed reform to the UK competition regime and the role that the UK Treasury envisages for competition policy in driving productivity. Mr. Boateng's starting point was that productivity is the main factor that affects standards of living. He said that high productivity both supports higher

levels of income, generating tax revenues to provide better public services, and drives competitiveness. The UK Government, he said, had identified a sizable productivity gap between the UK and its neighbours. Microeconomic reforms have focucssed on 5 drivers of productivity growth: competition, enterprise, innovation, skills and investment, with competition first to reflect the impact it has on the other drivers.

He highlighted that strong competition reduces barriers to entry, brings new players who innovate and provide different products, which in turn drives all firms to reduce costs, adopt best-practice techniques, continuously seek to innovate and to reduce slack. Competition also protects consumers, he said, giving them greater choice, quality and value in goods and services.

Mr. Boateng concluded his speech by outlining details of the proposed UK competition policy reforms, which he said seeks to confirm the importance of competition as a driver of productivity growth. He said that these reforms had been underpinned by six key principles:

- Competition decisions should be taken by strong, pro-active and independent competition authorities.
- The competition regime should root out all forms of anti-competitive behaviour.
- There should be a strong deterrent effect.
- Harmed parties should be able to get real redress.
- Government and the competition authorities should work for greater international consistency and co-operation.
- Competition policy should have a high profile – because of its importance for economic performance.

The Future of Competition Policy in Ireland

In December 2001, the Authority organised a conference on "The Future of Competition Policy in Ireland". In April 2000, the Competition and Mergers Review Group recommended major legislative changes to competition law in Ireland. Following this, the Tánaiste brought forward proposals for a new Competition Bill, draft heads of which were approved by the Irish Government in July 2001, and published by the Tánaiste.

The purposes of the conference were to provide a solid basis for informed debate and discussion of this proposed legislation, to signal the support of the Competition Authority for the proposed changes and to enable the Authority to make its legal and economic expertise available to legislators and others who are interested in the substantive issues.

The conference was structured in three sessions. Session 1 put the legislation in a wider international and economic context, outlining international best practice developments in EC and UK policy, and the role of competition in Irish economic policy. The second session outlined the main changes to the legislation, particularly focussing on mergers, enforcement and advocacy. The third session was comprised of an open discussion led by an expert panel before the conference was closed with a keynote address by Mr. Peter Sutherland, Chairman of Goldman Sachs International. The style of the conference was one of a large number of short and focussed presentations, with ample room for questions and discussion.

The conference, attended by 130 delegates, was opened by the Tánaiste and Minister for Enterprise, Trade and Employment, **Mary Harney, T.D**. In her address the Tánaiste outlined the background and rationale to the new legislative proposals. She said that the new Bill would provide for tougher penalties for the more serious offences such as price fixing and market sharing with increased jail terms of 5 years. By way of balance, she said that the Bill would propose the abolition of jail terms for lesser offences though the current level of fines would remain for all offences. The notification system would be abolished in line with proposals being negotiated at EU level and the merger function would, save in respect of media mergers, be transferred to the Authority whose decisions would be based solely on competition criteria.

The Tánaiste complimented the Authority on its initiative of organising the conference as a forum for discussion and debate about the proposed legislation and said that she would consider carefully the deliberations of the conference when finalising the draft Bill. The Tánaiste also gave a commitment that new competition legislation would be enacted by Easter 2002.

Following the Tánaiste's opening remarks, **Frederick Jenny**, Chairman of the OECD Competition Policy Committee and Vice President of the French Competition Council opened the session, chaired by the Chief Executive of Forfás, **John Travers**, on the background context to the new legislative proposals. He addressed the conference on the topic of international best practice in the design of competition law. **Professor John Fitzgerald** of the Economic and Social Research Institute gave a presentation on competition in the context of overall economic policy in Ireland. **Margaret Bloom**, Director of Competition Policy in the UK's Office of Fair Trading, informed delegates of the proposed changes in the UK competition policy regime and **Damian Collins**, Partner in McCann Fitzgerald, Solicitors, Brussels, spoke about the effects of the modernisation of EC competition law on Irish competition policy.

