

Unclassified

DAF/COMP(2010)12/10



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

18-May-2010

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2010)12/10
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN IRELAND

-- 2009 --

This report is submitted by Ireland to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 16-17 June 2010.

JT03283683

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English - Or. English

TABLE OF CONTENTS

Executive Summary	3
1. Changes to Competition Laws and Policies, Proposed or Adopted.....	4
1.1 Summary of new legal provisions of competition law and related legislation	4
1.2 Other relevant measures, including new guidelines.....	4
1.3 Government Proposals for New Legislation.....	6
2. Enforcement of competition Laws and Policies.....	6
2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions	6
2.2 Mergers and acquisitions	9
3. The Role of Competition Authorities in the formulation and implementation of other policies.....	12
4. Resources of The Competition Authority	13
4.1 Resources Overall	13
4.2 Human Resources	13
5. New Reports and Studies on Competition Policy Issues	14
5.1 Retail-related Import and Distribution Study.....	14
5.2 General Medical Practitioners.....	15
5.3 Previous Recommendations of the Competition Authority	16
5.4 Raising Awareness: Other Activities	16

Executive Summary

1. This report addresses the activities of the Irish Competition Authority and competition law developments in Ireland from 1st January 2008 to 31st December 2009.
2. 2009 proved to be a very challenging year for the Competition Authority. As a result of budget cuts, an embargo on recruitment and implementation of various government incentive schemes to reduce numbers in the public service, the Competition Authority sustained real reductions in its budget and staff numbers; 18% and 17% respectively. Early in the year, decisive action was taken to reorganise our activities to cope with the reduced resources available, including the abolition of one Division and the restructuring of reporting lines. However, the work of the Competition Authority continued and this is due entirely to the expertise and dedication of the staff.
3. The enforcement record of the Competition Authority continued apace in 2009. Ten additional criminal convictions were secured in relation to prosecutions of cartel activity relating to the Citroën Dealers Association. To date, 33 criminal convictions have been secured in total, the level of fines has increased and one defendant in 2009 was sentenced to 28 days in prison for failure to pay a fine.
4. Other enforcement activity reinforced a longstanding message of the Competition Authority – that competition enforcement and competition policy is even more important in difficult economic times. At the end of 2008, the two trade associations representing publicans in Ireland, the LVA and VFI announced a “price freeze” on behalf of their members. The fact that such a “price freeze” was taking place in a deflationary economic environment was well noted by consumers. The Competition Authority took decisive action in 2009 to have the co-ordinated action in relation to prices struck down by the court. It is not in the public interest for trade associations to co-ordinate the prices of their members and the Competition Authority will always act against such anti-competitive activity. The action sent a strong and well-needed message to trade associations throughout the State.
5. Also in 2009, the State was successful in implementing cost-saving measures in the pharmacy sector; this outcome was certainly facilitated by the existence of competition law made credible by a strong Competition Authority. Some pharmacists sought to put pressure on the State to back down on the cost-saving measures by withdrawing their services. Due to the Competition Authority’s previous activity in this sector, pharmacists knew that they had an individual right to deal or not to deal with the State, but that a collective boycott across all pharmacies was prohibited by competition law. A collective withdrawal of services by every pharmacy in the State would have been a much bigger problem for the State to cope with than the individual withdrawal of a third of all pharmacies, which is what actually occurred.
6. 2009 began with a renewed commitment to advocacy in light of the crying need for the same due in large part to Ireland’s difficult economic conditions. Accordingly, we invested more in advocacy and took our message to the public in new ways. We published booklets providing general guidance to consumers, businesses and public authorities. We organised a “Bid-rigging Road Show” bringing the competition message on this important area to a variety of venues. We published Guidance Notices and Enforcement Decision Notes – providing guidance on areas as diverse as pay-TV exclusivity, collective action in the pharmacy sector and trade associations.
7. In addition, 2009 saw the publication of the first two parts of our Market Study on competition in the General Medical Practitioner profession. As a demonstration of our ability to engage stakeholders as part of the advocacy process, our Report was able to record that the Authority had, by the time of publication, already secured the agreement of the (statutory) Medical Council and the Irish College of General Practitioners to the Report’s two central recommendations.

1. Changes to Competition Laws and Policies, Proposed or Adopted

1.1 Summary of New Legal Provisions of Competition Law and Related Legislation

8. During 2009, there were no new competition law provisions introduced.

1.2 Other Relevant Measures, including New Guidelines

9. The Competition Authority published three Guidance Notices and one Enforcement Decision Note in 2009.

10. The Competition Authority publishes Notices to provide practical guidance for compliance with the Competition Act 2002. The Authority publishes Decision Notes only on selected investigations that create a precedent; are of public interest (e.g. the investigation is in the public domain, the issue has been subject to considerable debate and discussion); and raise issues of interest or complexity.

11. Guidance Notices and Decision Notes are provided for guidance only and are not legally binding.

1.2.1 Guidance Notice and Enforcement Decision Note on Pay-TV Exclusivity in Apartment Developments

12. On 14th August 2009 the Authority published a Notice and a Decision Note regarding alleged anti-competitive practices in the provision of pay-TV to apartment developments. The Decision Note sets out in detail the relevant legal and economic bases, while the Guidance Notice gives consumers a synopsis of the findings, and indeed their rights, in plain language.

