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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN IRELAND

-- 2010 --

This report is submitted by Ireland to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 June 2011.

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Executive Summary

1. One of the Competition Authority's key roles in the current environment is to communicate the crucial role of competition policy in a downturn. Improving the country's competitive position is the key to ensuring that future generations can have a chance to enjoy the levels of opportunity and prosperity that Ireland has seen in the past.
2. Competition can help the economy to recover its competitiveness. It brings dynamism. The greater the intensity of competition in the economy, the better able Irish firms will be to compete and succeed on a global level.
3. We are very aware of the difficulties facing businesses in these recessionary times, but anti-competitive conduct or protectionist policies are not appropriate responses.
4. Looking back at 2010, we can identify a number of high points for the Authority, as well as a number of very significant challenges.
5. In December, we completed a major investigation file for the Director of Public Prosecutions. The file concerns an extremely complex and substantial investigation that has required a major investment of our resources over a number of years. We recommended prosecution on indictment against a number of companies and individuals.
6. Our long-running case against the Beef Industry Development Society Ltd. continued in 2010 and came to a successful conclusion early in 2011. This was a most important case for Irish and European competition law. We welcome the clear message that has come from the Courts, namely that a plan to restructure an industry by agreement between a group of competitors is likely to restrict competition and therefore breach national and EU law.
7. We continued work on competition in the professions in 2010 by publishing a substantial report into General Practitioner services. Our report identified a number of measures to improve access to GP services, improve consumer information and remove barriers to GPs establishing new practices. The Government has committed to implementing our recommendations, both in the National Recovery Plan and the Memorandum of Understanding with the European Commission, the ECB and the IMF.
8. Several more of our recommendations for pro-competition reforms have appeared as commitments in the National Recovery Plan and the Memorandum of Understanding, including those relating to regulation of the legal profession and legislating for civil fines in competition law cases.
9. Merger notifications were up in 2010 on the previous year by more than a third. In October 2010, the Centre for European Law and Economics published the findings of a 2009 survey of 257 experts from over 60 jurisdictions asking them to rank jurisdictions on the institutional efficiency of their merger review systems. The Irish Competition Authority, along with the Netherlands Competition Authority, was ranked first in the EU for institutional efficiency of its merger review system. Ireland and the Netherlands, along with the United States, shared second place in the global ranking of 60 jurisdictions.
10. In December 2010, we started a review of the Authority's Guidelines for Merger Analysis by holding a public forum to discuss a range of issues in light of international developments and recent Authority practice in relation to substantive merger analysis. This exercise provided valuable feedback for the Authority and will help us in preparing revised Guidelines for public consultation in 2011.

11. We also publicly consulted on our Cartel Immunity Programme in conjunction with the Director of Public Prosecutions. Having evaluated how the programme works in practice, and taking into account changes internationally in immunity and leniency models, we felt the time was right to propose changes to the existing model. The Authority and the Director of Public Prosecutions will publish a revised programme in the coming months.

12. The Cartel Immunity Programme is an important tool in the investigation and prosecution of cartels in Ireland, which continues to be a top priority for the Competition Authority. To date, 33 criminal convictions have been handed down to 18 undertakings and 15 individuals, with fines totalling more than €600,000, and suspended prison sentences ranging from three to 12 months.

13. 2010 was also a very challenging year for the Authority. Continuing budget cuts, the embargo on public sector recruitment and implementation of the various schemes to reduce numbers in the public sector have resulted in substantially reduced resources, yet the workload – and indeed what the public rightly expects of us – remains relatively unchanged.

14. Staff numbers are down by a third. Clearly this means that we have had to be ruthless in prioritising our resources. The Chairperson of the Authority, Mr Declan Purcell, has publicly indicated what he believes is realistic for us to achieve in the coming period.

15. With the current level of resources we have (and can expect to continue to have), this is his assessment of what it is realistic to expect of the Irish Competition Authority –

- we will focus our enforcement capacity on those cases that cause very serious harm to competition,
- we will meet the statutory deadlines in merger review but only through diverting resources where necessary from other statutory functions,
- we will focus our competition advocacy on the least resource- intensive forms of advocacy rather than carry out valuable market studies,
- we will comply with best practice corporate governance standards with as few resources as we can afford.

16. Finally, matters regarding the proposed amalgamation of the Competition Authority with the National Consumer Agency – and indeed possibly other bodies – have not been finalised at the time of writing. These matters are likely to have a significant impact on our ability to meet targets set for 2011.

17. Changes in personnel at a senior level within the organisation, with the temporary replacement of three Members of the Authority and the interim position of the Chairperson, also contribute to the degree of uncertainty faced by Authority staff.

18. Despite these difficulties, we have achieved a great deal in the past year, and would intend to carry this on into the next.