The second session of the conference was chaired by **Moore McDowell**, Economist, and looked at the background to the proposed legislation and how, after enactment, it would effect competition policy in Ireland. **Brian Whitney**, Assistant Secretary in the Department of Enterprise, Trade and Employment outlined the background to the proposed legislation from the recommendations of the Competition and Merger Review Group to the deliberations of his Department in framing the new proposals. **Gary Dixon** of the Department's Competition Policy Section gave an outline of how the Department deals with mergers and acquisitions notified to it under the current legislation and how the merger regime might change following the proposed transfer of the merger function from the Minister to the Authority. **Paul Gorecki**, Member of the Competition Authority in charge of its Monopolies and Cartels Enforcement Divisions, addressed the conference on the Authority's current practices for dealing with alleged contraventions of competition law both in regard to monopolies and cartels and how the practices might change with the enactment of stronger powers for the Authority. Another Member of the Competition Authority, **Isolde Goggin**, Director of its Regulated Markets Division, spoke about the Authority's current competition advocacy role and its relationship with the sectoral Regulators and how they would be affected by the enactment of the proposed legislation. The session was concluded with an open and lively question and answer session.

Session 3 of the conference was a panel discussion chaired by the Commissioner for Aviation Regulation **William Prasifka**. The panel consisted of **Pat Rabbitte, T.D.**, **Andrew Whitaker**, Editor of Competition Press, **Lochlann Quinn**, Chairman of Allied Irish Banks, **Philip Lee** of Philip Lee Solicitors, **John Gunnigan** , Digifone and **Niamh Hyland**, Barrister. Each panelist gave a 5 minute opening statement on a variety of issues surrounding the proposed legislation after which the discussion was opened to the conference floor.

The final session of the conference was a keynote address by **Peter Sutherland**, Chairman of Goldman Sachs International and former Commissioner of the European Commission. Mr. Sutherland's address was focused on the role and importance of competition policy generally which he described as one of the most important policy tools for influencing economic efficiency and productivity. In that context he welcomed the fact that the Government was focusing anew on strengthening the role of competition policy, recognising it as a powerful tool for them to enhance the Irish economy.

Mr. Sutherland traced the evolution and operation of competition policy in a global context, with particular emphasis on the European Union. He described competition policy as a fundamental part of the EU's economic constitution contributing vitally, in tandem with deregulation, to the Commission's internal market strategy by ensuring that barriers are not erected in new forms, that markets remain open and free, that producers and consumers can trade at the most advantageous cost and that firms can adapt to changing economic or technological trends. Mr. Sutherland said however, that while much had been achieved, service sector liberalisation remained incomplete with key sectors such as energy and telecommunications remaining to be fully deregulated. He said that deregulation had been resisted by national governments despite the enormous benefits it would bring to consumers and producers.

Mr. Sutherland went on to explain why, in his opinion, competition policy was important, what benefits it had already brought to Ireland and looked at the proposals to reform Irish competition law. He said that the Competition Authority should strive to maintain and develop itself under the principles of best practice. Concluding, Mr. Sutherland said that

the foundation of European competition policy was strong and functioning well and that improvements to member state regimes, such as Ireland's, would bolster the European process.

International representation

European Union

The Division coordinates representation at official EU committees on which the Authority represents Ireland. Generally other divisions attend these meetings, and details are contained elsewhere in this report. The Chairman attends the "Directors General" meetings in Brussels. These meetings bring together the heads of the competition authorities from the Member States and some other countries, the senior civil servants in the industry ministries who look after competition policy, and senior officials from DG competition for a one day meeting. These meetings are held twice a year and the Chairman attended the two meetings held in 2001.

