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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN IRELAND

-- 2011 --

This report is submitted by Ireland to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 13-14 June 2012.

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Executive Summary

1. The Competition Authority is responsible for enforcing Irish and European competition law in Ireland and promoting competition in the economy. We have the power to investigate if there is evidence that businesses are involved in anti-competitive practices, such as price-fixing, or that businesses are abusing a dominant position.

2. Competition law in Ireland is governed by the Competition Act 2002 and Articles 101 and 102 TFEU. We do not make decisions on whether Irish or EU competition law have been infringed. Those decisions lie solely with the Courts. This is different to most other European countries, where competition agencies have the power to decide on whether or not competition law has been broken, and to impose penalties such as fines. We investigate suspected breaches of competition law and either take legal proceedings ourselves in court, or send a file to the Director of Public Prosecutions, who decides whether to prosecute in a higher court.

3. We can also block mergers between businesses that would substantially reduce competition and harm consumers. Any decision we take to block a merger or to clear it with conditions can be appealed to the High Court.

4. 2011 was another challenging year for the Irish Competition Authority. As with all public sector organisations, resources are scarce, while in many areas – not least in the competition arena – the need for robust enforcement, effective advocacy and education is greater than ever.

5. 2011 was also a year of turmoil for the Competition Authority. There was considerable turnover among the Members caused by the expiry of the contracts of three Members (two temporary and one long-term), the retirement of the Chairperson, Declan Purcell, the appointment of Authority staff as temporary Members and the recruitment of new Members and Chairperson through open competition. Three Authority staff - Noreen Mackey, David McFadden and Ciaran Quigley - acted as temporary Members in addition to their day jobs during this time. In October 2011 Isolde Goggin took up the position of Chairperson, and was followed in December by new Members Stephen Calkins and Gerald FitzGerald¹.

6. Difficult economic circumstances can also lead to firms seeking to dampen competition among themselves, either through direct anti-competitive practices, or by seeking legal protection for such actions. The Competition Authority continues to urge the Government to resist such calls for protectionism, and to prioritise the welfare of consumers.

7. The arrival of the EU/EC/IMF 'troika' in Ireland and the conditions of Ireland's bailout have led to major changes in some of the sheltered sectors of the economy. Reforms have included substantial changes to the legal and medical professions, as recommended in previous reports by the Authority. We continue to work with the Government to ensure pro-competitive reforms are introduced that will benefit the economy in the long run.

8. Our economic survival as a nation requires that we maintain our international competitiveness. We will not achieve this by avoiding competition – rather, we need to embrace it by allowing those firms which give their customers a better deal to reap the rewards of success. In the longer term, this will contribute to sustainable job creation and economic recovery.

¹ Patrick Kenny joined the Authority as Member in January 2012.

9. In 2008, the Government announced that the Competition Authority was to be merged with the National Consumer Agency as part of a rationalisation of state agencies. With the appointment of long-term senior staff, work on the amalgamation has been given fresh impetus and the two organisations are now working closely together to make the amalgamation a success.

10. 2011 was a busy year for mergers, with 40 mergers assessed during the year, just slightly down on the previous year. Merger review is a statutory obligation with strict time limits, and therefore any increase in merger notifications has a direct knock-on effect on other divisions, which are called upon to provide additional resources.

11. Given that staff numbers are down by a third overall since the moratorium on recruitment was put in place, this has meant that we have had to reassess how we manage our workload. In 2011 we implemented new prioritisation principles which we must adhere to rigidly so that we meet our statutory obligations, get the most from our limited resources and continue to provide good value for taxpayers' money.

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

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

12. During 2011, there were no new competition law provisions introduced.

1.2 Other relevant measures, including new guidelines

13. There were no other relevant measures or new guidelines introduced in 2011.

1.3 Government Proposals for New Legislation

14. During 2011, the Competition Authority assisted the Department of Jobs, Enterprise and Innovation in the drafting of the Competition (Amendment) Bill 2012. The Amendment Bill was drafted for the purpose of addressing certain issues that had arisen on the enforcement of competition law, both public enforcement by the Authority, and private enforcement by injured parties such as consumers. The Bill:

- no longer allows the application of the Probation of Offenders Act,
- increases sanctions in criminal cases, in particular the imprisonment sanction which is to be raised from a maximum of five years to ten years for an individual convicted on indictment,
- allows the court to order a convicted person to pay the costs of investigating the crime,
- splits the public and private parts of the civil enforcement of the Act,
- means undertakings given to the Competition Authority can be made an Order of Court,
- introduces *Res Judicata* to help follow-on actions by private litigators, and
- amends the Companies Act to allow the Competition Authority to apply to Court in civil proceedings to have a director disqualified.

