

**ANNUAL REPORT ON DEVELOPMENTS IN IRELAND**

*(1 January 2001 - 31 December 2001)*

**Summary**

1. The Competition Authority undertook, during 2001, 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.

**Enforcement Activities**

2. 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. 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.

3. 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. 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.

**Notifications**

4. 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 Notifications**

5. During the year 302 mergers were notified to the Minister for Enterprise, Trade and Employment. The Minister referred one proposed merger to the Competition Authority for detailed examination

**Competition Advocacy**

6. 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

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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.

7. 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 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 on 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.

### **Other Activities**

8. The Authority participated in a range of international for 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 national and international conferences. 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.

9. On the domestic policy front, a 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**

10. 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](http://www.tca.ie).

### **Authority structure**

11. In January 2001 the Authority formally put in place a new organisational structure modelled on the format recommended in an independent review carried out in 2000. The new structure comprises five

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separate divisions, each one directed by a Member of the Authority. These divisions are the Chairman's Division, Cartels Division, Monopolies Division, Regulated Markets Division and Competition Policy Division.

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### **I Changes in Competition Law and Policies Adopted or Envisaged**

### **II Enforcement of Competition Laws and Policies**

Action against anti-competitive practices.

1. Action against anticompetitive practices, including agreements and abuses of dominant positions.  
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### **III The role of the Competition Authority in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

### **IV Resources of Competition Authority**

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## **I Changes in Competition Law and Policies Adopted or Envisaged**

### ***Legislative Developments***

12. 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 2001 with the publication of the Heads of Bill and second at the end of December with the publication of the Competition Bill, 2001. The Bill proposed to transfer responsibility for examining and deciding upon mergers and take-overs, save for media mergers, from the Minister to the Authority and proposed that determinations would be on the basis of competition criteria only. The Bill also proposed new enforcement powers, the abolition of the notification system and making the Authority more financially autonomous and accountable. The Bill was enacted by the Irish Parliament and signed by the President of Ireland in April 2002 and will be commenced by the Minister for Enterprise, Trade and Employment later in 2002.

## **II Enforcement of Competition Laws and Policies**

### **1. Action against anti-competitive practices, including agreements and abuses of dominant positions**

#### **Enforcement Activities**

13. 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. 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.

14. 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. 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.

#### **Setting Enforcement Priorities**

15. When the divisional structure of the Authority 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.

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16. 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.

17. 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.

18. In 2002 both of the enforcement divisions will expand in accordance with the recommendations on staffing in the Deloitte and Touche Report of 2000. It is anticipated that progress will be made in reducing the volume of open files.

### **Legal Proceedings**

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

### **Cartel Immunity Programme**

20. On December 20<sup>th</sup> 2001, the Competition Authority, in conjunction with the Director of Public Prosecutions, introduced a "Cartel Immunity Programme. The introduction of this programme followed on from an extensive consultative process during which a consultation document was published on January 4<sup>th</sup> 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.

21. 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.

### **New Investigative Techniques**

22. During 2001, the Cartels Division employed new investigative techniques including surveillance and co-operation with An Garda Síochána (Police Force). 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.

23. Collaboration with members of An Garda Síochána is a major step forward for the Authority in conducting cartel investigations. The Gardai are professional investigators in criminal matters. They bring with them a body of knowledge and experience in the conduct of criminal investigations. During 2001, Gardai, 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.

### **Notifications**

24. 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.

25. During the course of 2001, 9 agreements were notified to the Authority, compared to 10 notifications in 2000. 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 1,417 notifications had been made to the Authority under Section 7 since the commencement of the Act.

### **Notification of Agreements in 2001**

26. Many agreements which would otherwise be notifiable are now covered by the Authority's Category Certificate for Mergers (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. When the new Competition Act, 2002, referred to earlier, is commenced, the notification system will be abolished.