ECA Meetings

Following an initial meeting in Rome in 2000, a new organisation called the European Competition Authorities (ECA) was founded. The ECA is an informal grouping of the Heads of EU competition authorities and colleagues from Norway, Iceland and Liechtenstein, and the head of DG Competition of the Commission. It is a forum for informal discussion of enforcement and other issues of concerns to competition enforcement agencies. The first meeting in Rome established subgroups to examine cartel immunity programmes and merger procedures, and discussed the organisation of the ECA generally.

In September, the Irish Authority hosted the second meeting of the ECA, partly in recognition of the Authority's 10th anniversary at the end of that month. The meeting opened with presentations from three guest economists. Professor John Sutton of the London School of Economics spoke about understanding market mechanisms and the importance of entry as a mechanism driving competition. Professor Xavier Vives of the Institut d'Analisi Economica addressed the question of competition policy in the banking

sector. Professor Paul Klemperer of Oxford Universtiy discussed the application of competition policy to auction markets. Following the presentations, the meeting discussed the role of economics in competition policy enforcement.

Day two of the meeting opened with a lengthy discussion on building a pro-competition consensus during which the issues of:

- constituencies of support within the economy for competition authorities;
- positive experiences of enforcement actions and/or regulatory reform; and
- entry barriers imposed by the State itself;

were discussed. The meeting agreed that while competition authorities should continue to lobby their respective national governments to remove existing State restrictions on competition, authorities needed to be vigilant against the introduction of new state restrictions by national governments and local authorities. It noted the unwelcome development of Governments increasingly being the focus of pressure from various sectoral interests for derogations from competition law and that as competition enforcement became more vigorous, trade associations would increasingly look to the state for legal or regulatory protection or exemption from the competition rules.

The meeting also received reports from two working groups that it had established to look at Leniency and Merger procedures. The statement it adopted on cartel immunity is discussed on page 19 above.

OECD

The Division contributed to the OECD Roundtable on Portfolio Effects in Merger Analysis at its October meeting, and participated in the first Global Forum for Competition under the aegis of the OECD.

Presentations

During 2001, the Chairman was invited to give a number of presentations abroad. In July, he spoke on “The Globalisation of Antitrust Analysis and Policy” to a seminar organised

by National Economic Research Associates in Santa Fe, New Mexico. In September, he delivered a lecture entitled “Reflections on the 10th Anniversary of the Irish Competition Act” to the UK Competition Law Association and spoke to the 5th Annual Competition Conference of the International Bar Association in Florence, Italy on “Modernisation of the European Competition Rules”. At the 28th Annual Conference on International Antitrust Law & Policy of the Fordham Corporate Law Institute in New York, he presented a paper entitled “Political Economy Insights from Competition Policy in Ireland” and participated in a subsequent roundtable discussion of political economy of competition policy generally. He also spoke at a number of other debates, seminars and conferences in London, Brussels, New York and Dublin during the year. Full details are given in Annex 4 below.

Annex 1

Notifications made in 2001

Notification No.	**Parties**
CA/1/01	Independent Radio Sales (IRS) – Shareholding Agreement
CA/2/01	ServiceMaster Limited / Merry Maids – Franchise Agreement
CA/3/01	MBNA Europe Bank Ltd / ACC Bank plc – Credit Card Affinity Agreement
CA/4/01	MBNA Europe Bank Ltd / Tusa Financial Services Limited – Credit Card Affinity Agreement
CA/5/01	Irish Payment Services Organisation Limited (IPSO) / An Post – Over the Counter "OTC" Bill Payment
CA/6/01	Mechanical Copyright Protection Society Limited and Jonathan Reginald Simon / Music Publishers Association of Ireland / Mechanical Copyright Protection Society Ireland Limited – Share Purchase, Agency and Services Arrangements
CA/7/01	Agency Express / Exeton – Franchise Agreement
CA/8/01	Irish Bankers Federation / Irish Mortgage and Savings Association – Euro Changeover Arrangements
CA/9/01	GlaxoSmithKline – Standard GSK Operating Procedure for the Distribution of Pharmaceuticals – European Economic Area