13. Over the past decade, apartment dwelling has become much more common in Ireland, particularly in Dublin and surrounding counties. In recent years, the Competition Authority has received approximately 200 complaints from residents of apartment developments who have been unable to switch pay-TV provider. Most of these complaints concerned the fact that residents were unable to switch to another pay-TV provider because of exclusivity arrangements, agreed during the building construction phase, between the original pay-TV service provider and the developer.

14. The Competition Authority conducted an in-depth investigation of this sector and sourced information from a large number of pay-TV providers, construction firms, solicitor firms, other EU Member State competition authorities, local authorities and a number of relevant State agencies in Ireland.

15. The Authority found that exclusivity agreements are unlikely to breach the Competition Act 2002 where they are for less than two years' duration. This is because pay-TV service providers incur high sunk costs in installing dedicated infrastructure to apartment developments. In the absence of a limited period of exclusivity, no service provider may wish to take the risk of installing infrastructure without a guaranteed revenue stream. The Authority indicated that, where agreements are of longer than two years' duration, they will be assessed on a case-by-case basis. Furthermore, the Authority indicated that it will continue to advocate in favour of legislative and regulatory steps which can be taken to facilitate competition in the provision of pay-TV to apartment developments.

1.2.2 Guidance Notice in respect of Collective Action in the Community Pharmacy Sector

16. On 23rd September 2009 the Competition Authority published a "Notice in respect of Collective Action in the Community Pharmacy Sector". The Notice provides guidance on the application of Irish and European competition law to collective action by community pharmacy contractors, and other healthcare professionals, when engaging with the Health Service Executive ("the HSE"). In particular, the Notice

clarifies the limits competition law places on co-ordinated action by self-employed health professionals in relation to key competitive factors such as fees.

17. The Notice was published in the context of a public consultation launched by the Authority, in October 2008, into collective action in the healthcare sector. The Authority issued the Guidance Notice on the basis of information received from the consultation. The Notice restates the Competition Authority's recommendation of the adoption of the "messenger model" for the setting of contractual terms and conditions.

18. The Notice also takes into account the Hickey Judgment¹ and the *Financial Emergency Measures in the Public Interest Act 2009* ("the 2009 Act"). The Hickey case occurred when a number of pharmacy contractors commenced court actions against the HSE, alleging breach of their agreement with it. The Court found that the HSE was in breach of contract because the Minister for Health and Children was obliged to consult (not negotiate) with the Irish Pharmacy Union, in advance of unilaterally setting the rates of payment. The Court further found that this obligation to consult was not contrary to section 4(1) of the Competition Act 2002 on the basis that there was no obligation to negotiate.

19. Pursuant to the 2009 Act, the Minister for Health and Children may, with the consent of the Minister for Finance, unilaterally reduce the fees paid to health professionals in respect of services provided. The Minister for Health and Children may choose to consult with representatives of health professionals or others prior to reducing the payment rate, however, it is expressly stated that nothing in the Competition Act shall prevent participation in such consultations.

1.2.3 *Guidance Notice on Activities of Trade Associations and Compliance with Competition Law*

20. The Notice on Trade Associations, published on 9th November 2009, informs the business community and trade associations about the limits that competition law places on joint or co-ordinated action by competitors.

21. The Competition Authority has investigated cases where trade associations have been used to restrict competition, either by co-ordinating such activity or by providing competitors with the opportunity to meet and form anti-competitive agreements. Indeed, in relation to the Authority's investigation and subsequent prosecution of certain cartel cases by the Director of Public Prosecutions, it transpired that trade association meetings provided a convenient forum for illegal price fixing agreements amongst its members. Criminal convictions have been secured relating to price fixing activities by the Connaught Oil Promotion Federation, Irish Ford Dealers Association and the Citroën Dealers Association. In all three cartels, trade association meetings were used as the venue for price fixing agreements between competitors. The Competition Authority also brought contempt of court proceedings against two publican trade associations, the Vintners' Federation of Ireland and the Licensed Vintners Association.

22. The Notice addresses the application of competition law to a range of activities of trade associations and its members. The types of activities featured in the Notice include co-ordination on pricing; co-ordination on market allocation; collective boycotts and collective negotiations; participation in anti-competitive meetings; and information exchange.

23. The Notice identifies those forms of co-ordinated horizontal conduct which are absolutely prohibited by competition law, as well as forms of conduct which the Competition Authority considers to be of considerable concern. Within the category of co-ordinated activities, it is firmly established that there are certain practices which are absolutely prohibited – such as price fixing – as well as many practices which may have an anti-competitive effect, and are thus prohibited. The Notice is intended to provide

¹ Hickey and others v HSE [2007] 180 COM judgment of 11th September 2008.

some insight into the Authority's enforcement priorities in this area, and to put interested parties on notice of when the Competition Authority may be expected to take enforcement action.

