

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN IRELAND**2002****Executive Summary**

1. For Ireland's Competition Authority, the most significant event of 2002 was the change in competition legislation. The Competition Act, 2002, enacted in April 2002, enhanced the Authority's powers in several important respects and transferred to it the responsibility for the review of mergers.

2. The Authority's enforcement divisions received 148 complaints in 2002 compared with 222 in 2001. Increased staff numbers enabled considerable progress in and dealing with the significant backlog of complaint files that had built up previously.

3. During 2002 the Authority continued its study of the professions and initiated new studies of banking and insurance. In addition the Authority, as part of its advocacy function, articulated a pro-consumer, pro-competition message on bodies such as the Liquor Licensing Commission and the Pharmacy Review Group, as well as in relation to taxi, ports and health sectors.

4. The most significant impact of the Competition Act, 2002 was the transfer of the merger review function from the Department of Enterprise Trade and Employment (DETE) to the Authority. This introduced a politically independent and transparent system of merger control, complete with procedural safeguards, tight time limits and a competition-based test. Although the new regime did not come into effect until 1 January 2003, preparation for it occupied a large part of the Authority's work in the second half of the year. Merger Guidelines (the first in the European Union) and Procedures were published in December following detailed consultation.

5. During 2002 staff numbers grew from 25 to 36. The additional staff came from a range of backgrounds and provided the Authority with various skills including economics, law, forensic investigation and administration. In addition staff retention rates improved in 2002 relative to previous years.

1. The Competition Act 2002

6. The enactment and coming into effect of the Competition Act, 2002 was the most significant legal development in 2002. The Act enjoyed a speedy passage, having been first published in December 2001 and enacted by the legislature in April 2002.

7. The Act consolidated and repealed previous legislation such as the Mergers, Take-Overs and Monopolies (Control) Act, 1978, the Competition Act, 1991 and the Competition (Amendment) Act, 1996. The Act strengthened the Authority's enforcement powers and increased the range and severity of sanctions for anti-competitive behaviour, including stronger criminal sanctions for hard core cartel offences. The Act also expanded and strengthened the Authority's advocacy mandate. Most of the Act came into effect on 1 July 2002 while Part 3 of the Act, dealing with mergers and acquisitions, commenced on 1 January 2003.¹

¹ The Act can be viewed on the Authority's website www.tca.ie

2. Enforcement

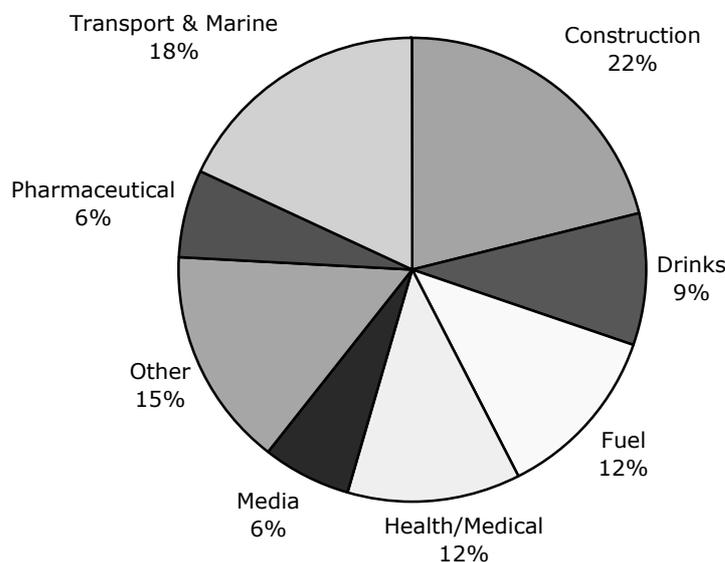
8. The Authority has two separate divisions responsible for enforcement of competition law. The Cartels Division enforces the law in relation to hard-core (Section 4) offences, while the Monopolies Division has enforcement responsibilities in respect of rule of reason (Section 5) offences. Between the two divisions, 149 complaints were received in 2002 as compared with 222 in 2001. At the beginning of 2002 the enforcement divisions carried over 427 open complaint files. During the year the Authority closed, on the recommendation of the divisions, 329 files meaning that by year's end the total number of files on hand was 247, a reduction of 180 over the total at the end of 2001.