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

1.1 Summary of new legal provisions of competition law and related legislation

19. During 2010, there were no new competition law provisions introduced.

1.2 Other relevant measures, including new guidelines

1.2.1 Category Declarations

20. The Competition Act allows us to declare in writing that a specified category of agreements, decisions or concerted practices are not considered to be anti-competitive and are exempt from section 4 of the Act. We publish these views as *Declarations*.

21. During 2010, we reviewed all existing Declarations. In July we published a consultation document inviting submissions from interested parties on our proposals in respect of three Declarations.

- The Vertical Agreements Declaration, which concerns commercial arrangements between parties at different levels of the distribution chain, such as suppliers and resellers.
- The Cylinder Liquefied Petroleum Gas (LPG) Declaration, which concerns cylinder LPG exclusive purchasing agreements.
- The Motor Fuels Category Declaration, which concerns exclusive purchasing agreements

22. The consultation document also sought comments on the text of a proposed new Bulk LPG Declaration.

23. We received 14 submissions. We report on the outcome in each case below.

1.2.2 Vertical Agreements Declaration

24. In the consultation document, we proposed to bring the Vertical Agreements Declaration into line with the new EU Verticals Block Exemption Regulation. We also proposed allowing the Vertical Agreements Notice to lapse without renewal. Those who made submissions broadly supported these proposals.

25. The new Category Declaration in respect of Vertical Agreements and Concerted Practices (D/10/001) came into force on 1 December 2010. It exempts certain categories of vertical agreements and concerted practices from the prohibition set out in section 4 of the Act. The new Declaration brings the Irish exemption into line with that of the European Commission.

26. In addition, we developed a new Guidance Notice (N/10/01) for businesses on how to assess their vertical agreements and the difference between the Declaration and the EU's Vertical Block Exemption Regulation. In essence, the guidance in the new Notice amounts to a statement that, when assessing vertical agreements or concerted practices, we will follow, with limited exceptions, the European Commission's approach.

27. The most significant change is that the Declaration now applies to vertical agreements on condition that, among other things, the market share of the buyer is less than 30%. In the old Declaration, this buyer market share threshold only applied to vertical agreements containing exclusive supply

obligations. The new Declaration also modifies some of the previous hardcore restrictions, that is, those restrictions that *never* benefit from the exemption given by the Declaration.

28. One difference between the new Declaration and the EU Vertical Block Exemption Regulation relates to buyer pools. Article 2(2) of the EU's Vertical Block Exemption features an exemption for retailer buyer pools, where no individual member (or its connected undertakings) of a buyer pool has an annual turnover in excess of €50 million. Some submissions suggested that the Irish Declaration should contain similar terms. We decided that the financial thresholds used in the EU's Vertical Block Exemption would not be appropriate in an Irish context.

29. A review of the Vertical Agreements Declaration will take place after 6 years. The new Vertical Agreements Declaration is due to expire in 10 years on 1 December 2020.

1.2.3 Cylinder LPG Declaration

30. As proposed in the consultation, we have allowed the Cylinder LPG Declaration (D/05/001) to continue in force without amendment until its expiry date (31 March 2015). This Declaration concerns exclusive purchasing agreements for cylinder LPG, that is, where a reseller agrees with a supplier to sell a particular brand of cylinder LPG. The Declaration limits exclusive agreements in the cylinder LPG market to two years' duration.

31. Complying fully with the terms of the Declaration will give suppliers of cylinder LPG a safe harbour from prosecution under competition law.

1.2.4 Motor Fuels Declaration

32. Our consultation sought views on a proposal to allow the Motor Fuels Declaration to lapse. In general, the submissions were in favour of our proposals and no compelling reasons were offered for the Declaration to continue.

33. We decided that it was appropriate, given the changes to the market, to allow the Motor Fuels Declaration to expire on 30 November 2010. Agreements relating to garage forecourts now fall for consideration under the Verticals Declaration, which came into effect on 1 December 2010.

1.2.5 Bulk LPG

34. We also sought submissions on whether to issue a Declaration in respect of the Bulk LPG market. We have not yet made a decision on this issue. We are carrying out further research into how competition works in this market and we plan to make a decision in 2011 on whether or not to make a Declaration.

1.3 Government Proposals for New Legislation

35. In 2010, the Department of Enterprise, Jobs and Innovation continued to prepare 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.

36. In addition, the Department 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, Jobs and Innovation expressing concerns about the introduction of such a Code.

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*

37. One of our core functions is to enforce competition law and to take legal action when we believe the law has been broken.

38. In some cases, where we are of the opinion there has been a breach of competition law, we will bring a civil case before the Courts. Other cases are closed following a settlement in which the offending parties recognise and remedy their anti-competitive behaviour. However, the majority of cases are closed following an internal finding that they do not involve a breach of the Act.

39. Where we have gathered sufficient evidence of criminal cartel agreements, we refer a file on that case to the Director of Public Prosecutions (DPP) for prosecution on indictment.