1.3 Government Proposals for New Legislation

24. At present, the Department of Enterprise, Trade and Innovation is preparing new legislation (the *Consumer and Competition Bill*) to give effect to the announced amalgamation of the Competition Authority and the National Consumer Agency and to comprehensively update existing competition law.

25. In addition, the Department of Enterprise, Trade and Innovation has committed to implement a Code of Practice in the grocery sector to develop a fair trading relationship between retailers and their suppliers. Provision to place a code for retailers and suppliers on a statutory basis will be included in the proposed Consumer and Competition Bill. The Competition Authority made a submission to the Department of Enterprise, Trade and Innovation expressing concerns about the introduction of such a Code; section three details the contents of this submission.

2. Enforcement of Competition Laws and Policies

2.1 Action against Anticompetitive Practices, including Agreements and Abuses of Dominant Positions

2.1.1 Summary of Activities

26. Sections 4 and 5 of the Competition Act 2002 prohibit anti-competitive agreements and abuse of dominance respectively. An infringement of section 4 or 5 is a criminal offence. However, in respect of any infringement of these sections, the Competition Authority has the right either to seek a criminal prosecution or to pursue the matter in the civil courts or both.

27. In Ireland, cartels are hard-core breaches of competition law. Any businesses and individuals who are found guilty of hard-core cartel offences can face a number of penalties, including fines and prison sentences. 2009 proved to be an extremely busy and active one for cartel enforcement in Ireland. Since 2000 a total of 33 convictions have been secured for offences under the Competition Act.² Ten of these convictions were secured in 2009 by the Director of Public Prosecutions in relation to the Competition Authority's investigation into price fixing of Citroën vehicles by members of the Citroën Dealers Association.

28. Civil enforcement of competition law was also active in 2009. An action brought by the Competition Authority in the High Court found the Vintners' Federation of Ireland and the Licensed Vintners Association to be in contempt of court because of a recommendation to their members in December 2008 regarding prices. The recommendation regarding prices charged by publicans breached previous undertakings given to the High Court arising from cases previously taken by the Authority against both organisations.

29. In another ongoing civil matter, the *Competition Authority v the Beef Industry Development Society* ("BIDS"), significant progress was made. The Irish Supreme Court, following a 2008 judgment by the European Court of Justice, held that the Society's agreement has as its object the restriction of competition. The Supreme Court remitted the case to the Irish High Court to decide whether the conditions of Article 101(3) TFEU are satisfied and therefore whether the agreement can be implemented.

² This total includes one conviction in connection with price fixing of petrol; 17 in connection with fixing the price of home heating oil; and 15 in connection with fixing the price of motor vehicles, one involving the Irish Ford Dealers Association and 14 involving the Citroën Dealers Association.

2.1.2 Citroën Dealers Association Cartel

30. In 2007 the Director of Public Prosecutions brought charges against six Citroën dealerships and seven individual officers and directors of those undertakings, alleging that they agreed to fix prices and to implement those agreed prices on the sales of Citroën cars, contrary to various provisions of the Competition Acts. The DPP also brought charges against the Secretary of the Citroën Dealers Association alleging that he had aided and abetted the alleged price fixing agreements by dealers.

31. In 2009 five individuals and four undertakings pleaded guilty to the price fixing charges and were convicted and sentenced in the Criminal Courts. As an consequence of these convictions, the four individuals concerned are disqualified, for a period of five years from the date of their conviction, from appointment as or acting as an auditor, director or other officer of any company.

32. In 2009, the Secretary of the Citroën Dealers Association also pleaded guilty to the offence of aiding and abetting the commission of the offence of price fixing and was also convicted and sentenced.

33. Sanctions were also imposed in all instances. Fines ranged from €2,000 to €80,000. Suspended custodial sentences on individuals were imposed by the Courts ranging from six to nine months. In one instance, failure to pay the fine imposed on him resulted in the person concerned being sentenced to 28 days in prison.

34. These convictions bring to an end the DPP's prosecutions in connection with the Competition Authority's investigation of the Citroën Dealers Association. In total 14 convictions, comprising eight individuals and six undertakings, were secured by the DPP in relation to this investigation.

35. At the sentencing of an individual and company in the Central Criminal Court, the presiding Judge described the Citroën Dealers Association cartel:

*"It appears that in March 1995 an association known as the Citroen Dealers Association ("the C.D.A.") was established... It held its first meeting in April 1995 and operated at least until February 2004. ... From the outset it set in place a comprehensive scheme which had the following as its objects: -(i) The setting of minimum discounts from the retail dealers recommended price list for new Citroen motor vehicles; (ii) The setting of delivery charges in respect of such vehicles; (iii) The setting of accessory prices; (iv) The setting of prices for metallic paint; (v) The setting of prices for trade-ins and for used stock; and (vi) The setting of export prices and parts. ...At meetings of the Association, of which about 48 were minuted, prices were agreed in respect of each of these items and then recorded. Thereafter a new revised price list would be printed and distributed by the Secretary to each member of the association. In addition, the Secretary produced a pocket card for internal use by individual dealers showing what price should be asked for. This became known as the "card price". The routine was followed on every occasion upon which there was a price change. ...To underpin adherence to the objectives of the scheme, the association employed two independent companies to police its members so as to ensure compliance. These monitors carried out so called "mystery shopping surveys", during which, disguised as genuine members of the public, they attended at a dealer's premises and obtained a quote or price for any one or more of the products above mentioned. A report would then be submitted to the Secretary. Fines, which were specified for any breach, were originally set at £500 and later increased to £1,000 (€1,270)."*³

³ Judgment of Mr. Justice McKechnie, Director of Public Prosecutions v Patrick Duffy and Duffy Motors (Newbridge) Limited, 23 March 2009, at paragraphs 6 to 9.