15. In 2011, the Department of Jobs, Enterprise 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.

16. 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 Jobs, Enterprise 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

17. The principal goal of competition law is to protect and benefit consumers, so they can purchase goods and services at a competitive price. Greater competition ensures good value for consumers; it stimulates business and enhances the economy as a whole. Anti-competitive behaviour by businesses, for example, price-fixing, results in consumers paying higher prices without any extra benefits and makes the Irish economy less competitive.

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

19. 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 opinion that they do not involve a breach of the Act.

20. Where we have gathered sufficient evidence of criminal cartel agreements, we refer a file on that case to the DPP for prosecution on indictment.

21. At the end of 2010 six investigations of alleged hardcore criminal breaches of section 4 were ongoing. In 2011 three of these cases were closed. In two of these cases there was insufficient evidence to warrant recommending a prosecution to the DPP. In the third case (see below under Irish Rail) the case was closed following a court case in which the defendants were acquitted on all charges.

22. We reported in 2010 that one case was completed with a file sent to the DPP recommending prosecution on indictment. This case remains under consideration by the DPP.

23. Four new investigations of alleged hardcore criminal breaches of section 4 were opened in 2011 bringing the number of active investigations at the end of 2011 to seven. Four of these seven cases were initiated following applications for immunity under the *Cartel Immunity Programme*.

24. At the beginning of 2011 there were four active civil investigations ongoing and two investigations which had been suspended because private actions were taken by the parties involved. Three of the four active civil investigations and one of the suspended civil investigations were closed during 2011. In addition, two new civil investigations were opened during 2011 so that, as of year end 2011, three active civil investigations were ongoing.

25. Given that some of our investigations involve potentially serious infringements of competition law and the possibility that some may result in criminal trials at a future date, it is inappropriate for us to comment publicly on investigations. However, we acknowledge that two of the cases under investigation in 2011 have been reported in the media. These concern allegations of anti-competitive activities:

- in the liquid milk market and
- in the concrete and cement industries.

26. No further details can be provided as the investigations are ongoing.

27. Many cases that do not involve hardcore criminal breaches of section 4 of the Act, such as vertical agreements or concerted practices that reduce competition are also investigated by the Competition Authority. The Authority may take these cases in the Civil Courts. Alternatively, we may seek a commitment from a firm whose behaviour we believe may be in breach of the Act, to put an end to that behaviour. Some examples of this are described below in the section outlining our success in changing the behaviour of trade associations.

28. In relation to section 5 and the behaviour of dominant firms, the Authority secured commitments from two firms operating in different sectors of the economy. Marine Transport Services gave commitments to ensure effective competition between shipping agents in Cork harbour. In the media sector, RTÉ gave commitments to amend the way they sell advertising to address concerns we had over its effect on television broadcasting. This change should enhance the ability of RTÉ's competitors to compete with the State-owned company.

29. After the settlement of the BIDS case, the Competition Authority published a guidance note on how competition law applies to agreements to reduce capacity in an industry. (See below for a summary of the BIDS case).

30. In 2011, we received:

- 33 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 2011, and 11 are still being evaluated.
- 106 new complaints of anti-competitive agreements and abuses of dominance, 92 of which were closed during the year.

2.1.2 *Cases Before the Courts*

- Beef Industry Development Society [

Competition Authority –v- Beef Industry Development Society: In January 2011, the Authority reached a settlement in its long-running proceedings against Beef Industry Development Society Limited (the BIDS case). This settlement was reached at a time when the BIDS case had been referred back to the High Court by the Supreme Court after the European Court of Justice had decided that an agreement between competitors to reduce capacity in the Irish beef processing industry was prohibited by Article 101(1) TFEU.

On 16 June 2011, the Authority published a Guidance Notice on agreements to reduce capacity (N/11/001). The Notice gives information on the decisions of the various courts involved in the BIDS case and in that way provides guidance on the application of Irish and European

competition law to businesses considering entering into agreements or any form of co-ordination to reduce capacity in specific industries in Ireland. In particular, the Guidance Notice

- sets out the legal and historical context relevant to agreements aimed at reducing capacity in specific industries,
- describes the main features of the BIDS agreement and summarises the conclusions of the courts involved in the proceedings,
- explains the effect of the BIDS case in respect of the application of section 4(1) of the Act and Article 101(1) TFEU to agreements to reduce capacity in specific industries, and
- outlines the Authority’s views on the application of section 4(5) and/or Article 101(3) to anti-competitive agreements.