40. Reflecting our commitment to tackle the harmful effects of cartels, in 2010 we concluded a lengthy and complex cartel investigation and we referred a file to the DPP recommending prosecutions against a number of companies and individuals.

41. We also try to help businesses to comply with competition law by giving appropriate guidance. During 2010, we reviewed our guidance in the areas of vertical agreements and concerted practices, cylinder LPG distribution and motor fuels retailing.

42. In 2010, we received:

- 31 new complaints of alleged criminal cartel behaviour, one of which has led to a detailed investigation being launched. Of the others, 21 were closed in 2010, and nine are still being evaluated.
- 135 new complaints of anti-competitive agreements and abuses of dominance, 112 of which were closed during the year.

43. Six criminal cartel investigations were ongoing throughout 2010. Three investigations were nearing completion at the end of 2010. In two of these, our investigations have found that there was no breach of the Competition Act. In the third case, sufficient evidence has not yet been uncovered to warrant recommending a prosecution to the DPP. One case was completed with a file sent to the DPP recommending prosecution on indictment, and the remaining two cases are still being actively investigated.

44. Seven civil investigations were ongoing during 2010. Of these, two investigations were concluded by the end of 2010. We ceased investigative work on two files because of private actions taken by parties involved. Work is ongoing on the remaining three investigations.

2.1.2 *Cases before the Courts*

- The BIDS Case

During 2010, the *Competition Authority v Beef Industry Development Society* (BIDS) case came before the High Court. In January 2011, we won this case.

The importance of this case became clearer in 2010 with the decision by the European Commission to submit written observations to the Court. This is only the fourth time that the Commission has intervened in this way before a national court.

This case involved an agreement between competitors to reduce capacity in the Irish beef processing industry. The agreement involved the major players in the industry agreeing to pay those players who would voluntarily leave the industry. In return for that payment, the players leaving 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.

We took the view that the scheme was incompatible with both section 4(1) of the Competition Act 2002 and Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and took legal action in 2003. The case has gone through a number of stages since then.

- In July 2006, the High Court held that the agreement had neither the object nor the effect of preventing, restricting or distorting competition and therefore did not breach Article 101 TFEU.
- We appealed this judgment to the Supreme Court.
- In March 2007, the Supreme Court sought a preliminary ruling from the European Court of Justice (ECJ) on the question of whether an agreement like the BIDS agreement, where the competitors in that industry agreed between themselves to restructure the entire industry, had the object of restricting competition.
- On 20 November 2008, the ECJ found that the BIDS agreement had as its object the restriction of competition and is incompatible with Article 101(1) TFEU.
- On 3 November 2009, the Irish Supreme Court held that the BIDS agreement had infringed Article 101(1) TFEU. The Supreme Court remitted the case to the High Court to decide whether the conditions for exemption set out in Article 101(3) TFEU were satisfied.

During the High Court proceedings in 2010, the Commission decided to intervene in the case and submitted written observations pursuant to Council Regulation (EC) No 1/2003. Under Article 15(3) of that Regulation, the Commission may submit written observations to courts of the Member States where the coherent application of Articles 101 or 102 TFEU requires doing so.

Before the High Court had the opportunity to reach any decision on the application of Article 101(3) to the BIDS agreement, BIDS withdrew its claim for exemption under Article 101(3) and agreed to pay a substantial contribution to our costs in the case.

- Closed Investigations

We conducted a number of investigations during 2010, three of which were concluded during the year. As there was no evidence to suggest that an offence was committed under the Act, we decided to close these investigations without taking any further action.

Below are two examples of complaints alleging anti-competitive behaviour and the action that we took.

- Poolbeg Incinerator

During 2010, we assessed a complaint alleging that the contract for the operation of the proposed Poolbeg Waste-to-Energy Incinerator contained breaches of competition law. There were a number of aspects to this complaint. Some aspects of the investigation have been completed while other aspects are continuing.

The Poolbeg incinerator is to be constructed and operated by Dublin Waste-to-Energy Ltd. (DWEL) on behalf of Dublin City Council (DCC) and the other Dublin area local authorities. DWEL is a joint venture between Dong Energy Generation AS and Covanta Energy. The agreement between DWEL and DCC is set out in a Public Private Partnership (PPP) contract.

Under the terms of the contract, DCC must, for each year of the lifetime of the contract, provide enough waste to fill an agreed proportion of the incinerator's capacity.

The Irish Waste Management Association (IWMA), the trade association representing private waste management companies in Ireland, complained to us that various terms of the contract breached both section 4 (anti-competitive agreements) and section 5 (abuse of dominance) of the Competition Act 2002.