2.1.3 *Mayo Waste Disposal Case*

36. In this case, four individuals, in their capacity as Directors, and three undertakings were each charged with entering into an agreement which had as its object the prevention, restriction or distortion of competition in the provision of domestic waste collection services in County Mayo. A further individual was charged with aiding, abetting or procuring others to enter into such an agreement.

37. The eight defendants were tried before a jury in mid-2009. The trial judge sent the case to the jury for deliberation, but all defendants were acquitted of the charges.

2.1.4 *The Licensed Vintners Association and others*

38. On 24th July 2009, the Licensed Vintners Association (“LVA”) and the Vintners’ Federation of Ireland (“VFI”), the principal trade associations representing publicans in Ireland, were found to be in contempt of court for implementing a one-year price freeze among their members. The proceedings had been initiated by the Competition Authority in the High Court, on foot of undertakings given previously to the High Court by the LVA and VFI.

39. The undertakings stemmed from cases taken against the LVA and VFI in 1998, in which it was claimed that certain activities of the LVA and VFI breached Irish competition law prohibiting anti-competitive co-ordination. Under settlement terms reached between the Competition Authority and the LVA and VFI which were lodged in the High Court, in 2003 and 2005 respectively, each representative association undertook (1) not to recommend to members “the prices, margins, increases in prices and increases in margins earned on the sale to the public of alcoholic beverages”, and (2) not to “breach section 4 of the Competition Act 2002” in relation to the price at which alcohol was sold to the public for consumption on licensed premises.

40. On 1st December 2008, the associations issued a joint press release, announcing “a one year price freeze in drinks prices in pubs with immediate effect”; this committed members to not exceeding the existing price levels that they applied to drinks products over the following twelve months. The announcement took place at a time when general price deflation was expected throughout the economy. The Competition Authority’s view was that a freeze in prices, when prices are expected to fall, is as harmful to consumers as an agreement to raise prices in a normal inflationary environment. The Authority’s resolve to take action with respect to the publicans’ associations actions was not driven only by concerns arising solely in the drinks industry. If the price freeze policy adopted by the publicans were to be replicated in other sectors of the economy, consumers and businesses alike would suffer.

41. The Authority considered that the co-ordinated pricing policy breached Irish and EC competition law, and that it violated the undertakings previously given by the LVA and the VFI. In order to get the case to court as expeditiously as possible, and thus secure cessation of the price freeze prior to the expiry of the one year period, the Authority brought an action for contempt of court, based on breach of the undertakings. The High Court on 24th July 2009 held that the announcement did indeed breach the first undertaking, namely, not to recommend prices to its members. It was not necessary for the Court to rule on whether there had been a breach of the Competition Act 2002 in the circumstances.

42. In order to purge their contempt, the LVA and VFI apologised to the High Court; they also undertook to cease the price freeze with immediate effect, to notify each of their members in writing that the policy had been discontinued and to publish a press release in three Sunday newspapers explaining that the policy had come to an end. The Competition Authority was awarded its full costs in the matter.

2.1.5 *The Competition Authority –v- Beef Industry Development Society (BIDS) and others*

43. On 3rd November 2009, following an ECJ judgment of 20th November 2008, the Irish Supreme Court found that the Beef Industry Development Society (“BIDS”) agreement had infringed Article 101(1) TFEU. The Supreme Court remitted the case to the High Court to decide whether the conditions of Article 101(3) TFEU are satisfied.

44. The substantive case⁴ was a civil action brought by the Competition Authority alleging that BIDS had infringed Article 101 TFEU by the plans it adopted for the rationalisation of the Irish beef industry. These plans involved the major players in the industry agreeing to pay those players (“the goers”) who would voluntarily leave the industry. In return for that payment, the goers would agree to decommission their plants, refrain from using the associated lands for processing for a period of five years and sign a two-year non-compete clause with regard to processing anywhere in Ireland. The High Court held that the agreement had neither the object nor the effect of preventing, restricting or distorting competition.

45. The Competition Authority appealed this judgment to the Supreme Court. At the start of the appeal hearing, the Supreme Court made a reference to the European Court of Justice pursuant to Article 234 EC, asking whether an agreement in the form of the BIDS scheme had the object, as distinct from the effect, of preventing, restricting or distorting competition contrary to Article 101(1) TFEU.

46. On 20th November 2008, the ECJ found that the BIDS agreement has as its object the restriction of competition and thus is incompatible with Article 101(1) TFEU. The judgment states that “An agreement with features such as those of the standard form of contract concluded between the 10 principal beef and veal processors in Ireland, who are members of Beef Industry Development Society Ltd, and requiring among other things, a reduction of the order of 25% in processing capacity has as its object the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC”.