The purpose of the Guidance Notice is to help firms carry out an informed assessment of their agreements and practices from the point of view of competition law. Guidance Notices published by the Authority are not intended as legal advice. Firms must assess the legality of their actions in order to make an informed decision on whether to go ahead with an agreement or practice and in what form.

The Guidance Notice is available on our website at www.tca.ie.

- Irish Rail

DPP -v- John Joe McNicholas trading as John Joe McNicholas Plant Hire, Oliver Dixon and Oliver Dixon (Hedgecutting & Plant Hire) Limited: On 14 October 2008, the Competition Authority commenced summary proceedings in Athenry District Court against John Joe McNicholas trading as John Joe McNicholas Plant Hire, Oliver Dixon, and Oliver Dixon (Hedgecutting & Plant Hire) Limited in connection with alleged price-fixing on a tender for vegetation clearance services by Iarnród Eireann/Irish Rail.

This case was heard before Mr Justice Cooke in the Central Criminal Court between 19 May and 27 May 2011. Mr Justice Cooke sent the case to the jury for deliberation on 27 May 2011. Later that day all defendants were acquitted on all counts.

The defendants subsequently made an application for costs. On 20 December 2011 Mr Justice Cooke awarded the defendants 50% of the costs incurred finding that

“While, in the judgment of the Court, these charges were properly laid and the prosecution justifiably brought and fairly conducted, the Court considers that the imbalance between the length of time taken (for which the defendants are not in any way accountable) together with the formality, stress and expense of a jury trial in the Central Criminal Court on the one hand and the essential character of the events out of which the charges arose on the other, justifies the exercise of the Court's discretion towards a partial acceptance of the defendants' application.

“Having regard to these factors, the Court considers that it would be a just and proportionate exercise of its discretion under the rule to award the defendants John Joe McNicholas trading as John Joe McNicholas Plant Hire and Oliver Dixon (Hedge Cutting and Plant Hire) Limited 50% of the costs incurred.”²

²

Judgment of Mr Justice Cooke in *DPP -v- John Joe McNicholas trading as John Joe McNicholas Plant Hire, Oliver Dixon and Oliver Dixon (Hedgecutting & Plant Hire) Limited* on 20 December 2011 at paragraphs 36 and 37.

2.1.3 Closed Investigations

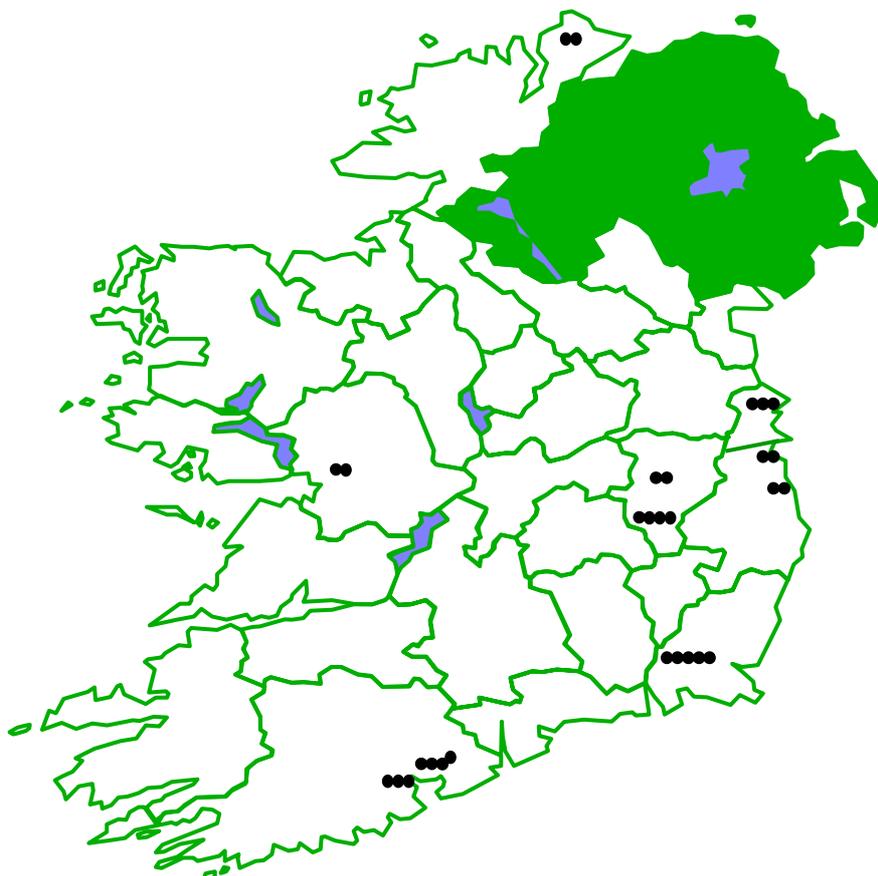
31. Three investigations concerning alleged hardcore breaches of section 4 of the Act were concluded in 2011. These investigations concerned allegations of criminal behaviour but the Authority concluded that there was not enough evidence to warrant referring a file to the DPP.