Annex 2

Decisions and cases dealt with in 2001

Individual Decisions

Decision No.	*Notification No.*	*Parties*	*Decision*
585	CA/10/00	An Post/Standard Postal Franking Machine Licence Agreement	certificate
586	CA/525/92E	Canada Dry Corporation Ltd / Cantrell & Cochrane	file closed
587	CA/527/92E	Schweppes International Limited / Cantrell & Cochrane	file closed
588	CA/305/92E	Cantrell & Cochrane Dublin Ltd / Pepsi Co. Inc.	file closed
589	CA/9/93	Smith & Nephew Limited / Beiersdorf UK Ltd	licence
590	CA/3/00	Cadbury Ireland Sales Limited / Retailers	certificate
591	CA/1/01	Independent Radio Sales / Shareholders	certificate
592	CA/3/01	MBNA Europe Bank Ltd / ACC Bank plc	certificate
593	CA/4/01	MBNA Europe Bank Ltd / Tusa Financial Services Limited	certificate
594	CA/8/01	Irish Bankers Federation / Irish Mortgage and Savings Association	certificate

Category Certificate/Licence

The Authority decided that the following notifications came within the provisions of, and therefore benefited from, Decision No. 528 – Category Certificate / Licence in respect of Agreements between Suppliers and Resellers dated 04/12/98:

CA/4/00	Daewoo Ireland / Dealers	certificate
CA/2/01	ServiceMaster Limited / Merry Maids	certificate

Withdrawals

The following agreements which were notified to the Authority pursuant to Section 7 of the Act were subsequently withdrawn by the notifying parties in 2001:

Notification No.	Parties	Date of Withdrawal
CA/6/00	The Governor and Company of the Bank of Ireland / USIT Now Ltd	15/06/2001
CA/9/00	Dungarvan Energy Limited / Bord Gáis Eireann	01/06/2001

Annex 3

Freedom of Information

The Freedom of Information Act, 1997 asserts the right of members of the public to obtain access to official information to the greatest extent possible consistent with the public interest and the right of privacy of individuals. In accordance with Sections 15 and 16 of the Act, the Authority has published a guide to the functions of and records held by the Authority. The purpose of the guide, which is updated on a regular basis, is to facilitate access to official information held by the Authority by outlining the structure and functions of the Authority, details of the services it provides and how they may be availed of, information on the classes of records it holds and information on how to make a request under the Act. The Authority's guide is available from the Authority, free of charge, in hard copy format and on its website.

During 2001, the Authority received fourteen requests for information under the Act as compared with fifteen received in 2000. Six of the requests were part granted, six were refused, one was withdrawn, and in one case, the information became publicly available before the issue of the final decision. Of the fourteen requests made, five came from journalists and the media, seven from individuals and two from business. One of the decisions made during the year was appealed to the Authority for internal review, following which one record was released in part but the original decision was upheld.

Annex 4

Speeches and Presentations

Speeches and presentations took place in Dublin unless otherwise stated.

Title	Forum	Date	Person
The Competitiveness of Ireland's Economy: National Competition Policy Issues and Practice at Present and in Future	Forfás Annual Meeting, Co. Wicklow	15th January	John Fingleton
Irish Merger Control: An Overview of Proposed Reforms	Irish Business and Employers Confederation Competition Council	7th February	Philip Andrews
State Restrictions on Competition Overview of Proposed Reforms	Institute for European Affairs Confederation Competition Council	12th February	Isolde Goggin
State Actions and Competition Law	Irish Centre for European Law	23rd February	Philip Andrews
Collusive Tendering	Department of Education Planning and Building Unit	21st March	Patrick Massey
	Law Society's Diploma in Commercial Law Students	31st March	Patrick Massey
Economic and Social Injustice - Legal Remedies	Burren Law School, Co. Clare.	5th May	John Fingleton
Market Liberalisation and Regulatory Reform	Irish Business and Employers Confederation Energy Conference	10th May	Isolde Goggin
New Institutional Arrangements for Transport: A Competition Perspective	Foundation for Fiscal Studies Annual Conference	11th May	Isolde Goggin
Conference Chair	International Law Congress 2nd Annual International Law Congress, Dublin	14th May	John Fingleton
Consumers in Economic Policy	Department of Enterprise, Trade & Employment's Annual Senior Management Conference, Co. Monaghan	17th May	John Fingleton
Competition policy and small business	ISME Conference, Athlone	24th May	John Fingleton
The benefits of competition policy	Cork Chamber of Commerce Breakfast Briefing, Cork	25th May	John Fingleton