3. Cartels

9. The Cartels Division received 54 complaints during 2002. Understaffing in previous years had resulted in a large number of open investigational files. This year the Cartels Division was able to complete and close its investigations in 94 matters. Consequently, the Cartels Division is now better able to focus its limited resources on the most promising investigations. Currently the Cartels Division has 79 open investigational files.

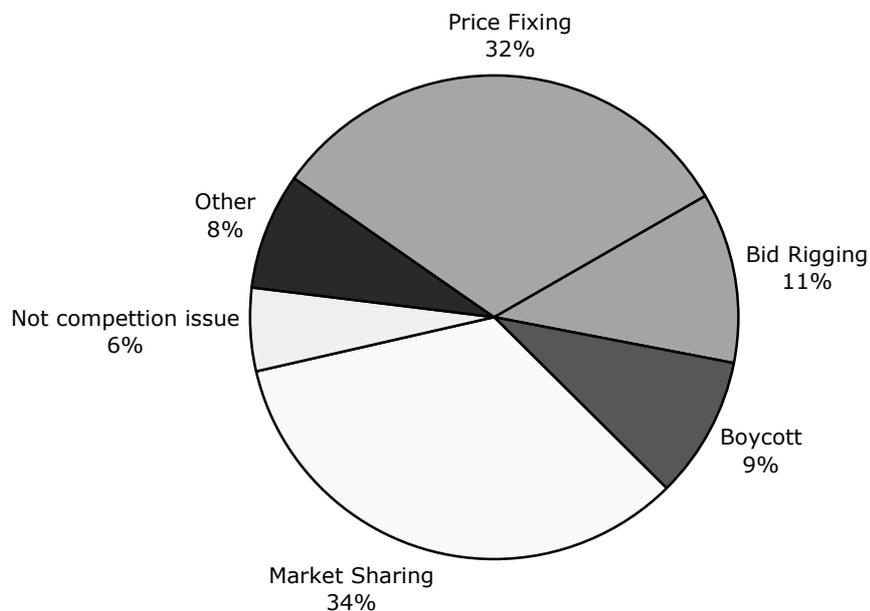
10. Details of the cartel complaints received in 2002 are given in the following graphs. Figures 1 and 2 below illustrate the breakdown of complaints by sector of the economy and by category.²

Figure: 1: Cartel Cases by Sector



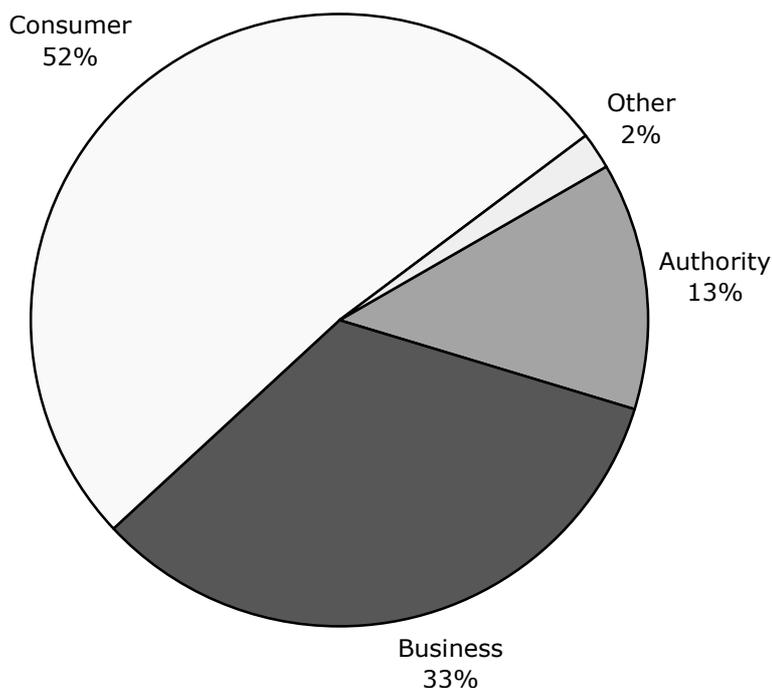
² Cartel complaints totalled 54 in 2002.

