

IRELAND*(1998)***Summary**

The Competition Authority undertook, during 1998, an extensive amount of work in accordance with the functions assigned to it under the Competition Acts, 1991 and 1996 with the purpose of achieving its objective to promote greater competition in every sector of the Irish economy by tackling anti-competitive practices, thereby contributing to an improvement in economic welfare.

During the course of 1998 a total of 160 complaint files were opened, including ten cases which were commenced on an "own initiative" basis. A further 116 cases had been carried over from 1997. A total of 181 complaint files were closed during the year compared with 156 in 1997. By the end of the year, the Authority had a total of 95 complaints on hand. 3 cases brought by the Authority involving alleged price fixing were dealt with by the Courts during 1998 while the Authority issued proceedings in a further 2 cases.

Eleven notifications of agreements were made to the Authority in 1998 bringing the total of notifications since the Act came into force to 1,381. The Authority disposed of 129 notifications in 1998, bringing the total disposed of since 1991 to 1,249. The Authority took 43 decisions bringing the total to 532.

During the year 233 mergers were notified to the Minister for Enterprise, Trade and Employment under the Mergers Acts. 2 of these mergers were referred to the Authority for investigation.

The Tanaiste (Deputy Prime Minister) and Minister for Enterprise, Trade and Employment appointed an additional member to the Authority during 1998. This brought the number of members up to the maximum level of five permanent members permitted under the legislation for the first time since the Authority was established in October, 1991.

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Annual Report on Developments in Ireland

I. Changes in Competition Law and Policies Adopted or Envisaged

There were no changes in Irish competition law and policy in 1998.

II. Enforcement of Competition Laws and Policies

Action against anti-competitive practices.

Under the 1991- 1996 Acts - the work of the Competition Authority.

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I. Changes in Competition Law and Policies Adopted or Envisaged

1. There were no changes in Irish competition law and policy in 1998.

II Enforcement of Competition Laws and Policies

Action against anti-competitive practices

Under the 1991- 1996 Acts - the work of the Competition Authority

Enforcement Activities

2. During the course of 1998 the Director of Competition Enforcement conducted a number of investigations into alleged serious breaches of the Acts. Three cases brought by the Authority were dealt with by the Courts during the course of the year, while the Authority issued proceedings in a further two cases and these had still to go to trial at the end of the year. In one case a file was submitted to the Director of Public Prosecutions with a recommendation that criminal proceedings should be instituted. The authority also decided to institute proceedings under Section 6, as amended in the same case. Several other investigations were still ongoing at the end of the year.

3. Authority officers conducted a total of 12 searches of premises in accordance with the provisions of Section 21 of the 1991 Act, as amended. In one instance a complaint was referred to the Gardai alleging that officers were obstructed in the conduct of a search contrary to the provisions of Section 21(3) of the 1991 Act, as amended. In addition, in the case of two investigations, summonses were issued compelling individuals to appear before the Authority and produce documents in accordance with paragraph 7 of the Schedule to the 1991 Act, as amended.

4. During the course of 1998 a total of 160 complaint files were opened by the Authority compared with 220 during 1997. Ten cases were opened on an own initiative basis the remaining 150 being opened on foot of complaints received. A further 116 files were carried over from 1997. A total of 181 cases were dealt with during the course of the year, compared with 156 in 1997. Thus by the end of the year there were 95 cases open.

5. The most common single complaint type involved alleged cartel activities. There were 34 such cases. A further 28 cases involved alleged abuse of a dominant position. In the vast majority of such cases the alleged offenders were State companies.

6. Since the 1996 Act came into force the Authority has opened a total of 474 complaint files. In the two and a half years since the passage of the 1996, Act, there have been 109 complaints alleging price fixing or other cartel type behaviour with a further 88 cases alleging abuse of a dominant position. The figures reflect the fact that in some instances there may be more than one complaint about the same behaviour. In addition it may be clear from even a preliminary investigation that the complaint is based on nothing more than an unfounded suspicion. As against this, the reality is that cartel agreements are generally secretive in nature, particularly since the introduction of criminal penalties in the 1996 Act. There is therefore good reason to believe that the number of cases reported to the Authority represents only a proportion of the number of actual cases. Price fixing on this scale represents a serious cost to consumers

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and to the economy as a whole and illustrates clearly the need for vigorous and effective competition legislation.