47. On the 3rd November 2009, the Irish Supreme Court held that the BIDS agreement had infringed Article 101(1) TFEU.

48. The Supreme Court has remitted the case to the High Court to decide on whether the conditions of Article 101(3) TFEU are satisfied. An agreement which infringes Article 101(1) TFEU, such as the BIDS agreement, may be allowed under Article 101(3) if four cumulative conditions are satisfied and if the benefits outweigh the negative effects of the agreement. The onus of proof is on the party relying on the defence in Article 81(3). The case is now pending.

49. The European Commission sought to intervene as Amicus Curiae and has decided to submit written observations pursuant to Article 15(3) of Regulation 1/2003 to the High Court in the BIDS case. This is the fourth time that the Commission will intervene as Amicus Curiae before a national court.

2.2 *Mergers and Acquisitions*

2.2.1 *A Statistical Overview*

50. The number of mergers and acquisitions notified to the Competition Authority decreased slightly in 2009 relative to previous years. The following summarises the activity:

- 27 mergers were notified to the Authority;
- The Authority also finalised its work on two transactions which were notified in 2008 and whose deadlines extended into 2009;

⁴ Competition Authority -v- Beef Industry Development Society & Another (2006) IEHC 294.

- All transactions were analysed within the statutory time period;
- 23 of the 27 merger notifications received during 2009 were cleared during the initial (Phase 1) investigation, usually within one calendar month;
- Three merger notifications were carried forward into 2010;
- The Competition Authority initiated one full (Phase 2) investigation in 2009, following which the merger was approved subject to conditions; and
- 2009 saw a decrease in the notification of mergers involving media businesses. There were two such mergers notified to the Competition Authority in 2009, compared with five notified in 2008.

51. Table 1 provides more detailed statistics on mergers evaluated between 2007 and 2009.

52. A description of the Phase 2 investigation and an ongoing appeal of a merger case are set out below.

2.2.2 *Metro/Herald*

53. On 17th July 2009 the Competition Authority received a notification of a proposed transaction - *M/09/013 Metro/Herald AM* - whereby Irish Times Limited (“ITL”), DMG Ireland Holdings Limited (“DMG”) and Independent Newspapers (Ireland) Limited (“Independent”), the publisher of *Herald AM*, would acquire joint control of Fortunegreen Limited (“Fortunegreen”), the publisher of *Metro*. At the time of the notification, Fortunegreen was controlled by ITL and DMG, each with a 45% shareholding, and by Metro International which held a 10% shareholding.

54. The relevant market affected by the proposed transaction was the market for display advertising in daily paid-for and free newspapers in the Greater Dublin Area (“GDA”). In this market, *Metro* and *Herald AM* were each other’s closest competitor, but both also faced competition from paid-for newspapers in the GDA particularly *Evening Herald* and *The Independent*.

55. The Competition Authority concluded that three competition concerns would likely result from the proposed transaction, these were:

- The ability of Fortunegreen to compete effectively in the market for display newspaper advertising in the GDA may be diminished;
- A forum would be created that could enhance the potential for co-ordination between the shareholders of Fortunegreen; and
- A forum would be created that could enhance the potential for co-ordination between Fortunegreen and its shareholders.

56. On 2nd November 2009, ITL, DMG, Independent and Fortunegreen submitted proposals, in accordance with section 20(3) of the Competition Act 2002, to address the competition concerns arising from the proposed transaction. The parties undertook that the shareholders would direct Fortunegreen to operate the New Free Newspaper as an independent competitor of the shareholders’ other newspapers; in particular the parties undertook that:

- The management of Fortunegreen will make decisions in respect of certain competitive parameters without requiring the approval of the shareholders or their representatives on the Board;
- The parties undertake that the directors nominated to the Board of Fortunegreen will not have day-to-day responsibility for the advertising function of any daily newspaper sold in the GDA; and

- Certain information in respect of their own business activities will not be exchanged between the shareholders or between the shareholders and Fortunegreen.

57. The Authority determined that the proposals, summarised above, would be appropriate and effective to address its concerns.

2.2.3 Appeal to the Supreme Court on Kerry Foods Decision

58. On 28th August 2008 the Competition Authority made a decision to block the acquisition of Breeo Foods Limited and Breeo Brands Limited (Breeo) by Kerry Group plc (Kerry) - *M/08/009 Kerry/Breeo*. Kerry successfully appealed to the High Court which, on 19th March 2009, annulled the Competition Authority's decision to block the acquisition.

59. On 7th April 2009 the Competition Authority appealed the High Court decision to the Supreme Court. The appeal was in accordance with section 24(9) of the Competition Act 2002, which specifies that an appeal to the Supreme Court may only be made on a question of law. The matter has not yet been heard by the Supreme Court.