Figure 2: Cartel Cases by Category



11. As indicated below in figure 3, the Cartels Division receives complaints from many quarters, particularly industry and consumers. These two groups are most likely to feel the effects of anticompetitive practices. As in prior years, consumers provided the majority of complaints received by the Cartels Division.

Figure: 3: Cartel Complaints by Source



12. On 20 December 2001 the Authority, in conjunction with the Director of Public Prosecutions, introduced a *Cartel Immunity Programme* under which an undertaking that satisfies the requirements of the Programme will be granted immunity from criminal prosecution. The Programme is designed to encourage the self-reporting of cartels by offenders at the earliest possible stage.

13. Fifty two investigational summonses were served and returned in 2002. In addition, the Division sought and obtained seventeen search warrants from the District Courts. The Authority decided in the fourth quarter to initiate criminal proceedings in two matters that the Division had investigated. Of these, one file was sent to the Director of Public Prosecutions (DPP) for direction on whether to proceed on a summary or indictable basis. Regarding the second case, the Authority is working with the DPP in the preparation a file with a view to prosecution on indictment. These are the first decisions to bring criminal proceedings since 1999 and reflect the increased staffing available to the Cartels Division in the second half of 2002. As these cases involve investigations of alleged criminal breaches of the law the Authority will not make details of the cases public.

14. In addition to reacting to alleged contraventions of the law, the Authority may act pre-emptively when it becomes aware in advance of possible a contravention. For example, in April 2002, the Irish Pharmaceutical Union (IPU) threatened to withdraw certain pharmacy services from the State. The

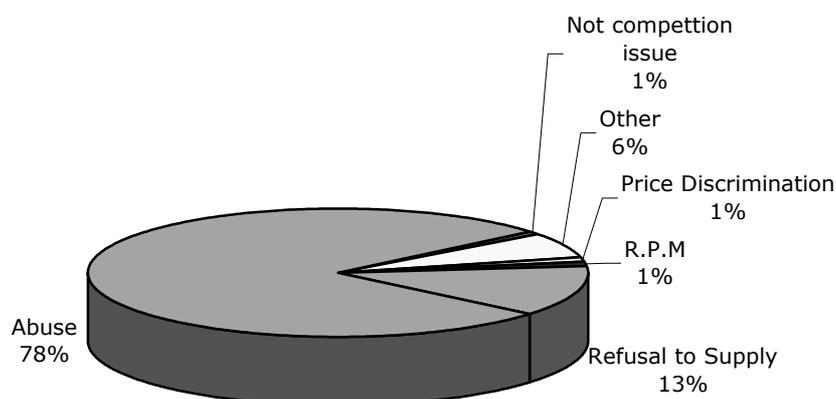
Authority issued a public statement of its view that such an action would represent a breach of the Competition Acts. As the IPU did not carry out its threat to withdraw services, the Authority did not initiate proceedings.

4. Monopolies

15. In 2002 the Monopolies Division received 94 complaints resulting in files being opened, compared to 146 in 2001. The composition of Monopoly Division files is shown in Figure 4 below. As in 2001 alleged abuse of a dominant position was the largest category (73 cases in 2002).

16. At the start of 2002 there was one civil case before the Courts, against Eircom with regard to the introduction of local loop unbundling in the Irish telecommunications market. Due to regulatory changes the case has not proceeded and the legal proceedings were discontinued.