7. Details of a number of specific cases dealt with by the Authority during 1998 are outlined below.

8. In April 1997, the Irish Travel Agents Association (ITAA) announced that its members would not sell Ryanair tickets unless that company reversed a decision to reduce the commission rates paid to agents. The Authority wrote to the ITAA indicating that, unless it reversed this decision, the Authority would institute proceedings under Section 6 of the 1991 Act, as amended. The ITAA indicated in a letter dated 11 April 1997, that it would reverse the decision and inform its members accordingly.

9. It subsequently emerged that a large number of ITAA members were not selling Ryanair tickets. Following further investigations by the Director, including a search of the ITAA offices on foot of a warrant issued under Section 21 of the Act, the Authority decided to institute proceedings against the ITAA and a number of individual travel agents alleging that they were parties to an agreement/decision or a concerted practice whereby they would not sell Ryanair tickets unless it paid them higher rates of commission for such sales and that such arrangements were in contravention of Section 4(1) of the 1991, Act. The Authority was concerned that any arrangement involving a boycott of a particular airline would reduce competition in the market and deny consumers access to low-price air fares and that it was in the public interest that such actions should be prevented.

10. On 27th July, 1998 the ITAA gave undertakings to the High Court that it would not organise meetings, circulate members or take any other actions to implement or organise a boycott or take any actions which were designed to encourage ITAA members not to sell Ryanair products. The individual travel agents concerned also gave undertakings not to take any steps to boycott Ryanair products with a view to forcing Ryanair to increase commission on its airline tickets. The agents involved were Portlaoise Travel Limited, Club Travel Limited, Tony Bond Travel, Sunset Tours & Travel and Arrow Tours. The defendants also agreed to pay the Authority's legal costs.

11. Following the passage of the 1996 Act, the Minister referred to the Director of Enforcement a complaint alleging that the Irish Veterinary Union (IVU) and its members were engaged in price fixing in respect of fees charged to farmers for carrying out compulsory TB tests. In April 1997 the Authority received a complaint from an individual farmer alleging that, when they had gone to a vet who was prepared to carry out TB testing for a lower rate than that charged by IVU members, local vets had refused to supply any other services.

12. Authority officers conducted an investigation into the allegations during the course of which they interviewed a number of individual farmers as well as representatives of the IFA and ICMSA. In February authorised officers from the Authority carried out a search of the IVU offices on foot of a warrant issued under Section 21 of the 1991 Act, as amended. During the course of the search they copied a number of documents. These included a newsletter issued to IVU members dated 29 March 1996 which included a list of *'recommended minimum fees'* and stated that it was *'vital that these minimum charges are strictly adhered to subject to your normal credit policies. There should be much greater contact with and co-operation between neighbouring practices in this regard. The IVU branch will facilitate this.'* In a subsequent newsletter dated 24 March 1997 reference was made to recommended minimum fees for other clinical services and it was stated that: *'It is stressed that these recommended fee guidelines are minimum standards only. However, it is the Union's view that no practice should be charging below these levels. Branches will be asked to do what they can to reproduce the co-operation seen in relation to TB fees in bringing fees up to these and improved levels. Obviously where your current fees are above this level you should continue charging as before.'*

13. The Authority brought court proceedings against the IVU under Section 6 of the 1991 Act, as amended. The proceedings were settled on 19th October 1998 after the IVU gave undertakings to the court that it would not recommend minimum fees to be charged by its members for carrying out annual testing for TB and Brucellosis and/or for providing clinical veterinary services. It further undertook to inform its members that :

- a) any agreement regarding the charging of such minimum fees;
- b) the operation of any recommended minimum fee system; and
- c) the refusal to provide clinical services to farmers who refuse to pay such recommended fees

were contrary to Section 4 of the Competition Act, 1991. The IVU also agreed to pay the Authority's costs.

14. The Director began an investigation into a possible cartel in the road haulage industry in May 1997 following complaints that the Irish Road Haulage Association (IRHA) had written to various firms indicating that IRHA members had agreed minimum rates for the transport of freight to and from Dublin Port and would not provide services to any customer at rates below these levels. On foot of this Authority officers carried out a search of the IRHA offices on 22 May. In early June a large number of hauliers began blockading sections of Dublin Port. The Authority applied for an ex parte injunction against the IRHA and a number of individual hauliers on 6 June, because it believed that the blockade was intended to secure customers' agreement to the proposed rates. An injunction was granted and was subsequently lifted when the defendants gave undertakings not to engage in any further blockade, pending a full hearing of the case.

15. The Authority's case against the IRHA and the other defendants began in the High Court on 20 October 1998. The action was settled on 27th October 1998 when the defendants agreed to a Court declaration that they had engaged in a concerted practice to fix prices for road haulage services to and from Dublin Port between January and June of 1997. The defendants also gave undertakings to the Court that they would not engage in price fixing contrary to Section 4(1) of the Competition Act and they would not engage in the blockading of Dublin Port and the surrounding areas in order to achieve any increase in prices for haulage services. The IRHA also agreed to an order for costs in favour of the Authority.