In relation to section 4 of the Act, one of the IWMA allegations was that the contract contained price-fixing arrangements amounting to a hardcore breach of the Act. After careful examination of the contract, we concluded that the contract is like a partnership arrangement where the two parties are sharing the benefits and risks of an enterprise. The contract therefore provides for discussions and consultations between the parties on many aspects of the management of the facility, including pricing. We are satisfied that the provisions for consultation between DCC and DWEL, when analysed in the context of the overall contract, do not amount to a breach of the Act.

The IWMA also complained that the scale of the incinerator, and the fact that DCC is a public body with statutory functions in relation to waste management, meant that DCC and/or DWEL were dominant in the waste processing market in the Dublin area. One of the allegations under section 5 of the Act was that DCC and/or DWEL would engage in conduct that could amount to an abuse of dominance in the waste processing market. We examined this issue closely and found that the alleged abuses were unlikely, given the current structure of the waste processing market and the related waste collection market.

After a detailed evaluation of the various aspects of the complaint, we found that, while the incinerator and the PPP contract would affect the market for waste collection and disposal, it would not affect these markets in an anti-competitive way.

The IWMA also made complaints relating to DCC's role as both the issuer of waste collection permits and a competitor in the waste collection market in Dublin. Our investigation into this aspect of the complaint is continuing.

- Pay-TV Exclusivity in Apartment Developments

In 2009, we published a Guidance Notice and an Enforcement Decision Note in relation to Pay-TV exclusivity in apartment developments. This arose from complaints that some apartment residents were unable to switch to another pay-TV provider because of exclusivity arrangements agreed between the original pay-TV service provider and the developer during the building

construction phase. We found that exclusivity agreements of two years or less are unlikely to breach the Competition Act, but that agreements lasting longer than two years need to be assessed on a case-by-case basis.

During 2010, we concluded the assessment of a group of exclusivity agreements relating to a number of new developments in Dublin. At these developments, the exclusive TV provider had intended to retain exclusivity for a period that went significantly beyond two years. We raised our concerns with the provider and secured the removal of the exclusivity. and the provider also indicated that other TV service providers could access the developments in question. Based on this successful outcome, we closed our investigation.

We will continue to assess, on a case-by-case basis, pay-TV exclusivity agreements that are longer than two years' duration.

2.2 Mergers and acquisitions

2.2.1 A Statistical Overview

45. The number of mergers and acquisitions notified to the Competition Authority increased significantly in 2010 in comparison to the previous year. The following summarises the activity:

- 46 mergers in total were notified to the Authority.
- Of these, 8 were media mergers.
- We finalised work on 3 transactions which were notified in 2009 and whose deadlines extended into 2010. In one of those cases, we decided, in January 2010, to carry out a full (phase 2) investigation.
- All transactions were analysed within the statutory time period.
- We issued 8 Requirements for Further Information in 3 merger assessments.
- 40 of the 46 merger notifications received during 2010 were cleared during the initial (phase 1) investigation, usually within one calendar month.
- We cleared one merger notification in phase 1 subject to conditions in 2010.
- 6 merger notifications were carried forward into 2011.
- We initiated two full (phase 2) investigations

2.2.2 Greenstar/Veolia

46. On 22 October 2009, we were notified of the proposed acquisition by Greenstar Holdings Limited of sole control of Veolia Environmental Services (Ireland) Limited. The assessment of this case carried over into 2010 and on 7 January 2010 we made a decision to move to a phase 2 investigation.

47. We considered a number of markets as part of our investigation. These were:

- the provision of waste management services in the Greater Dublin Area (GDA) to either large or small commercial & industrial (C&I) customers,
- the provision of waste management services in the South-East region to either large or small C&I customers,
- the provision of waste management services in Cork City and County to either large or small C&I customers,
- the market for the sale of recyclable materials, and
- the market for the management of recycling facilities on behalf of County Councils.

48. On 11 March 2010, having completed our investigation, we formed the view that the result of the proposed transaction would not be to substantially lessen competition and therefore could be put into effect.

2.2.3 *Mergers Cleared with Commitments*

- ESB/NIE

Following an extensive phase 1 assessment, we cleared with commitments the proposed transaction whereby Electricity Supply Board (ESB) would acquire, among other things, sole control of Northern Ireland Electricity plc and its subsidiaries (NIE). The transaction was notified on 5 August 2010.

During the assessment we considered a number of different markets. These were:

- the provision of engineering consultancy services in the State,
- the provision of high voltage electricity installation services in the State,
- the transmission and distribution of electricity in the State, and
- electricity generation and wholesale supply in the Single Electricity Market.

We identified one area of concern during the course of our assessment. This concern was that, post-acquisition, ESB would be in a position to acquire and use commercially sensitive information gained from its ownership of NIE to the competitive advantage of their generation and supply business activities on the island of Ireland.

On 29 October 2010, we cleared the merger after accepting a proposal from ESB which satisfied our concerns. The proposal formed part of the basis for our decision and is therefore binding on ESB.