### **Decisions**

27. 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, 98% of notifications received by the Authority since the commencement of the Act in 1991 had been disposed of. All of the Authority's decisions are available on its website at [www.tca.ie](http://www.tca.ie).

## **2. Mergers and Concentrations**

28. During the year 302 mergers were notified to the Minister for Enterprise, Trade and Employment. Under the provisions of the Mergers, Take-overs and Monopolies (Control) Acts, the Minister for Enterprise, Trade and Employment may refer a proposed merger or take-over to the Authority to consider whether the proposed merger would be likely to prevent or restrict competition, restrain trade or operate against the common good and the Authority must state its opinion in this regard. One case was referred to the Authority in December 2001 – the proposed acquisition by GEHE of the Unicare chain of retail pharmacy outlets.

29. The Competition Act, 2002 provides that the merger function, save in the case of media mergers, will be transferred from the Department of Enterprise, Trade and Employment to the Competition Authority. In preparation for the transfer of this function the Authority has been represented on the EC's advisory committee on concentrations and began to make initial preparations for assuming this function.

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### Statistics on Concentrations

30. Concentrations notified to the Minister for Enterprise, Trade and Employment under the Mergers and Take-overs (Control) Act, 1978, as amended, in 1998 and 1999 were:

	1999	2000	2001
Carried forward	12	20	13
Notified in year	273	341	302
Outside Act	167	231	227
Did not proceed / Withdrawn	6	5	1
Allowed	100	105	89
Prohibited	-	-	-
Referred to the Competition Authority	2	1 (case withdrawn)	1
Carried forward to next year	18	21	8

### III. The role of the Competition Authority in the formulation and implementation of other policies e.g. regulatory reform, trade and industrial policies.

31. 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 to 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. 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.

32. 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 Licensing Commission and on the High Level Group on Regulation. The Authority made two submissions to the Liquor Licensing Commission during 2001, both of which are available on the Authority's website at [www.tca.ie](http://www.tca.ie). The first submission dealt solely with off-licences, since the Commission was required to submit a report on this issue. The second submission in October 2001 to the Commission dealt with liquor licensing in the broader sense and argued that the existing legislative framework restricts competition in the market and at the same time fails to limit alcohol consumption.

33. 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.”

34. In response the Taoiseach (Prime Minister) 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. 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*.

35. The Authority also published papers/submissions on a range of issues connected with recently liberalised markets. In this regard, papers were published on aspects of the energy sector (electricity and gas), the telecommunications sector and the transport sector (railways, taxis and aviation). All of these papers are available on the Authority’s website at [www.tca.ie](http://www.tca.ie).

#### **IV Resources of the Competition Authority**

##### **Staffing**

36. 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.

37. 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 the new positions sanctioned earlier in the year and referred to above. At the end of the year, 10 members of staff worked on enforcement duties (cartels division and monopolies division), 5 in competition policy (mergers, studies and notifications), 4 in regulated markets (advocacy) and 6 in the Chairman’s division (management, strategy, administration, communications).

##### **Finances**

38. 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.

39. 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’ social insurance 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.

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40. 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.

## V References to new reports and studies on competition policy issues.

### OECD

41. In April 2001 the OECD concluded a yearlong, 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 (Prime Minister), the Tánaiste (Deputy Prime Minister) and the Minister for Public Enterprise. The report consisted of seven chapters:

- the macro-economic context for regulatory reform;
- government capacity to ensure high-quality regulation;
- the role of competition policy in regulatory reform;
- enhancing market openness through regulatory reform;
- regulatory reform in electricity, gas, pharmacy and legal services in Ireland;
- regulatory reform in the telecommunications industry, and
- conclusions and policy options for regulatory reform in Ireland.

42. 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.

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

- 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.

### **Casual Trading Study**

44. On 31 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”.

45. 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.

46. 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.

47. 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.

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### **Professional Services**

48. On 1 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.

49. 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.”

50. 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.

51. 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](http://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.