16. An investigation was launched into the pub trade following newspaper reports of increases in drink prices in October 1997, in the wake of the lifting of a Price Freeze Order by the Minister. Following certain inquiries, authorised officers conducted a search of the offices of the Vintners Federation of Ireland (VFI) in late November. Subsequent searches of the offices of the Licensed Vintners Association (LVA) and the Limerick City branch of the VFI were carried out in January and February 1998. As a result of the investigation, the Authority instituted separate proceedings against the VFI and the LVA and a number of individual publicans alleging that they had engaged in agreements/decisions and/or concerted practices to increase drink prices by a set amount in the Summer of 1996 and in October/November 1997 and to fix margins in respect of certain alcoholic beverages on an ongoing basis.

17. During 1997 the Director wrote to Avonmore Waterford Group plc (AWG) and a number of multiple and symbol groups regarding the liquid milk trade in Dublin. In early 1998 allegations that certain parties were involved in arrangements to fix the retail price of milk were made to the Authority. A follow-up investigation was launched. Between August and November 1998 a total of nine searches were carried out by authorised officers of a number of dairies and supermarket multiples. In one case the Authority referred to the Gardai allegations that officers were obstructed in the course of their search in breach of Section 21(3) of the 1991 Act. In addition to these searches the Authority interviewed a number of individuals engaged in milk supply and retailing.

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18. In December the Authority decided to refer a number of matters to the Director of Public Prosecutions with a recommendation that criminal prosecutions be brought against a number of parties in respect of activities discovered during the course of the investigation. The Authority also decided to bring civil proceedings under Section 6 of the 1991 Act, as amended, in respect of these and a number of other practices.

19. During the course of the investigation the Authority became aware of a proposal by AWG to acquire control of Athboy Co-Op. The Authority brought proceedings under Section 6 of the 1991 Act, as amended, seeking an interlocutory injunction to prevent the acquisition on 10th November, 1998. It was agreed by the defendants, AWG and Athboy, at the outset that there was a fair issue to be tried. However, the Court refused to grant the injunction on the basis of the balance of convenience. The full matter is yet to be heard.

20. The Authority received a number of complaints regarding the activities of Telecom Eireann during 1997 and 1998. Following investigations into a number of these cases, the Authority decided that in two instances there was, in its opinion, evidence of a possible abuse of a dominant position. The Authority decided to write informing Telecom that unless the practices concerned were terminated, it would institute proceedings under Section 6. The position had not been resolved by the end of the year. The Authority wrote in similar fashion to RTE following a complaint about its code for advertisements by commercial radio stations. Again the issue had not been resolved by year end.

21. In a number of other cases the Authority intervened and succeeded in resolving matters without having to institute court proceedings.

22. In a large number of cases complainants failed to respond to Authority requests for further information to support the allegations made in the complaints received. In the majority of such cases the Authority has little option but to close the file for lack of evidence. In the case of any complaint alleging a potentially serious breach of the Acts, the Authority makes every effort to obtain further information from the complainant rather than close the file.

Notifications

23. The number of notifications of agreements made to the Authority in 1998 was 11 compared to 23 in the previous year. Up to the end of 1998, a total of 1,381 notifications had been made, of which 1,249 had been dealt with at the end of 1998.

Decisions

24. During 1998 the Authority took 43 decisions and disposed of 129 notified agreements leaving 132 out of the total of 1,381 left to be dealt with. Some of the decisions are discussed below.

25. Among the forty three decisions made by the Authority during 1998, a number related to intellectual property rights. In Dalgety Agriculture Ltd (Decisions 502 to 505) the Authority certified that the exclusive know-how licensing agreements and ancillary trade mark agreements did not contravene Section 4(1) of the Competition Act. In its assessment, the Authority argued that there should not be a presumption that intellectual property rights create market power and said that where market shares were relatively small and where there was effective competition, licensing simply allowed the parties to transfer their know-how. In its assessment of the conditions of competition the Authority drew particular attention to the fact that the licensee's market share was insignificant.

26. On 4 September 1997 Guinness Ireland Group (GIG) notified to the Authority 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, in the event of a refusal by the Authority to issue a certificate, a licence. On 17 June 1998 the Authority, as decision no. 512, granted a licence to the agreement, subject to certain conditions. These conditions were that GIG would, not later than 15 January 1999, reduce its shareholding in Cantrell & 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 and by M & J Gleeson & Co., Comans Wholesale Limited and J. Donohoe 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. The combined cases were due to be heard in January 1999.