Table 1: Statistics on Mergers Evaluated 2007-2009

	2009	2008	2007
Notified Mergers	27	37	72
required notifications [section 18(1)]	27	37	71
voluntary notifications [section 18(3)]	0	0	1
Carried from previous year	2	9	9
carried as Phase 1	2	9	8
carried as Phase 2	0	0	1
Referred from the EU Commission (ECMR Art 9)	0	1	0
TOTAL CASES	29	47	81
of which media mergers	2	5	20
of which entered Phase 2 in year of determination	1	2	3
of which entered Phase 2 in year previous to determination	0	0	1
Cases Withdrawn	0	0	2
Withdrawn at Phase 1	0	0	2
Withdrawn at Phase 2	0	0	0
Determinations Delivered	26	45	70
Phase 1 Determinations cleared without proposals	25	43	64
Phase 1 Determination with proposals	0	0	2
Phase 2 positive Determination without conditions or proposals	0	1	3
Phase 2 Determination with proposals	0	0	1
Phase 2 Determination with conditions	1	0	0
Phase 2 Prohibition	0	1	0
Referral to EU Commission (ECMR Art 22)	0	0	0
Carried to next year	3	2	9
Carried as Phase 1	3	2	9
Carried as Phase 2	0	0	0

3. The Role of Competition Authorities in the Formulation and Implementation of other Policies

60. The Competition Authority also has a statutory duty to promote competition in the economy. Competition can be restricted by State laws, regulations or administrative practice. This means that consumers do not get the benefits of competition. The Competition Act 2002 gives the Authority the specific function of advising the Government, Ministers and Ministers of State about the implications for competition of existing and proposed legislation.

61. In carrying out this function, the Authority regularly highlights competition concerns and seeks to pre-empt any negative consequences for consumers and the economy in general.

62. In 2009, the Authority continued to raise awareness and call for the removal, amendment or avoidance of anti-competitive laws and regulations through submissions to Government Departments and State bodies in response to public consultation processes.⁵

63. For example, the Authority made a submission in response to a call for submissions by Minister for Enterprise, Trade and Employment on her intention to introduce a *Code of Practice for Grocery Goods Undertakings*. The Competition Authority questioned the rationale for introducing the proposed Code of Practice and suggested an alternative approach that might be more effective than a Code of Practice.

64. Much of the conduct at issue in the proposed Code of Practice is already prohibited by legislation. The Competition (Amendment) Act 2006 was enacted to prevent the following practices in the grocery trade:

- Attempts to impose resale price maintenance;
- Discrimination by dissimilar conditions equivalent transactions in the sector;
- Compelling or coercing payment or allowances for advertising or display of goods; and,
- “Hello money” to new extended retail outlets or outlets under new ownership.

65. The Competition Authority pointed out that such conduct is only prohibited where it has as its “*object or effect the prevention, distortion of competition*”. The Authority’s submission suggested some novel remedies to assist and incentivise plaintiffs to bring such private actions. These included removing a fault requirement in a follow-on action by a private plaintiff, limiting the exposure to costs of a plaintiff if the plaintiff loses the private action, and allowing for the possibility of double damages to plaintiffs. Double damages would act as a deterrent to would-be offenders whilst also encouraging plaintiffs to take otherwise expensive actions in court.

66. The Competition Authority also made a submission to the Department of Health and Children regarding resource allocation in the health sector. The Authority identified a number of issues relating to the efficient allocation of resources in three health care professions, namely: optometry, dentistry and pharmacy. It drew specific attention to a number of recommendations it had previously made in its reports on the dental and optometry professions which would bring efficiencies but have not yet been implemented.

⁵ Copies of these submissions are available from the Competition Authority’s website (www.tca.ie).

67. The Authority also made a submission to the Commission for Taxi Regulation following the publication by the Commission of the *Economic Review of the Small Public Service Vehicle Industry*. The Competition Authority highlighted the need for the Commission to make potential entrants to the market more aware of general market conditions e.g. average hours worked and potential earnings.

68. In addition to commenting on specific draft legislation and making formal public submissions, the Competition Authority also gives advice to Government Departments and public agencies in other ways and in various formats such as meetings, written communications or combinations of both. In 2009 the Competition Authority advised Government Departments and public bodies on many issues covering a wide range of economic sectors including public transport, energy and waste collection. Competition Authority staff members were also invited to attend consultative group meetings organised by the Department of the Environment, Heritage and Local Government and the Dublin Transportation Office (now the National Transport Authority).

4. Resources of the Competition Authority

4.1 Resources Overall

69. The Competition Authority is funded by way of annual grant from the Department of Enterprise, Trade and Innovation. In 2009 the Authority's grant was €5.57m following the supplementary budget of April 2009. The Competition Authority's accounts are subject to audit by the Comptroller & Auditor General and the audit of the 2009 accounts is unlikely to be completed until the second quarter of 2010. However, at the time of writing, the provisional, unaudited outturn for 2009 was expenditure of €5.38m. The underspend arose mainly from the existence of a number of vacancies in the second half of the year. The savings identified by the Authority were surrendered to the Department of Enterprise, Trade and Innovation.