32. The following is a selection of some of the Authority's enforcement activity and includes examples of one investigation into alleged cartel activity in the retail petrol sector, and two cases investigating non-hardcore activity. It should be noted, the latter were not criminal investigations.

- Retail Petrol/Diesel Prices

Throughout 2010 and 2011 the Authority received a number of independent complaints from different parts of the country alleging cartel behaviour in relation to the retail prices of petrol and diesel between local petrol stations (see Figure 1).³

Figure 1: Location of complaints alleging cartel behaviour between petrol retailers



Source: the Competition Authority

³ The National Consumer Agency carried out an investigation into diesel and petrol prices in 2008 and concluded that “At a national level, the retail market shows strong evidence of competition between players. Evidence of this is the low level of profits made by oil companies, the number of stations that have closed in recent years and the increased emphasis on making profit through retail outlets attached to service stations.”

The Authority carried out a detailed assessment of these complaints which included

- conducting price surveys,
- monitoring prices,
- meeting employees of the petrol stations concerned and
- meeting senior management in three of the main wholesale oil companies, which together account for approximately 40% of filling stations operating within the State.⁴

The price surveys and follow-up discussions with complainants revealed that while prices may follow each other for a period of time, this pattern does not always continue over the longer term. Before opening a criminal investigation we need sufficient evidence to suspect that filling stations or other companies further down the supply chain have entered into pricing agreements or that more informal concerted practices exist.

The interviews with wholesalers confirm that company-owned filling stations closely monitor their competitors' prices. However each of the companies demonstrated an acute awareness of competition law and while instructing their employees to monitor local prices they expressly forbid their employees to talk about retail prices with their competitors. Retail prices of petrol at these company-owned petrol stations are set by head office while the prices charged at dealer owned stations are set independently of the wholesale supplier.

Throughout the course of this review no complainant provided any evidence that either formal or informal anti-competitive agreements or concerted practices took place between individual filling stations. Most complainants state that motor fuel prices are identical in a number of locations throughout the State. Parallel pricing is not a breach of the Competition Act and it is not unique to the motor fuel market. The Authority addressed the issue of parallel pricing when it appeared before an Oireachtas Joint Committee meeting on 8 October 2008

“Sometimes the line between normal competitive behaviour and price-fixing or concerted practices is difficult to define. For example, there is nothing wrong with parties deciding unilaterally to charge similar prices. This type of parallel pricing can be found in many areas, especially those which share characteristics such as transparent pricing, undifferentiated products and stability of demand, and where the sellers' costs and business structures are the same. As the retail motor fuel sector has many of these features, it is not surprising to find parallel behaviour there.”

Bill Prasifka, Chairperson, Competition Authority

The review of the complaints made to the Authority in relation to petrol prices failed to provide any evidence of unlawful price co-ordination.

- RTÉ

On 7 October 2011, the Competition Authority entered into an Agreement and Undertakings with Raidió Teilifís Éireann (RTÉ) following an investigation in respect of the 'share deal' scheme operated by RTÉ in the market for television advertising airtime in the State. Under this scheme, discounts granted to individual advertisers depended, among other factors, on the percentage (or share) of each advertiser's total television advertising budget committed to RTÉ.

⁴ Own-branded filling stations account for approximately 25% and nine other brands account for the remaining 35%.

According to established case law, target rebates with loyalty-inducing effects offered by a dominant firm may amount to an abuse of a dominant position in breach of section 5 of the Competition Act and/or Article 102 TFEU. The Competition Authority started an investigation with the aim of reaching a view on the following issues: (i) the relevant market, (ii) whether RTÉ held a dominant position in the relevant market, and (iii) whether the share deal amounted to an abuse of such a dominant position.