Category Certificate/Licence in respect of agreements between Suppliers and Resellers.

27. Since the coming into effect of the Competition Act in October, 1991 a large number of agreements involving exclusive and non-exclusive distribution, exclusive purchasing, franchising and selective distribution have been notified to the Authority and many of these agreements were dealt with through a combination of category licences and individual certificates and licences. With the imminent expiration at the end of 1998 of the Authority's existing Category Licence for Exclusive Distribution the Authority reviewed its existing category licences and individual certificates and licences for non-price vertical restraints. The Authority concluded that, in certain circumstances, non-price vertical restraints were not anti-competitive and identified a category of such agreements which, in its opinion, did not contravene Section 4(1) of the Act. The Authority also identified a second category of such agreements which could also normally be regarded as satisfying the conditions for the grant of a licence laid down in Section 4(2).

28. Consequently, the Authority decided, as Decision No. 528, to publish a new Category Certificate/Licence in respect of agreements between suppliers and resellers. The decision applies to vertical agreements between undertakings which operate at different stages in the supply chain in respect of the same product or service whereby one party supplies the product or service to another party for resale. It therefore includes, for example, agreements between manufacturers, importers and suppliers on the one hand and distributors, wholesalers and retailers on the other. The vertical agreements concerned include exclusive distribution, exclusive purchasing, franchising and, for the first time, selective and non-selective distribution.

29. The Authority had been aware for some time that the existing category licences were unsuited to the task of ensuring legal certainty of contractual relations in an economic context where distribution structures and techniques were changing rapidly. The Authority considered that the new Category Certificate/Licence was more in tune with modern economic analysis of business behaviour, that it delivered a greater degree of legal certainty and that, in many respects, it reflected an attempt by the Authority to respond to the new environment of business agreements.

30. In preparing the Category Certificate/Licence in respect of agreements between suppliers and resellers, the Authority published a draft of the document and organised an open seminar in September at which the Authority explained its thinking behind the published draft and listened to the views of business and the legal profession. The Decision was published on the 11th of December, 1998 and by the end of the year 41 notified agreements had been dealt with under the certificate/licence.

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III. Mergers and Concentrations

Competition Authority

(i) The Coillte Teoranta/Balcas Limited Merger Proposal

31. On 27 January, 1998, the Tanaiste (Deputy Prime Minister) and Minister for Enterprise, Trade and Employment referred to the Competition Authority the proposed acquisition of the majority of the issued share capital of Balcas Limited by Coillte Teoranta in accordance with Section 7 of the Mergers and Take-overs (Control) Acts, 1978 to 1996. The Authority transmitted its report to the Tanaiste on 6 March, 1998.

32. The Authority stated in its report that by virtue of its 97% market share of roundwood sales in the State in 1996, Coillte enjoyed a dominant position in that market. The Authority said that Coillte's dominance was sustained not only by its near monopoly over roundwood sales but also by three significant barriers to entry to the market:

- a) the phytosanitary ban on imports of raw, unbarked timber into the State,
- b) high transport costs of forestry products relative to product value, and
- c) the long lead time between tree planting and harvesting.

33. The Authority contended that because of these three barriers to entry, Coillte would continue to have a dominant position in the roundwood market in the State for the foreseeable future. The Authority considered that the critical issue raised by the proposed take-over of Balcas by Coillte was the effect of the take-over on the dominance of Coillte in the roundwood market and took the view that a strengthening or increase in that dominance would be sufficient justification for blocking the take-over. In coming to this view the Authority relied on the EC Merger Regulation (4064/89) which provides that a merger which "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded is incompatible with the common market" and should be prevented by the Commission. The Authority considered also that Balcas had a competitive significance greater than its market share because of its ability to act independently of Coillte in that it alone had significant alternative sources of supply. As a result Balcas was capable of undercutting Coillte's prices by bringing cheaper product into the State. It was the Authority's view therefore that as the elimination of Balcas as an independent actor would strengthen the dominance of Coillte by allowing it (Coillte) to sustain higher prices for its sales, the take-over was likely to restrict competition in the State and operate against the common good. It also considered that there were other restrictions on competition likely to occur as a result of the proposed take-over. After the take-over, Coillte would, according to the Authority, be both the dominant/sole supplier to its customers in the State as well as a competitor. These circumstances, the Authority felt, were likely to increase the ability of Coillte to abuse its dominant position in the State and restrict competition.