Table 2: Competition Authority Budget 2008-2009

Budget	2009	2008	% Change
Euro	5.57 million	< 6.78 million	18%
USD ⁶	7.09 million	< 8.63 million	

4.2 Human Resources

70. 2009 saw the introduction by Government of a number of measures to reduce public service staffing levels, including placing a moratorium on recruitment and the introduction of incentivised career break and early retirement schemes. This resulted in the staffing level of the Competition Authority dropping by nine people in 2009. As a result, at the end of 2009 there were 46 people working in the Competition Authority, compared to an earlier approved staff complement of 59.

Table 3: Number of employees by profession

Employees by Profession	
Lawyers	10
Economists	17
Other professionals and support staff	19
Total Staff	46

⁶ The USD value was calculated using the exchanges rates of May 6th 2009 at <http://www.xe.com/>.

Table 4: Number of employees by function

Employees by Function	
Enforcement	22
Mergers	6
Advocacy	9

Note: Reflects staffing actually working in the Authority on the 31st December 2009.

5. New Reports and Studies on Competition Policy Issues

71. In 2009, the Competition Authority published two reports on competition. The reports examined the import and distribution of products for retail sale, and the general medical practitioner profession. The report on General Medical Practitioners is part of a series of major studies on competition in eight professions. The Competition Authority has made numerous recommendations to improve competition in these sectors and, in 2009, continued to successfully advocate for implementation of these recommendations.

72. In 2009, the Competition Authority also fulfilled its role of promoting competition by publishing a series of booklets offering guidance on competition law and policy; and designing a “Bid-rigging Road Show” which raised awareness among public procurers of the harm caused by bid-rigging and the role of the Competition Authority in investigating suspected bid-rigging.

5.1 Retail-related Import and Distribution Study

73. The price differential between the Republic of Ireland and Northern Ireland has grown in recent years. A survey conducted by the National Consumer Agency in 2008 found that supermarket prices (excluding VAT) in the Republic were on average 21% higher than those in Northern Ireland.

74. Many retailers in the Republic of Ireland attributed the price differential to higher business costs south of the border, while others cited costs associated with the importation and distribution of goods. For example, some retailers claimed that a substantial portion of the price differential could be explained by suppliers in sterling zones not passing on exchange rate benefits from the fall in the value of sterling.

75. In response, the Minister for Enterprise, Trade and Employment asked the Competition Authority to examine how retail goods are imported and distributed. The Authority’s Report, published in June 2009, described the supply chain, specifically the distribution of imported goods, and how competition works in the retail grocery, clothing and pharmaceutical sectors.

76. The Authority found that suppliers frequently charge retailers in the Republic of Ireland more than their Northern Ireland counterparts. However, the Report showed that increasingly cost-conscious consumers are forcing retailers and suppliers to lower their prices. Retailers are pressurising suppliers for better deals and finding alternatives, with food and clothing prices falling as a result (see Figure 1).

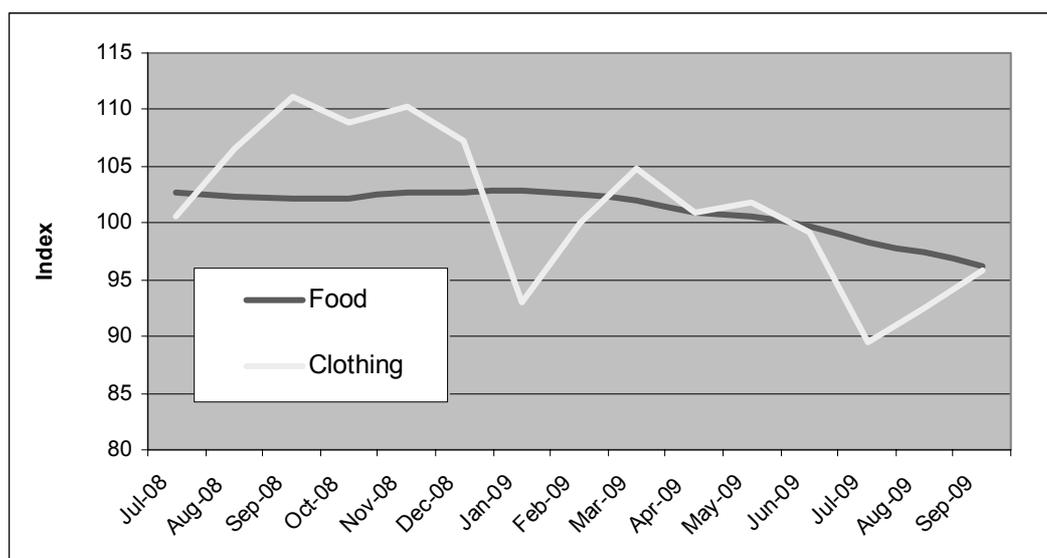
77. The extent and nature of a retailer’s reaction to changing consumer behaviour depends significantly on the flexibility of the supply chain as well as the level of competition. For example, some resellers of branded clothing are having difficulty renegotiating prices with suppliers, while relatively weak competition at the wholesale and retail level of the Irish grocery supply chain might also be limiting price reductions to consumers.

78. Apart from import and distribution costs, the Report identified a number of other factors that contribute to the price differential between the Republic of Ireland and Northern Ireland. These include the high cost of doing business, differences in planning conditions, higher disposable incomes and incomplete

exchange rate pass-through. Northern Ireland, as part of the UK, also benefits more from economies of scale and centralised distribution systems.