Based on the information gathered during our investigation, our preliminary view was that RTÉ was likely to be dominant in the market for television advertising in Ireland. It was also our view that the share deal scheme was likely to be a target rebate with loyalty-inducing effects and therefore capable of foreclosing RTÉ's competitors. We communicated our concerns to RTÉ and, in response, RTÉ offered undertakings that were satisfactory to us. In particular, RTÉ undertook to start the process of implementing a new trading scheme, one which would not include incentives related to the share of an advertiser's budget which was allocated to advertising through RTÉ. RTÉ also undertook to implement the new scheme by no later than 1 July 2012. As these undertakings addressed the Authority's concerns, we did not need to continue the investigation and therefore did not reach a final view on the application of section 5 and/or Article 102 to the share deal scheme.

The full Enforcement Decision is available on our website at www.tca.ie.

- Marine Transport Services

In December 2011, the Competition Authority entered into an Agreement and Undertakings with Marine Transport Services (MTS) following an investigation into their pricing practices for the sale of sea-side mooring services in Cork Harbour.

All ships that call to any port need to acquire services at that port. To employ these services the ship owner or charterer appoints a ship agent. The agent's role is to contract third parties to provide services for the ship such as mooring services, towage etc.

All ships require mooring services, ie, assistance to tie the vessel to the shore. In all cases ships need the assistance of linesmen from the shore (shore-side mooring). In some instances, ships need the assistance of boats to pass the rope to the linesmen on the shore (sea-side mooring).

MTS is the only provider of sea-side mooring services in Cork Harbour. The Authority's investigation concerned the manner in which MTS priced its sea-side mooring services. MTS charged a higher price for sea-side mooring services to ship owners that used independent ship agents than it did when ship owners used its sister company, James Scott, as ship agent. Due to the possible exclusionary effect this practice may have had on the market for ship agency services in Cork Harbour, we were concerned that MTS's pricing practice for sea-side mooring services could be in breach of section 5 of the Competition Act.

We communicated our concerns to MTS and they offered undertakings to address our concerns. The Agreement and Undertakings received from MTS mean that ship owners or charterers availing of sea-side mooring services from MTS within the Port of Cork will be treated the same by MTS, whether they use James Scott or any competitor of James Scott as ship agent, except in circumstances which objectively justify otherwise. In other words, the Agreement and Undertakings provide that any terms offered by MTS will be independent of the ship agent chosen.

- RPM Cases

During 2011, the Competition Authority received commitments from a number of companies in relation to allegations of Resale Price Maintenance (RPM) cases.

RPM refers to agreements or concerted practices that dictate the price at which goods or services should be sold by the retailer. Such agreements are presumed anti-competitive under European and Irish competition law unless they can be objectively justified (which is only possible in very exceptional circumstances).

The products involved in these cases include power tools, cooking oil, and cosmetic and beauty products. After an initial assessment, the Authority wrote to the companies involved in each case to outline its concerns. These companies subsequently offered commitments to address our concerns.

- Trade Associations and Competition Law

During 2011, the Competition Authority intervened on a number of occasions where trade associations and professional representative bodies appeared to be co-ordinating the commercial conduct of their members.

At the beginning of December, the Authority wrote to the Criminal Law Practitioners Organisation in relation to alleged threatened strike action by its members. The Criminal Law Practitioners Organisation represents barristers and solicitors who practice criminal law. Self-employed solicitors, solicitor partnerships and barristers are subject to competition law. The alleged threatened strike action, in response to changes in the Criminal Legal Aid Scheme, could be considered a decision or concerted practice by an association of undertakings and as such, could have amounted to an infringement of competition law. We received a response indicating that the threatened strike action did not relate to fees; however we continue to monitor the situation in conjunction with the Department of Justice.

Later in December 2011 the Authority contacted the Irish Property Owners Association (IPOA) concerning its recommendation to its members that they should pass on the Household and Non Principal Private Residence (NPPR) Charges to tenants. The Competition Authority informed the IPOA that this type of concerted action by their members in relation to pricing may be in breach of competition law. In response, the IPOA issued a clarification stating that pricing is a matter for individual landlords and their tenants and withdrew their earlier recommendation to their members. Tenants must be allowed to negotiate their arrangements with landlords individually without interference from a landlords' trade association.

Also, in December 2011, the Authority contacted the Restaurant Association of Ireland (RAI) concerning their apparent recommendation that all restaurants charge a €10 deposit per head for bookings to reduce the number and impact of 'no-shows'. Although the Competition Authority understands that no-shows can have a detrimental impact on restaurants, the stipulation of a particular fee for a deposit raised concerns. Competing businesses should not co-ordinate on any aspect of pricing, either directly or through a trade association. However, in response to our concerns the RAI clarified with its members that it was up to all restaurants to make all commercial decisions independently.