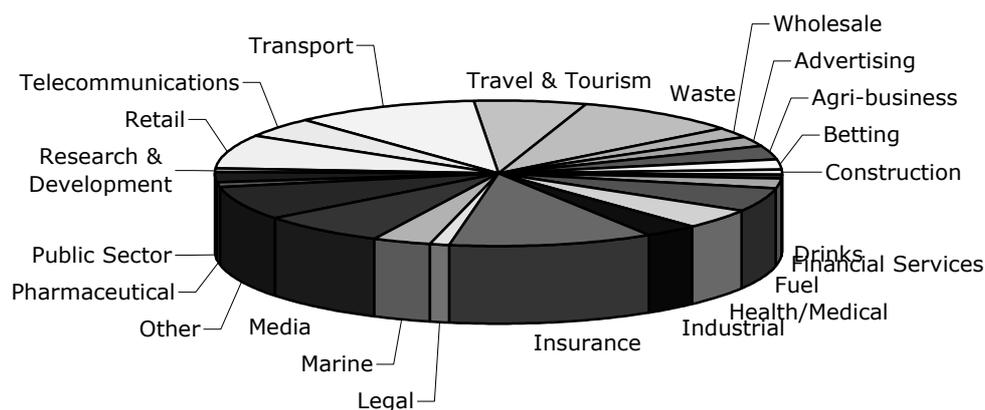
Figure 4: Monopoly Cases by Category



17. The most important sectors in terms of files opened in 2002 were insurance, transport and waste respectively, which together accounted for a third of all files opened. A complete sector breakdown is provided below in Figure 5.³

³ Monopoly complaints totalled 94 in 2002. The largest sectors for complaints were Insurance (11), Transport (10), Waste Management (9), Media (7), Retail (7), and Travel and Tourism (6).

Figure 5: Monopoly Cases by Sector



18. In conducting investigations, usually on foot of a complaint, the Authority does not necessarily resort to witness summons or searches. Rather, undertakings and others typically comply with requests for information and documents. Nevertheless in 2002, the Monopolies Division issued four witness summons in one case due to the non-co-operation of a particular undertaking. In another case a search warrant was executed.

19. Authority decisions that arise from detailed investigations may frequently be of public interest because they clarify the Authority’s interpretation of the law or its enforcement stance. In some instances grounds for not taking action on foot of a complaint (e.g., the allegations of abuse by Vodafone or the National Lottery) are also of public interest, while in other cases a negotiated arrangement reached by the Monopolies Division with the parties (e.g., amending the criteria for admission to the Joint National Readership Research study may give grounds to discontinue an investigation.

20. On four occasions in 2002, the Authority issued a brief public statement (in the form of a press release) announcing and briefly explaining a decision.⁴

⁴ These releases may be found on the Authority’s website, www.tca.ie under ‘press’.

5. Mergers

21. Under Section 7 of the Mergers, Take-overs and Monopolies (Control) Act, 1978, (as amended), the Minister of Trade Enterprise and Employment could send a merger notified to the Department of Enterprise, Trade and Employment, to the Authority for a detailed investigation of the transaction's impact upon competition and a variety of other factors. During 2002 the following proposed mergers were referred to the Authority:

- GEHE/Unicare – a case concerning pharmacies;
- USITNow/STA Travel – a case concerning student travel services; and
- Maxol/Estuary – a case concerning oil and petroleum retailing.

22. In each case the Authority considered that there would not be a substantial adverse impact on competition.

23. The Competition Act 2002 introduced a number of changes to merger regulation in Ireland, to come into effect on 1 January 2003. All notifiable mergers occurring within the State will be notified to the Authority with the Mergers Division, previously called the Competition Policy Division, responsible for dealing with all mergers. Under the Act, mergers are to be evaluated on the basis of a substantial lessening of competition (SLC) test, as opposed to the previous public interest test. The Act also provides for more transparency in the assessment of mergers, allowing for submissions from third parties, the publication of reasoned decisions by the Authority and the possibility of appeals to the High Court against negative decisions.

24. The Authority spent time in 2002 preparing for the new functions it would take on in 2003. Notably, in July 2002 the Authority published drafts of:

- the procedures it will use to administer the new system;
- the substantive economic rules by which it will interpret the new test; and
- the forms which notifying parties will use when submitting notifications.