Title	Forum	Date	Person
The Role of the Competition Authority	Law Society Students	5th June	John Fingleton
New Institutional Arrangements for Transport: A Competition Perspective	Foundation for Fiscal Studies Annual Conference	11th June	Isolde Goggin
Free Markets, Competition and Government	Debate at Centre for the New Europe Competition Policy, London and Brussels	18th and 19th June	John Fingleton
Conference Chair	Competition Press Competition in the Professions	26th June	John Fingleton
The Globalisation of Antitrust Analysis and Policy	NERA Antitrust & Trade Regulation Seminar	5th July	John Fingleton
Entry Regulation and the Influence of an Incumbent Special Interest Group	CESifo Industrial Organisation Workshop	22nd July	John Evans
Entry Regulation and the Influence of an Incumbent Special Interest Group	EARIE Conference Workshop	31st August	John Evans
Conference Chair	Anti-Trust Special Session: EARIE Conference	30th August	John Fingleton
The proposed new competition law	Irish Business and Employers Confederation Competition Council	11th September	John Fingleton
Reflections on the 10th Anniversary of the Irish Competition Act	UK Competition Law Association, London	11th September	John Fingleton
Modernisation of the European Competition Rules	International Bar Association 5th Annual Competition Conference, Florence	21st September	John Fingleton
Competition Law and Policy	Boston University's Overseas Internship Program	23rd September	Declan Purcell
Competition Policy and the Consumer	Consumer Advisory Council	25rd September	John Fingleton
General Benefits of Competition	Laois Rotary Club, Portlaoise	15th October	John Fingleton
Legislative Reform and the Pharmacy Progression	Annual Conference of the Pharmaceutical Society of Ireland, Limerick	13th October	Declan Purcell
Case Management: The Irish Experience	International Cartels Workshop, Ottawa	26th October	Paul Gorecki

Title	Forum	Date	Person
Political Economy Insights from Competition Policy in Ireland	28th Annual Fordham Conference on International Antitrust Law & Policy, New York	26th October	John Fingleton
New Institutional Arrangements for Transport: A Competitive Perspective	Students of M.Sc. in Transport, Trinity College	9th November	Isolde Goggin
Getting paid for Quality – The parameters	Macra na Feirme's Annual Young Farmers Conference, Westport	23rd November	John Fingleton
The Competition Authority and Regulatory Reform	Presentation to Dept. of the Environment and Local Government	28th November	Isolde Goggin Pat Kenny Vivienne Ryan
Competition policy, productivity and competitiveness	Presentation to National Competitiveness Council	30th November	John Fingleton
The Applicability of Competition Law in the Telecoms Sector	The Association of Licensed Telecommunications Operators	7th November	Vivienne Ryan

Annex 5: Cartel Immunity Programme

CARTEL IMMUNITY PROGRAMME

Introduced 20th December 2001

PREFACE

This notice outlines the policy and procedures involved in applying for immunity from prosecution for criminal offences under the Competition Acts, 1991 and 1996.

The Competition Authority (the Authority) has identified the pursuit of cartels as a top priority. Cartel behaviour is almost inevitably harmful to consumers as it results in their having to pay more than they should for goods and services. Cartels are by their very nature conspiratorial. The participants are secretive and hard-core cartels are notoriously difficult to detect and prosecute successfully. This programme encourages self-reporting of unlawful cartels by offenders at the earliest possible stage.

This notice makes transparent the policy of both the Authority and the Director of Public Prosecutions (the DPP) in considering applications for immunity in such cases of self-reporting. It also outlines the process through which parties must agree to cooperate, in order to qualify for immunity.