2.2 *Mergers and acquisitions*

2.2.1 *A Statistical Overview*

33. 40 mergers were notified to the Authority in 2011 compared to 46 in 2010. The following points about 2011 are highlighted:

- A significant number of the mergers examined took place in the foods and groceries sectors followed by the financial services sector, information technology and media.
- The Authority finalised its examination of six transactions which were notified in 2010 and whose deadlines extended into 2011. In one of those cases, the Authority decided, in January 2011, to carry out a full (phase 2) investigation.
- All transactions were analysed within the statutory time period.
- 10 Requirements for Further Information were issued in the examination of 5 mergers.
- 36 of the 40 merger notifications received during 2011 were cleared during the initial (Phase 1) investigation, usually within one calendar month.
- Four merger notifications were carried forward into 2012.

2.2.2 *Mergers Requiring a Full (Phase 2) Investigation*

34. The Authority must carry out a detailed (phase 2) investigation of a transaction if after a preliminary (phase 1) investigation it has been unable to conclude that the transaction would not “substantially lessen competition”. In 2011, we initiated one phase 2 investigation described below concerning a merger received in 2010.

- M/10/043 - Stena/DFDS

On 17 December 2010, the Competition Authority was notified of the acquisition by Stena AB (Stena), through its subsidiary Stena Line (UK) Limited, of sole control of vessels, related assets, inventory, employees and contracts relating to passenger and freight ferry services operated by DFDS A/S (DFDS) between Belfast and Heysham and between Belfast and Liverpool. The examination of this case was carried over into 2011 and on 14 January 2011 the Authority made a decision to move to a phase 2 investigation.⁵

On 21 December 2010 the Authority advised the parties in writing that (i) implementing the acquisition before receiving Competition Authority clearance infringed section 19(1) of the Competition Act 2002 and (ii) the acquisition was void, under section 19(2) of the Act. The Authority also issued a press release on the same day stating that there had been a breach of Section 19 of the Act and that the acquisition was void. The Authority subsequently assessed the notified transaction as a proposed transaction in accordance with the Act.

Subsequent to the notification, on 24 December 2010 Stena ended its ferry services between Larne and Fleetwood. Also subsequent to the notification, on 13 January 2011 DFDS ended its ferry services between Dublin and Liverpool.

⁵ The merger was also reviewed by the UK Office of Fair Trading and subsequently referred to the UK Competition Commission which on 29 July 2011 announced it had cleared the merger. See http://www.competition-commission.org.uk/press_rel/2011/june/pdf/34-11_CC_clears_ferry_acquisition.pdf.

On 14 January 2011 the Authority made a decision to move to a more intensive phase 2 investigation which included considering whether the above decisions by Stena and DFDS were integral parts of a larger transaction (ie, encompassing more than the transaction as notified). The investigation included ongoing contacts with the parties and also obtaining the views of third parties, in particular competitors and customers of Stena and/or DFDS.

On 7 April 2011, the Authority formed the view that the result of the transaction would not be to substantially lessen competition in any market for goods or services in the State and could be put into effect. In particular, the Authority concluded that:

The acquisition by Stena of DFDS's routes between Belfast and Heysham and between Belfast and Liverpool would not substantially lessen competition in any market for goods or services in the State.

The above conclusion holds irrespective of Stena's decision to end its ferry services between Larne and Fleetwood and irrespective of whether the decision to end ferry services between Larne and Fleetwood is an integral part of a larger transaction (including the notified transaction).⁶

DFDS's decision to end its ferry services between Dublin and Liverpool was a separate decision, ie, not an integral part of a larger transaction (including the notified transaction).

DFDS would most likely have exited from its routes between Dublin and Liverpool, irrespective of Stena requiring DFDS routes between Belfast and Heysham and between Belfast and Liverpool. Therefore any impact on competition on routes between Dublin and Liverpool would not be a result of the acquisition by Stena of DFDS routes between Belfast and Heysham and between Belfast and Liverpool.

The Authority did not find evidence to support a theory of harm of co-ordinated behaviour by the parties, or by the parties and third parties, for the ending of DFDS ferry services on its routes between Dublin and Liverpool.

The Authority did not find evidence to support a theory of harm of co-ordinated behaviour by the parties, or by the parties and third parties, for any actual or expected price rises for freight services.

2.2.3 *Extended Phase 1 Merger Investigations - Requirements for Information*

35. The Authority can issue a Requirement for Further Information (RFI) to any one or more of the parties to a merger in order to obtain information which will assist us with the examination of a merger. An RFI may be used to get, for example, more detailed information about the business activities of the parties, the parties' decisions regarding the transaction, the transaction process, empirical information concerning market shares, or data such as prices. The precise nature of any particular RFI depends on the type and extent of the information required by the Authority.