- Alpha Newspaper Group/Newry Democrat - Call Option Agreement

Notifying parties may enter into other forms of agreements that are related to a notified transaction but are not themselves notifiable. We consider that all such agreements should be brought to our attention as part of the notified transaction. Failure to do so may lead to unnecessary delay in the assessment of a notified transaction.

In the case of M/10/030 - Alpha Newspaper Group/Newry Democrat, the existence of a Call Option Agreement was not brought to our attention as part of the notified transaction. This resulted in an extended phase 1 assessment during which we issued two Requirements for Further Information (these are formal requests for information from the parties and have the effect of delaying a merger determination).

We formed the view that the Call Option Agreement was related to the proposed transaction and should have been included in the notification of the proposed transaction. The parties disagreed with this view. The parties later informed us that the Call Option Agreement was terminated. On receipt of this information and after conducting the analysis, we considered that the proposed transaction would not lead to a substantial lessening of competition in the State.

- Rescue Mergers

Due to the financial crisis and economic downturn, a number of companies have found themselves in financial difficulty. In 2010, the Competition Authority was notified of a number of mergers where one or more of the undertakings concerned were in financial difficulty, and in some cases a failing firm argument was made.

The following three cases are examples of rescue mergers notified to the Authority in 2010. In all of these cases, we used our discretion to reduce the number of days for third party submissions to expedite the assessment process.

- Club Travel/Budget Travel (in liquidation)
- An Post/PostPoint (orderly wind-down of Postbank)
- Pilgrim (Oaktree Group)/MHL & MCL (construction sector).

In these cases, we did not consider it necessary to specifically assess whether there was a failing firm, that is, a firm whose assets would exit the market in the absence of the proposed transaction. Rather, in all three cases, our competition analysis indicated that there were enough grounds to clear the merger irrespective of whether the target undertaking would exit the market.

- Mergers Involving Media Businesses

The Competition Act 2002 allows for the possibility that a media merger cleared by the Competition Authority on competition grounds after a full investigation may still be blocked by the Minister for Enterprise, Jobs and Innovation on public interest grounds.

2010 saw an increase in the number of media mergers notified to us. Eight media mergers were notified in 2010. The Minister for Enterprise, Jobs and Innovation made no order during 2010 to either carry out a full investigation under section 22 of the Act or to prohibit a media merger from being put into effect. Table 1 provides more detailed statistics on mergers evaluated between 2008 and 2010.

Table 1: Statistics on Mergers Evaluated 2008-2010

| | 2010 | 2009 | 2008 |
|--|-------------|-------------|-------------|
| Notified Mergers | 46 | 27 | 37 |
| required notifications [section 18(1)] | 46 | 27 | 37 |
| voluntary notifications [section 18(3)] | 0 | 0 | 0 |
| Carried from previous year | 3 | 2 | 9 |
| carried as phase 1 | 3 | 2 | 9 |
| carried as phase 2 | 0 | 0 | 0 |
| Referred from the EU Commission (ECMR Art 9) | 0 | 0 | 1 |
| TOTAL CASES | 49 | 29 | 47 |
| of which media mergers | 8 | 2 | 5 |
| of which entered phase 2 in year of determination | 1 | 1 | 2 |
| of which entered phase 2 in year prior to determination | 1 | 0 | 0 |
| Cases Withdrawn | 0 | 0 | 0 |
| Withdrawn at phase 1 | 0 | 0 | 0 |
| Withdrawn at phase 2 | 0 | 0 | 0 |
| Determinations Delivered | 43 | 26 | 45 |
| Phase 1 determinations cleared without proposals | 41 | 25 | 43 |
| Phase 1 determination with proposals | 1 | 0 | 0 |
| Phase 2 positive determination without conditions or proposals | 1 | 0 | 1 |
| Phase 2 determination with proposals | 0 | 0 | 0 |
| Phase 2 determination with conditions | 0 | 1 | 0 |
| Phase 2 prohibition | 0 | 0 | 1 |
| Referral to EU Commission (ECMR Art 22) | 0 | 0 | 0 |
| Carried to next year | 6 | 3 | 2 |
| Carried as phase 1 | 5 | 3 | 2 |
| Carried as phase 2 | 1 | 0 | 0 |

3. The role of Competition Authorities in the formulation and implementation of other policies

49. Difficult economic times have led to a renewed focus on the key role that competition policy can play in regenerating the Irish economy. Alongside our law enforcement role, we have a statutory duty to promote the benefits of competition throughout the entire economy and to advise policy-makers on how the application of the principles of fair and open competition throughout the economy can help to achieve better policy outcomes.