This Programme comes into effect on 20th December 2001.

CONTENTS

A. INTRODUCTION

1 The Competition Acts, 1991 and 1996 (the Competition Acts) establish rules for the conduct of business in Ireland. The Acts prohibit anti-competitive agreements, decisions and concerted practices, and abuse of dominance. The most serious forms of anti-competitive agreements are price-fixing, bid rigging and market sharing by competitors – generally described as cartel activity.

2 For the purposes of this notice, the term undertaking is as defined in section 3 of the Competition Act, 1991.

3 The Competition Acts established the Authority as an independent body responsible for administering and enforcing the Acts, and gave it the power to carry out investigations. The 1996 Act created criminal and civil provisions that prohibit amongst other things, horizontal price-fixing agreements and "bid-rigging". The criminal provisions carry penalties of up to two years in prison (for individuals) and fines of up to £3million or 10% of turnover (whichever is the greater) for individuals and undertakings.

4 When there has been a violation of the Acts, the Authority's objective is to investigate the anti-competitive behaviour, prosecute the undertakings and individuals responsible, and deter similar offences. The Authority recognises the importance of programmes that contribute to the detection, investigation and prosecution of cartels. This notice details the approach of both the Authority and the DPP to the grant of immunity for an offender who violates the Competition Acts, but nevertheless comes forward and volunteers information to the Authority which leads to the detection and prosecution of other offenders who might otherwise escape detection. A cartel necessarily involves at least two conspirators. Immunity would be granted to one conspirator in order to bring the other conspirator to justice.

5 This notice does not give legal advice. Readers should refer to the Acts and obtain independent legal advice when questions of law arise or if a particular situation causes concern.

6 Nothing in this programme shall affect the discretion of the Director of Public Prosecutions in the exercise of his functions.

7 In this notice, the term immunity refers to a grant of full immunity from prosecution in criminal cases under the Competition Acts.

8 Any person or undertaking implicated in an activity that violates the Competition Acts may offer to co-operate with the Authority and request immunity. An undertaking may choose also to initiate an application on behalf of its employees including its directors and officers. Employees who are neither directors nor officers of the corporate undertaking may approach the Authority on their own behalf.

B. ROLES OF THE AUTHORITY AND THE DPP WHEN A REQUEST FOR IMMUNITY IS MADE

9 The Authority investigates alleged breaches of the Competition Acts. The DPP has sole responsibility to prosecute offences on indictment.

10 Applications for immunity should be made to the Authority. Only the DPP can grant immunity. Subject to the requirements set out below, the Authority will make a recommendation to the DPP to grant immunity.

C. OBTAINING IMMUNITY

11 The Authority encourages parties (which may include corporate undertakings, partnerships and individuals) to come forward as early as possible.

12 Subject to the requirements set out below, the Authority will recommend immunity to the DPP if the applicant is the first to come forward before the Authority has gathered sufficient evidence to warrant a referral of a completed investigation file to the DPP.

The requirements:

13 The applicant must take effective steps, to be agreed with the Authority, to terminate its participation in the illegal activity.

14 The applicant must do nothing to alert its former associates that it has applied for immunity under this programme.

15 The applicant, including all its relevant past and present employees, must not have coerced another party to participate in the illegal activity and must not have acted as the instigator or have played the lead role in the illegal activity. The applicant must be able to show this to the satisfaction of the Authority.

16 Throughout the course of the Authority's investigation and any subsequent prosecution, the applicant must provide complete and timely co-operation. In particular, the applicant must:

a) Reveal any and all offences under the Competition Acts in which it may have been involved;

b) Provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control, including all documentary and other records, wherever located, relating to the offences under investigation with no misrepresentation of any material facts; and

c) Co-operate fully, on a continuing basis, expeditiously and at its own expense throughout the investigation and with any ensuing prosecutions.