36. An RFI requires parties to respond within a specified timeframe. During the phase 1 period, an RFI has the effect of changing the appropriate date and consequently the phase 1 deadline. (The 'appropriate date' is the start date of the timeframe for phase 1 and phase 2 decisions). The RFI stops the clock and the clock restarts only after we have received the requested information. In contrast, the phase 2 deadline remains unchanged by the issuing of an RFI.

⁶ In this regard the UK Office of Fair Trading in paragraph 156 of its Decision of 8 February 2011 commented as follows "Based on the evidence available to it, the OFT was not persuaded, to the relevant standard, that the potential acquisition of the target routes did not influence Stena's decision to decide to close the Fleetwood-Larne route..." See paragraph 165 of http://www.oft.gov.uk/shared_of/mergers_ea02/2011/Stena.pdf.

37. In 2011, 10 formal RFIs were issued in 5 merger cases.⁷ One case was carried over to 2012 and the remaining four cases were cleared in phase 1 following an extended investigation lasting, on average, between two to three months. Two of these cases are discussed below.

- M/11/005 – JD Sports/Champion Sports

This transaction was notified by the parties on 25 January 2011. The Authority cleared the transaction on 30 March 2011 following an intensive investigation, which included obtaining the views of third parties and further information from the parties.

The Authority examined the likely competitive impact of the transaction in two product markets:

- Retail sale of branded sports clothing
- Retail sale of branded sports footwear

The Authority examined the likely competitive impact of the transaction in the two geographic areas:

- Greater Dublin Area consisting of Dublin City Centre, Liffey Valley Shopping Centre, and Blanchardstown Centre
- Newbridge Area consisting of White Water Centre and shopping outlets within a radius of approximately a 20 minute drive-time from it

The Authority concluded that the transaction on its own did not raise competition concerns in any of the markets listed above.

- M/11/022 – Musgrave/Superquinn

This transaction was notified by the parties on 21 July 2011. The Authority cleared the transaction on 28 September 2011 following an intensive investigation which included desk research, ongoing contacts with the parties, obtaining the views of both suppliers and competitors, and on-site inspections of affected local markets.

During our investigation we looked at four possible problems that might arise as a result of the transaction:

- Would the new entity be able to raise prices regardless of the reaction of its competitors and customers?
- Would consumers face higher prices and/or reduced output because of the actions of the new entity and its competitors?
- Could the deal be a strategy for Musgrave to discourage a new competitor from entering the market?
- Could the deal mean that the merged entity could force better terms from suppliers, causing them in turn to price discriminate against smaller retailers, harming consumers in the long term?

The Authority concluded that the transaction would not result in the problems identified.

⁷ M/11/001 – Greencore/Northern Foods; M/11/004 - Glanbia/Dawn Dairies and Golden Vale Dairies; M/11/005 – JD Sports/Champion Sports; M/11/022 – Musgrave/Superquinn; and, M/11/037 – Connacht Gold/Donegal Creameries. See <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications.aspx> for more details.

- Credit Institutions (Financial Support) Act 2008 - Advice provided to Minister for Finance under section 7

CIFS Act/11/001 – AIB/EBS: Under section 7(7) of the CIFS Act, the Minister for Finance may request that the Authority provide any advice, information and assistance that the Minister reasonably requires for the purposes of making a decision on a notification under the CIFS Act.

On 9 June 2011, the Minister for Finance requested the views of the Authority by 15 June 2011 on the proposed transaction whereby Allied Irish Banks plc would acquire sole control of EBS Building Society. This deadline was subsequently extended by two days until 17 June 2011.

The views expressed by the Authority were based primarily on the information provided by the parties, AIB and EBS, in the joint notification they submitted to the Minister for Finance on 8 June 2011. The Authority also relied on information provided to it by the Department of Finance on 23 May 2011, particularly in relation to the relevant counterfactual (ie, what would have happened in the absence of the proposed acquisition of EBS Building Society by Allied Irish Banks plc.). Where applicable, we also drew from our previous experience in reviewing mergers involving the financial services sector. Due to the urgency attached to the provision of these views, we were not in a position to conduct our own market enquiries into the proposed transaction.