25. These were put out for consultation, and a substantial number of replies were received. The Authority also held a conference in early September, to which it invited a number of international experts on merger policy as well as the Irish practitioners in the area. The conference was very successful and, on foot of it and the consultation process, the Authority produced revised versions of the three sets of documents in December which were published by the Authority and are available on its website.

6. Advocacy

26. Section 30 of the Competition Act, 2002 has consolidated and strengthened the Authority's advocacy functions, which include:

- advising Government and Ministers concerning the implications for competition, in markets for goods and services, of proposals for legislation, including statutory instruments;
- advising public authorities generally on issues concerning competition which may arise in the performance of their functions;

IRELAND

- identifying and commenting on constraints imposed by any enactment or administrative practice on the operation of competition in the economy; and
- carrying out such activities as the Authority considers appropriate so as to inform the public about issues concerning competition.

27. During 2002, this wide range of functions was carried out by two non-enforcement divisions of the Authority – Regulated Markets Division and Competition Policy Division.⁵

7. Formal Studies

28. During 2002 the Authority either continued or initiated the following sectoral studies:

- Professions;
- Casual trading;
- Banking; and
- Insurance.

29. The decisions to undertake studies in banking and insurance were made against a background of explicit criteria for evaluating studies developed by the Authority in the first half of 2002. When determining whether to undertake a particular study, the Authority considers the following factors:

- The economic importance of the sector or market;
- Indicators of possible competition problems;
- The existence of public or private barriers to entry;
- The degree of public interest; and
- The impact on Authority resources.

7.1 Professions

30. Work on the Professions Study continued throughout 2002. External consultants met with professional bodies and analysed their replies to questionnaires. The consultants' report surveyed the relevant literature and, for each of the professions chosen, examined the restrictions operating within the profession in terms of the benefits and costs of those restrictions. The report was published in March 2003⁶ and the Authority will complete the Study by issuing reports on each profession (or sub-group of professions) on a phased basis.

⁵ These two divisions are now called respectively Advocacy Division and Mergers Division, to reflect the expanded functions of the Authority arising from the Competition Act, 2002.

⁶ The report is available on the Authority's website www.tca.ie

7.2 *Casual Trading Study*

31. The Minister of Enterprise, Trade and Employment requested the Authority, in 2000, to undertake a study into the implementation by local authorities of the Casual Trading Act, 1995, in particular to examine the effects of the measures employed by local authorities on competition in local markets, and whether those measures are necessary for the achievement of public interest objectives, such as public order and safety. The Authority commissioned the Market Research Bureau of Ireland (MRBI) to gather 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, which formed the basis for the Authority's report, which was completed and was sent to the Minister in August 2002. The Authority found a lack of consistency in the implementation of the Act so that the effect on competition in local markets has been nil, negative, or positive, depending on the area. The Authority made 10 recommendations to improve the Act and its implementation, arising out of the research and analysis conducted during the Study.

7.3 *Banking Study*

32. In September 2002 the Authority initiated a study of non-investment banking. The study will identify barriers to entry into non-investment banking in the State, analyse their origin, their intended and actual effects and, where appropriate, make recommendations to have disproportionate barriers to entry removed.

33. The study will identify and analyse industry practices, legislation and/or administrative practices in non-investment banking within the State that limit the degree of rivalry on the market place to the detriment of consumers.

34. Any practice or arrangement that appears to be in breach of the Competition Act, 2002 will be brought to the attention of the Cartels and/or Monopolies Divisions of the Authority. Following a tendering process, external consultants were commissioned in December 2002 to assist in the study. It is envisaged that the bulk of the work for the study will be completed in 2003 and will be carried out by the Authority's Advocacy Division.