50. In 2010, the Authority's Advocacy Division focused its activities on advising Government Departments and public bodies on a range of competition-related matters. A noticeable feature of 2010 was the renewed effort by the public sector to achieve better value for money as budgets came under increasing pressure. The Government itself is one of the largest consumers of goods and services in the Irish economy and it is therefore essential that it can buy goods and services at reasonable prices. In designing policies, Government Departments are increasingly aware of the need to consider the impact of various policy options on competitiveness.

51. Among the issues the Authority examined in 2010 were:

- the reform of bus licensing legislation,

- the deregulation of the retail electricity sector,
- waste management costs, and
- the need for reform of the State's system for subsidising GP services.

3.1 Identifying Public Restrictions on Competition

52. State laws, regulations and administrative practices can, and often do, restrict competition. This means that consumers do not get the benefits of competition. We refer to these as *public restrictions on competition*.

53. Public restrictions on competition often force consumers to pay more for services. They also increase business input costs, making businesses less competitive. They allow sheltered sectors of the economy to be subsidised by internationally exposed sectors and reduce productivity and growth in the economy as a whole. Therefore, identifying and removing public restrictions on competition is of utmost importance. The end result of public restrictions is the same as with private ones - less value for money, less choice for consumers and higher costs to both consumers and business.

3.1.1 Bus licensing

54. In September 2010, we made a submission to the National Transport Authority's (NTA) public consultation on its *Draft Guidelines for the Licensing of Public Bus Passenger Services*. We were concerned that the Draft Guidelines would, if implemented as initially drafted, be anti-competitive.

55. In particular, the Draft Guidelines did not reflect the positive benefits which competition can bring, and appeared to create unnecessarily high barriers to entry to providing commercial bus services. We were also concerned about the extent to which Dublin Bus and Bus Éireann routes are deemed to be "Public Service Obligation" routes (non-commercial routes) and therefore exempt from the licensing system. We made 10 proposals to the NTA to amend the Draft Guidelines.

56. When the final Guidelines appeared in December 2010, we were pleased to note that they had clearly taken on board our concerns. The new Guidelines are an important step forward in introducing greater competition in the commercial bus service sector.

57. We have highlighted the need for greater competition in public bus services for over a decade. Previously, the Transport Act 1932 governed the licensing of bus services. The 1932 Act gave Bus Éireann and Dublin Bus a very significant competitive advantage and curtailed the expansion of private bus operators. The Public Transport Regulation Act 2010 and the new Guidelines together represent a significant change in the regulatory regime in favour of competition.

58. However, for bus services to be fully competitive in Ireland bus companies should also have equal opportunity to compete to provide the *subsidised* (Public Service Obligation) services currently provided by Bus Éireann and Dublin Bus. These subsidised services are exempt from the licensing system set out in the Guidelines. We will continue to advocate competitive tendering of subsidies for bus services, rather than the monopoly held by Bus Éireann and Dublin Bus.

3.1.2 Electricity

59. We made a submission to the Commission for Energy Regulation's (CER) consultation on a *Roadmap for Deregulation of the Electricity Retail Market* in February 2010. The consultation was timely,

given that competition in retail electricity supply has finally become a reality with the entry of Bord Gáis Energy and Airtricity into the domestic household market, which was previously dominated by ESB.

60. We emphasised the need for strong regulatory oversight of the electricity sector, as there is a delicate balance to be struck between ensuring that well-informed consumers get the benefits of competition while also ensuring that vulnerable consumers are protected.

61. While the entry of Bord Gáis Energy and Airtricity has given consumers greater choice, we recommended that the CER should conduct further studies of consumer attitudes - to see if there are barriers which may inhibit consumers from switching supplier even when it is beneficial for them to do so.

62. Up to now the CER has, quite rightly, focused its resources on ensuring that the structural elements of the supply side of the market are in place so that all electricity suppliers compete on a level playing field. The demand-side issues deserve similar attention.

63. While welcoming the arrival of competition among retail electricity suppliers, we highlighted that further market reforms are needed to build on the market-opening initiatives that have already taken place. Competitive conditions could be improved by:

- removing any remaining costs to consumers shopping around for electricity,
- removing any perception that switching from ESB may jeopardise service quality,
- raising awareness of the ease of options for switching,
- ownership unbundling of the network from the supply business,
- rolling out smart metering.

3.1.3 *Waste management*

64. We made a submission to the Department of the Environment, Heritage and Local Government in January 2010 regarding its *Draft Statement of Waste Policy*. We emphasised that competition policy is compatible with waste policies, and that competition in the waste management sector can keep collection costs down for businesses and households.

65. We made six recommendations.

- The proposed national framework plan and nationally administered arrangement should incentivise competition among waste management service providers at each level of the waste management hierarchy and allow flexibility for the introduction of new technology.
- The national framework plan should carefully balance the benefits from economies of scale and the benefits of competition.
- The proposed national administrator of waste regulation (instead of administration by local authorities) should not have any responsibility for price setting.
- A flexible system of levies in line with stated public policy objectives would be better than directing waste to particular treatment facilities.
- Competitive tendering is preferable where side-by-side competition does not appear to work well for consumers.
- Where competitive tendering is introduced, practical issues involved in designing the tender must be carefully considered in order to maximise the number of credible tenders.