79. To reduce the price differential, the Report recommended that the Government should tackle factors that raise the cost of doing business in Ireland. Labour, energy and other utility costs, as well as costs associated with professional and other services, contribute to a higher cost of doing business in Ireland. The Competition Authority also recommended the reform of the *Retail Planning Guidelines* to better facilitate new competition to existing retailers in towns in Ireland. It also recommended that the mark-up paid to pharmacies for medicines under the State's Drugs Payment Scheme should be reduced.

Figure 1: Food and Clothing Prices in Ireland, July 08 – Sept 09



Source: Eurostat HICP Data

5.2 General Medical Practitioners

80. The Competition Authority has, in recent years, carried out a series of major studies on competition in eight professions, to examine how competition works in the professions concerned, and to identify –

- any laws, regulations etc. which tended to prevent or restrict competition, and
- behaviour which, although not necessarily breaching competition law, nevertheless inhibits competition.

81. Parts I and II of the Competition Authority's report on *General Medical Practitioners* were published in December 2009. The Report identified solutions to improve the supply of GPs in Ireland and to facilitate advertising by GPs.

82. Ireland is facing a shortage of supply of GP services. The Authority identified a bottleneck in GP training that is contributing to this problem. The Report found that GP training programmes do not recognise previous hospital training and experience and some GP trainees have to repeat certain training they have already completed.

83. The Authority proposed that an alternative intensive course could be introduced as a fast-track option for doctors who have already completed relevant hospital-based training. This will result in more GPs being trained as quickly and as cheaply as possible and help alleviate predicted shortages in the supply of GP services. This proposal has been positively received and deemed to be workable by the Irish College of General Practitioners (the training body for GPs in Ireland); however, the issue of funding such a course is a matter currently under discussion by the State and the ICGP.

84. The Report also noted that the Authority had secured the removal of previous restrictions on advertising by GPs that discouraged price competition. GPs have traditionally not been allowed to advertise. For example, a new GP practice could not distribute leaflets advertising its services or prices. In 2008, the Authority advocated that unnecessary restrictions on truthful and informative advertising by GPs should be removed. Subsequently, the statutory regulator in this area (the Medical Council) removed restrictions on advertising in its November 2009 revision of the *Guide to Professional Conduct and Ethics* for doctors. GPs are now free to advertise their services and prices. If GPs respond to this development, patients should start to see more information about the services available to them and how much they can expect to pay.

85. The issue of the impact of the GMS system (for GPs treating public patients) will be dealt with in Part III of the Report, to be published in 2010.

5.3 Previous Recommendations of the Competition Authority

86. The Competition Authority has published comprehensive reports on twelve sectors of the economy since the year 2000. Those reports made 163 recommendations to Government Departments, public agencies and private sector organisations.

87. Every year, the Competition Authority continues to advocate for the implementation of these recommendations. At the end of 2009, over 40% of recommendations made since 2000 had been implemented, with a further 30% being progressed or not requiring any action at this time. This is an improvement on 2008; it mainly reflects a number of recommendations that were being progressed in 2008 becoming fully implemented in 2009. The remaining 30% have not yet been implemented.

88. The Authority welcomed the Government announcement in late 2008 that it would, in future, "... publish a whole-of-Government response to recommendations contained in reports of the Competition Authority within nine months of their publication". The Government issued its first Statement responding to our recommendations in April 2010.⁷

89. Of course, the implementation of recommendations does not imply that any sector has achieved a "clean bill of health" from a competition perspective. Markets change over time; recommendations are there to encourage and facilitate competition but do not guarantee it. The Competition Authority will pursue any evidence of cartels, abuses of dominance, and other illegal activities in any sector of the economy, whether it has been subjected to a market study or not.

5.4 Raising Awareness: Other Activities

90. One of the Competition Authority's main goals is to foster a culture of competition in Ireland by raising awareness and understanding of the benefits of competition and the Authority's role among policy

⁷ The Government's first statement on our recommendations is available at: <http://www.entemp.ie/press/2010/20100408a.htm>.

makers, businesses and consumers. The Authority achieves this goal mainly through speaking opportunities, and media briefings.

91. In 2009, as part of its outreach and awareness-raising activities, the Authority also published four information booklets in 2009 for consumers, businesses and public procurement officials. They provide general information on the role that competition policy and law play in the economy and what to do if there is a suspicion that competition law is being breached:

92. In 2009, the Competition Authority also placed a high priority on raising awareness of the harm caused by anti-competitive conduct and in particular bid-rigging/collusive tendering cartels. A “Bid Rigging Road Show” was designed to create awareness among public procurers of the harm caused by bid-rigging and the role of the Competition Authority in investigating suspected bid-rigging. The Competition Authority gave presentations to individuals involved in public procurement in a number of Government Departments and State Agencies. Procurers were informed of the pitfalls to avoid in tender design and what to look out for in submitted tenders. The attendees included representatives from County Councils, Government Departments, State Agencies, Semi-State Bodies, Universities and other public bodies.