7.4 *Insurance Study*

35. In October 2002 the Authority, in conjunction with the Department of Enterprise, Trade and Employment, launched a study of the non-life insurance market in Ireland, with particular reference to motor insurance, employers' liability and public liability insurance. Following a period of public consultation in October-November 2002 on draft terms of reference, the terms of reference were finalised as follows:

- To identify anti-competitive practices or other constraints on competition in the non-life insurance market in Ireland, with particular reference to motor insurance, employers' liability and public liability insurance;
- To highlight any anti-competitive practices or other constraints that are particular to the Irish market;
- To make recommendations for legislative and other changes to ensure that competition works well for consumers in the Irish market; and

IRELAND

- In the case of any problems identified at EU level, to make recommendations for change at that level.

36. It is intended that the bulk of the work will be carried out in 2003, and a report published in 2004 with the Advocacy Division providing the Authority's inputs to the study.

8. Other Advocacy by Sector

37. In addition to undertaking formal sector studies the Authority performed a number of other advocacy functions.

8.1 Communications

38. In March 2002 the Authority raised concerns at EU level about the proposed system of relating significant market power (SMP) obligations in telecoms to competitive effects analysis, and in particular the impact that this might have on national Court decisions in competition cases. The Authority's concern was that national regulators' decisions, which are undertaken for a variety of purposes not all of which are necessarily consistent with promoting competition, might obtain precedent value in relation to the analysis of cases involving abuses of dominance, or in analysing mergers. The Authority was pleased that its concerns were taken on board in the final Recommendation.⁷

39. As part of the EU's framework process, the Authority together with the Office of the Director of Telecommunications Regulation (ODTR), now called ComReg, drafted a Joint Response to Consultation on the European Commission's Draft Recommendation on Relevant Product and Service Markets within the Electronic Communications Sector. The submission highlighted a number of concerns with regard to the implementation of the recommendations.

8.2 Energy

40. In April 2002 the Authority published a submission it had previously made to the Commission for Energy Regulation (CER) consultation on the Infrastructure Agreement. In November 2002 the Authority also made a submission to the Department of Communications, the Marine and Natural Resources on the draft Electricity legislation, which stressed that legislative provision was required to allow for meaningful restructuring of the electricity sector. In particular, the Authority recommended:

- Full vertical separation of the Electricity Supply Board (ESB), i.e. full ownership unbundling of the ESB's activities in generation, transmission and distribution and supply;
- Horizontal restructuring of the ESB's generation activities – this might mean that divestiture powers and/or the power to impose generation caps be conferred on the CER, and/or that provision be made for tendered plant management;
- The creation of regulatory and political structures that will enable the development of an all-Ireland electricity market; and
- The implementation of regulatory structures that embody the principle of asymmetric regulation, i.e. regulation that favours new investment interests over incumbent interests.

⁷ Commission Recommendation of 11/02/2003 On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

41. In December 2002 the Authority made a preliminary submission to the CER containing comments on proposals for new trading arrangements.

8.3 Taxis

42. In April 2002 the Authority formalised its views on taxi market regulation in a submission to a consultation process run by the Department of the Environment and Local Government. The Authority argued that the completion of the regulatory reform process, begun by the liberalisation of entry in 2000, required the following:

- Development and implementation of a systematic fare review process;
- re-balancing of fares to reduce excess supply and ensure adequate service at all times;
- retention of maximum fare controls and encouragement of fare competition below these levels;
- tightening of quality standards and an increase in the credibility of enforcement; and
- a reformed structure and process of regulation so as to make it efficient, rational and immune to capture.

43. The Minister for Transport has since announced the establishment of a new national taxi regulatory office that will operate on a statutory footing once the appropriate legislation has been passed.

8.4 Ports

44. In July 2002 the Authority made a submission to a consultation run by the Department of Communications, the Marine and Natural Resources to assess the current model for the governance of the State port companies. The Authority stressed that an efficient and competitive system of ports and port services is crucial to Ireland's national competitiveness and recommended that a full competitive assessment of the port sector be undertaken.

8.5 Financial Sector Regulation

45. In September 2002 the Authority made a submission to the Department of Finance outlining its main concerns with the proposed Bill to establish the Irish Financial Services Regulatory Authority (IFSRA). The Authority expressed reservations about proposed industry consultative panels which, the Authority considered, could provide an avenue by which the proposed new regulator might become captured by industry interests at the expense of consumer interests.