66. Appropriately regulated competition in the waste sector is essential in helping Ireland achieve environmental goals at a competitive cost.

3.2 *Advice on Proposed Legislation, Regulation and Competition Issues*

67. The Competition Act 2002 gives us the specific function of advising the Government, Ministers and Ministers of State about the implications for competition of proposed legislation. In carrying out this function, we seek to highlight competition concerns and pre-empt any negative consequences for consumers.

68. In 2010, we advised many Government Departments and other public sector bodies in this way, as illustrated by the table below. A notable feature of 2010 was the wide range of topics on which Government Departments and public authorities sought advice.

Table 2: Advice provided in 2010

| Department/Public Body | Topic |
|--|---|
| Department of the Environment, Heritage and Local Government | EU Directive on packaging waste Competitive tendering in waste collection Retail planning guidelines Competition policy and environmental policy |
| Department of Health and Children | General Medical Services (GMS) scheme and GPs Role of the State in provision of nursing home places |
| Department of Social Protection | Home Benefits Scheme |
| Department of Agriculture, Fisheries and Food | Competition policy in the context of the “Food Harvest 2020” strategy |
| Financial Regulator | Widespread restructuring of the banking sector |
| Department of Finance | Commitments given to the European Commission for reform of the banking sector to meet EU state aid rules |
| Health Service Executive | Competition Authority recommendations re GP training and reform of the GMS contract |
| National Transport Authority | Guidelines for the licensing of public bus passenger services |
| Department of Transport | Implementation of recommendations contained in Competition Authority’s 2005 report on non-life insurance |
| Review Group on State Assets and Liabilities | Competition and privatisation |
| EU Commission and the International Monetary Fund | The role of competition policy in facilitating economic recovery |
| Forfás | Competition and competitiveness |
| Bord Bia (Irish Food Board) | Competition law |
| Property Services Regulatory Authority | Minimum educational requirements to be an estate agent, auctioneer or property management agent |
| National Consumer Agency | Food price comparison websites |
| Department of Enterprise, Trade and Innovation | 28 different topics |

3.2.1 National Asset Management Agency

69. The Government established NAMA on 21 December 2009 in response to the Irish financial crisis. NAMA is “an asset management company that will acquire good and bad loans from participating institutions. It will manage these assets (hold, dispose, develop or enhance them) with the aim of achieving the best possible return for the taxpayer on the acquired loans and on any underlying assets over a 7-10 year timeframe.”¹

70. Under section 215(1) of the NAMA Act 2009, NAMA’s activities with respect to the acquisition of bank assets are exempt from the Competition Act 2002. However, NAMA’s conduct post-acquisition of assets still falls within the remit of the Act. We will be monitoring NAMA’s conformity with the Act after the transfer of assets.

71. In February 2010, under the EU State Aid rules, the European Commission approved the NAMA scheme as a measure to “remedy a serious disturbance in the economy of a Member State”. However, in light of the potential effects of the NAMA scheme on European competition law, the European Commission required and obtained a commitment by the Irish authorities to “report on a yearly basis to both the Commission and the Irish national competition authorities” on the use of NAMA’s post-acquisition powers. The Commission noted that this requirement “will allow the Commission and the Irish competition authorities to take any action they consider adequate if they deem that NAMA’s use of its powers has resulted in competition distortions.”²

72. In addition, certain provisions of the NAMA Act 2009 explicitly refer to the Competition Act 2002, for example:

- Section 203 provides that, where NAMA suspects that a participating institution has contravened competition law, NAMA must report the information which leads to that suspicion to the Competition Authority.
- Section 208(11) provides that the Minister for Finance may not approve a restructuring or business plan for a participating institution where that plan does not comply with Irish or European competition law.

4. Resources of the Competition Authority

4.1 Resources Overall

73. The Competition Authority is funded by way of annual grant from the Department of Enterprise, Jobs and Innovation. In 2010 the Authority’s grant was €4.7m. The provisional, unaudited outturn for 2010 was expenditure of €3.9m. The reduction in the number of staff working in the Competition Authority, either through the Government’s moratorium on recruitment to the public service or the delay in filling a number of vacancies at Member level, naturally led to a reduction in expenditure.

Table 3: Competition Authority Budget 2009-2010

| Budget | 2010 | 2009 | % Change |
|------------------|-------------|--------------|-----------------|
| Euro | 4.7 million | 5.57 million | -16% |
| USD ³ | 6.9 million | 8.17 million | |

¹ The National Asset Management Agency: A Brief Guide (30 March 2010) <http://www.nama.ie/Publications/2010/NAMABriefGuide30March2010.pdf>

² European Commission decision on the Establishment of a National Asset Management Agency: Asset relief scheme for banks in Ireland.