17 In the case of a corporate undertaking, the application for immunity must be a corporate act. While applications from individual directors or employees will be considered they will not be regarded as made on behalf of the undertaking in the absence of a corporate act. Corporate undertakings must take all lawful measures to promote the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions.

18 If the first applicant to request immunity fails to meet these requirements, a subsequent applicant that does meet these requirements can be considered for immunity

D. IMPACT OF CORPORATE IMMUNITY ON DIRECTORS, OFFICERS AND EMPLOYEES

19 If a corporate undertaking qualifies for a recommendation for full immunity, all past and present directors, officers and employees who admit their involvement in a cartel as part of the corporate admission, and who also comply with Paragraph 16 (a) to (c) will also qualify.

20 Applications for immunity for an individual employed by an undertaking involved in a cartel will be considered, even where the employer undertaking does not apply or otherwise co-operate under this programme.

E. THE IMMUNITY PROCESS

Step 1: Initial Contact

21 Applications for immunity must be made to the uniquely designated officer in the Authority who will receive all applications for immunity. Contact with the designated officer must be in person or by telephone. Applications made to any other person or body that is not at that time the officer designated for that purpose would be invalid. The officer designated by the Competition Authority may be contacted at telephone number 087 763 1378 between the hours of 10am and 4pm Monday to Friday, except public or bank holidays.

22 The applicant should present an outline of the facts of the case to the designated officer of the Authority. The applicant may initially present the case through its own legal advisors in hypothetical terms so as to protect its anonymity.

23 Applications for immunity will be queued and dealt with in the order of receipt. An applicant will be allowed to place a “marker” with the designated officer for a period to be determined by the designated officer in order to retain the applicant’s

place in the queue for immunity until such time as the applicant is in a position to complete its application for immunity.

24 Joint applications for immunity by two or more conspirators will not be accepted and will be invalid.

Step 2: Qualified Guarantee of Immunity

25 If the applicant decides to proceed with the immunity application, a description of the illegal activity must be furnished to the Authority, which in the Authority's opinion is sufficient for its purposes. If the Authority is of the opinion that the case falls within this programme, the Authority will then refer the matter to the DPP seeking a written qualified agreement to grant immunity from the DPP.

Step 3: Full Disclosure

26 Upon receipt by the applicant of a written qualified agreement to grant immunity from the DPP, both the DPP and the Authority must be informed with sufficient detail and certainty what evidence can be provided by the applicant. Full disclosure is required at this stage and will be conducted with the understanding that neither the Authority nor the DPP will use the information against the applicant, unless there is a failure to comply, as described in Part F, below.

27 The applicant will make full disclosure after the applicant has been reminded of its legal privilege against self-incrimination. This will ensure that should there be a subsequent failure by the applicant to comply with the terms of the immunity agreement, the Authority in continuing its investigations can then use information given by the applicant under full disclosure.

Step 4: Immunity Agreement

28 Once the terms of the qualified guarantee have been satisfied the DPP will execute an immunity agreement that will include all continuing obligations as described in paragraph 16, above.

F. FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE AGREEMENT

29 Failure to comply with any of the requirements set out in this programme may result in the DPP revoking the immunity agreement made with the applicant. The Authority will then continue its investigation and will include the applicant that has failed to meet its obligations under the agreement in the investigation.

30 Without prejudice to the generality of the above, failure to comply with requirements under the agreement includes failure by an undertaking to fully promote the complete and timely co-operation of its employees, failure to disclose any and all offences and failure to provide full, frank and truthful disclosure of all evidence and information known or available to it or under its control.

G. DISCLOSURE

31 Information becoming available pursuant to this programme will not be disclosed other than in accordance with the normal practices and procedures pertaining to criminal investigations and prosecutions. In particular, information may be disclosed:

a) When there has been public disclosure by the applicant;

b) Where disclosure is required by law;

c) When disclosure is for the purpose of the administration and enforcement of the Act;

d) When disclosure is necessary for the prevention of the commission of a criminal offence; and/or,

e) When disclosure is made in the course of an investigation or subsequent proceedings.

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