8.6 Health

46. In April 2002 the Authority, in a submission to the Health Insurance Authority, argued that a proposed risk equalisation scheme presented a barrier to entry, as it could potentially lead to significant transfers from new entrants to the incumbent. The Authority also emphasised, however, that risk equalisation is only one of a range of factors that discourage entry. Also important is the high market share of the former State monopoly and the role that the Minister plays as regulator and owner of the largest player in the market.

IRELAND

47. On 11 November 2002 the Authority hosted a conference on *Competition in Medical Markets – Prospects for Ireland*. The purpose of this conference was to start a process whereby the Authority and the general public could become informed as to where competition could be used to provide a better healthcare system for all members of society. The conference included a host of distinguished speakers, both Irish and International. The collected papers and presentations given at the conference are available on the Authority's website.

8.7 *Liquor Licensing*

48. During 2002 the Authority was represented on the Liquor Licensing Commission and consistently, through various presentations to interested groups and at conferences, emphasised the potential impact of increasing competition in the licenced drinks sector.

8.8 *Pharmacy*

49. The Authority was represented on the Pharmacy Review Group, established in November 2001 by the Minister for Health to report on the appropriate regulation of the retail pharmacy sector. Representatives on the group came from a range of government departments and sectoral interests. The group met 13 times during 2002, with the Authority attending each meeting.

50. The Authority argued that liberalisation of the retail pharmacy sector would be good for consumers by permitting more entry and thus greater choice, lower prices, and higher quality of service. The Authority highlighted the benefits resulting from liberalisation in other sectors, such as the taxi market. The Review Group finished its deliberations, and issued a report to the Minister at the end of January 2003.

51. Previously, in January 2002, the Minister for Health removed "location restrictions" in the pharmacy market. The Authority had consistently argued that these restrictions had seriously impeded competition in the pharmacy retail market, and that they were disproportionate because they did not clearly relate to any public policy objective.

9. *International Relations*

52. Throughout 2002 the Authority continued to maintain an active involvement with international organisations. The Authority values the maintenance of international contacts, particularly given Ireland's status as small economy and the Authority's status as a small agency (even after recent increases in staff numbers).

53. By maintaining international links, the Authority is able to share and benefit from the insights and experiences of others, both in terms of policy development and operational practices (e.g. merger analysis and investigative and enforcement techniques). During 2002 the Authority maintained an active participation in international networks and fora. In addition to its involvement with the OECD, the Authority has actively participated in the activities of the European Commission, the European Competition Authorities (ECA) and the International Competition Network (ICN). In addition, the Chairperson and other Authority staff have attended and/or presented papers to various international conferences.

10. Competition Authority Resources

54. The passage of the Competition Act 2002, increased the Authority's responsibilities which, together with the resulting increase in staff numbers, saw the overall Authority budget increase from €2.010 million for 2001 to €3.330 million for 2002.⁸

55. By 31 December 2002 the Authority's staff totalled 35, relative to a total sanction (i.e. authorised total staff level) of 44. This compared to a total staff figure of 25 at 31 December 2001.

56. As at 31 December 2002⁹ there were 5 Authority Members, including the Chairperson and 30 staff including 4 Divisional Managers, 9 economists and 4 lawyers.

57. Staff are deployed across the Authority's divisions as follows:

- Enforcement and anti-competitive practices – 16 person years;¹⁰
- Merger review and enforcement - 6.5 person years;
- Advocacy - 6.5 person years; and
- Chairperson's Division, including the Chairperson, - 6 person years.

⁸ The US dollar equivalents are \$1.895 million and \$3.139 million respectively using the euro dollar exchange rate as at 31 December 2002: €1 = \$0.9427.

⁹ Given the introduction of new legislation and the increased staffing that occurred during 2002 year-end rather than year-average figures have been provided.

¹⁰ These are year-end rather than year-average figures.