³ The USD value was calculated using the exchange rate of 27 April 2011 at <http://www.xe.com/>

4.2 Human Resources

74. In March 2009, the Government introduced 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. At the time of the introduction of the recruitment ban, the Competition Authority's sanctioned staff complement was 59. By the end of 2010, the number of people working in the Authority had fallen to 39. Departures in 2010 arose from the resignation in March of the Chairperson, William Prasifka, and in May the Director of the Cartels Division, Carolyn Galbreath. Mr Prasifka left to take up the position of Financial Services Ombudsman. Two staff members retired in 2010 and another two commenced unpaid career breaks.

75. The resignations of Mr Prasifka and Ms Galbreath left the Authority inquorate for a number of months until the appointment under the Competition (Amendment) Act 2010, of Mr Gerald FitzGerald and Ms Isolde Goggin as temporary full-time Members. These appointments followed the enactment by the Oireachtas of amending legislation to enable the Minister for Enterprise, Jobs and Innovation to appoint temporary Members to the Authority in circumstances where a permanent vacancy existed.

76. As a result of the moratorium on recruitment, the number of people working in the Authority in 2010 was at its lowest level since 2003.

Table 4: Number of employees by profession

| | |
|---------------------------------------|-----------|
| Lawyers | 9 |
| Economists | 15 |
| Other professionals and support staff | 15 |
| Total Staff | 39 |

Table 5: Number of employees by function

| | |
|-------------|----|
| Enforcement | 17 |
| Mergers | 5 |
| Advocacy | 6 |

5. New Reports and Studies on Competition Policy Issues

77. We have published 12 comprehensive market studies since the enactment of the Competition Act 2002. 2010 saw a number of important developments regarding the recommendations in these reports.

- First, additional recommendations from previous reports were implemented.
- Second, in April the Government published its first statement reviewing the progress made in relation to our recommendations.⁴ The Government also announced its decision to revisit this matter on a half-yearly basis. Throughout 2010, we supported the Department of Enterprise, Jobs and Innovation in its role of co-ordinating the Government's review of progress made on our recommendations.
- Third, a number of recommendations that have not yet been implemented appeared in the Memorandum of Understanding agreed between the Irish Government, the EU and the IMF in the *Programme for Financial Support for Ireland* as part of the package of specific policy measures which must be implemented. These also feature in the National Recovery Plan 2011-

⁴ <http://www.deti.ie/press/2010/20100408a.htm>

2014. Some of our other recommendations were included in the commitment Ireland gave to the EU Commission to implement a package of measures to support the restoration of competition in the Irish banking sector.

5.1 *General Medical Practitioners*

78. The publication of the final part of our report on *Competition in Professional Services: General Medical Practitioners*, in July 2010, ended our series of studies of competition in the professions.

79. This report focused on the operation of the General Medical Services (GMS) system through which the State provides GP services free-of-charge to public patients. A GMS contract is very valuable to GPs and very few practices in Ireland operate without one. Qualified GPs have no automatic entitlement to obtain such a contract.

80. We found that the system for awarding GMS contracts favours established GP practices and protects them from competition from newly-qualified GPs. This limits the number of GP practices in Ireland, reduces patient choice and creates less pressure for GP practices to compete on price for private patients.

81. We made five recommendations to the Minister for Health and Children, the Health Service Executive and the Irish Medical Organisation. The recommendations involve the removal of practices which protect established GP practices from competition and changes in the process for determining payments to GPs under the GMS.

- All qualified GPs should be entitled to obtain a contract to treat public patients, subject only to meeting general suitability criteria.
- GPs in possession of such a contract should be free to set up in, or move to, the location of their choice.
- Decisions to award a contract in a particular area should not have to take the viability of existing GP practices in the area into account.
- The system for awarding contracts should not favour applicants who already hold such a contract.
- Payments to GPs under the scheme should be decided **unilaterally** by the Minister for Health and Children and not by agreement with the Irish Medical Organisation.

82. The first two parts of our Report, published in 2009, gave an overview of the GP profession and identified competition concerns relating to GP training programmes and restrictions on advertising.

83. Following on from these recommendations, the Government included a commitment in its National Recovery Plan 2011-2014 that “*all the restrictions on appropriately trained General Practitioners who wish to hold GMS contracts will be abolished*”.

84. This commitment was reiterated and expanded in the EU/IMF Memorandum of Understanding (December 2010), which includes, under a list of actions to be completed by the end of Q3-2011, “*removing restrictions on GPs wishing to treat public patients*” and also “*eliminating restrictions on the number of GPs qualifying*”. Implementing recommendations 1-4 and recommendation 6 of our report would meet this commitment.