34. In the Authority's opinion, the proposed acquisition of the majority of the issued share capital of Balcas by Coillte was likely to restrict competition in the State and was likely to operate against the common good. The Authority therefore recommended that the transaction not be allowed to proceed.

35. On 9th April, 1998 the Tanaiste and Minister for Enterprise, Trade and Employment announced that she had accepted the majority report of the Competition Authority and had signed an Order under Section 9 of the Mergers, Take-overs and Monopolies (Control) Act, 1978 prohibiting the take-over. The Tanaiste published the Authority's report with commercially sensitive information omitted.

(ii) *The Ladbroke (Ireland) Ltd/Coral Leisure (Ireland) Ltd Merger Proposal*

36. On 1st April, 1998, the Tanaiste (Deputy Prime Minister) and Minister for Enterprise, Trade and Employment referred to the Competition Authority, in accordance with Section 7(b) of the Mergers and Take-overs (Control) Acts, 1978 to 1996, the proposed acquisition of Coral Leisure (Ireland) Limited by Ladbroke Limited. The Authority transmitted its report on 7 May, 1998.

37. The Authority considered that the proposed transaction would have little or no impact on competition in the Irish off-course betting market. The market, pre -merger, was in the view of the Authority either not concentrated or moderately concentrated and the post-merger increase in concentration would be relatively small. The Authority stated that the market was and would remain, after the completion of the merger, competitive with ease of entry conditions.

38. The Authority was also of the view that no market power would accrue to the merged entity in the off-course market because of the presence of new products and the presence of both price and non-price competition in the market. Ease of entry and the proliferation of smaller independent bookmakers throughout the country would, according to the Authority, ensure a degree of contestability in the market. The Authority also pointed out that the provision of S.I.S. (satellite information services), for example, would continue to facilitate entry into the market. It was the Authority's view that as the nature of the Irish market was conducive to ease of entry and a guarantor of continued competition in the market the proposed transaction was unlikely to prevent or restrict competition in the State.

39. The Authority stated that it did not believe that the proposed merger was likely to have any adverse effect on continuity of supplies or services, level of employment, regional development, rationalisation of operations in the interests of greater efficiency, research and development, increased production, shareholders and partners, employees or consumers.

40. In the Authority's opinion, the proposed acquisition of the entire issued share capital of Coral by Ladbrokes was unlikely to prevent or restrict competition or restrain trade and was unlikely to operate against the common good. The Authority therefore recommended that the proposed transaction be allowed to proceed without conditions.

41. On 3rd July, 1998, the Tanaiste announced that she had accepted the Competition Authority's conclusion that the merger be allowed to proceed and had therefore approved the merger. The Tanaiste published the Authority's report with confidential material omitted.

Statistics on Concentrations

42. Concentrations notified to the Minister for Enterprise, Trade and Employment under the Mergers and Takeovers (Control) Act, 1978, as amended, in 1997 and 1998 were:-

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	1997	1998
Carried forward	2	2
Notified in year	201	233
Outside Act	136	152
Did not proceed / Withdrawn	3	2
Allowed	61	68
Prohibited	-	1
Referred to the Competition Authority	1*	2**
Carried forward to next year	2	12

Notes:

* The proposed acquisition of United Beverages Holdings Limited (UBH) by the Guinness Ireland Group (GIG) was referred to the Competition Authority for further detailed investigation. However, the Minister subsequently decided to withdraw the referral due to a procedural flaw. Following discussions with the Minister, Guinness Ireland Group then agreed to voluntarily submit their agreement to take over UBH to the Competition Authority seeking certification under the Competition Acts.

** The 2 proposals which were referred to the Competition Authority involved (a) Coillte Teoranta/Balcas Ltd and (b) Ladbroke (Ireland) Ltd/Coral Leisure (Ireland) Ltd. The Minister accepted the Competition Authority's recommendations in both cases. Accordingly, she prohibited (a) the proposed acquisition by Coillte Teoranta of Balcas Ltd and she permitted (b) the Ladbroke (Ireland) Ltd acquisition of Coral Leisure (Ireland) Ltd.

IV Resources of the Competition Authority

43. In May, 1998 the Tanaiste and Minister for Enterprise, Trade and Employment appointed an additional member to the Authority. This brought the number of members up to the maximum of five permanent members as permitted by the Competition Act, 1991 for the first time since the Authority was established.

44. The staff of the Authority as at 31 December, 1998 consisted of five members, two legal advisors, four economists and 13 support staff bringing the total employed in the Authority to 24. This compared with a total of 21 persons employed with the Authority at the end of 1997.