On the basis of the information provided by the Department of Finance and, in the absence of information to the contrary, we concluded the following:

- In the State, there is unlikely to be any competition concerns as a result of the proposed transaction in relation to the insurance distribution, distribution of mutual funds, payment cards and savings accounts market segments.
- The Authority is not in a position to conclude whether there would be, or would not be, competition concerns as a result of the proposed transaction in relation to the residential mortgages market segment.
- The Authority considered whether the failing firm argument is applicable to EBS for the purposes of reviewing proposed acquisition of EBS Building Society by Allied Irish Banks plc and concluded that there is strong evidence in support of EBS being a failing firm.

The Minister for Finance approved the transaction on 27 June 2011 on the basis that the acquisition would not substantially lessen competition in the Irish banking market. According to the Minister, the rationale for this opinion was “there is no realistic alternative which would ensure that competition from EBS would be preserved”.⁸

2.2.4 *Mergers involving media businesses*

38. 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 Jobs, Enterprise and Innovation on public interest grounds.

39. Table 1 below provides details of mergers evaluated between 2009 and 2011.

⁸ See <http://www.finance.gov.ie/viewdoc.asp?DocID=6907&CatID>.

Table 1: Statistics on Mergers Evaluated 2009-2011

	2011	2010	2009
Notified Mergers	40	46	27
required notifications [section 18(1)]	40	46	27
voluntary notifications [section 18(3)]	0	0	0
Carried from previous year	6	3	2
carried as phase 1	5	3	2
carried as phase 2	1	0	0
Referred from the EU Commission (ECMR Art 9)	0	0	0
TOTAL CASES	46	49	29
of which media mergers	5	8	2
of which entered phase 2 in year of determination	1	1	1
of which entered phase 2 in year previous to determination	1	1	0
Cases Withdrawn	0	0	0
Withdrawn at phase 1	0	0	0
Withdrawn at phase 2	0	0	0
Determinations Delivered	42	43	26
Phase 1 Determinations cleared without proposals	40	41	25
Phase 1 Determination with proposals	0	1	0
Phase 2 positive Determination without conditions or proposals	2	1	0
Phase 2 Determination with proposals	0	0	0
Phase 2 Determination with conditions	0	0	1
Phase 2 Prohibition	0	0	0
Referral to EU Commission (ECMR Art 22)	0	0	0
Carried to next year	4	6	3
Carried as phase 1	4	5	3
Carried as phase 2	0	1	0

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

40. 2011 was a year when the Competition Authority focused resources on two aspects of promoting competition.

- Promoting the acceptance and implementation of recommendations we had made in previous years.
- Advising on areas of economic importance where future competition is going to be shaped by policy changes currently under consideration.

41. This focus was due to a convergence of opportunities for reform.

- In 2010, the then Government introduced a process for reviewing the progress of Competition Authority recommendations. We worked throughout 2011 with the Department of Jobs, Enterprise and Innovation to support its role of co-ordinating the Government's review process.
- The 2010 Memorandum of Understanding between Ireland and the EU/IMF set out commitments on structural reform which corresponded closely to, and gave added impetus to, some of our recommendations.
- The continued imperative to regenerate and grow the economy has created renewed interest in the scope for competition to contribute positively to Ireland's economic recovery. The number of requests for advice from Government Departments - on how to make the best use of competition in various sectors - which had already grown significantly in 2010, increased again in 2011.

42. This focus proved worthwhile. Promoting competition to better achieve public policy goals and regain competitiveness was a notable feature of Ireland's legislative and policy-making agenda in 2011. Significant progress was made in implementing our past recommendations and public debate in many economically important sectors acknowledges the role competition must play.

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

43. The Competition Act 2002 gives us the specific function of advising the Government and its Ministers about the implications of proposed legislation for competition as well as advising Government Department and other public agency officials about competition issues that arise in their work. This includes engaging in public consultation processes and making submissions on relevant competition issues, as well as providing competition experts to contribute to working groups and committees.

44. In carrying out this function, we aim to ensure that competition works well for consumers, for businesses and for the wider economy. We highlight any competition concerns and try to anticipate and pre-empt any negative consequences which might arise. State laws, regulations and administrative practices can, and often do, restrict competition. They can result in higher prices or poorer services for consumers and businesses.

45. No new formal market studies were initiated by the Competition Authority in 2011, in order to focus resources elsewhere. We nonetheless worked closely with policy-makers across a broad range of sectors to promote Ireland's competitiveness. We made 11 formal submissions to public consultation processes.

46. The key areas where we provided advice to Government in 2011 were banking, electricity, waste, and water. Our involvement in these areas is summarised below.

3.1.1 *Banking*

47. The new Irish banking landscape began to take shape in 2011 with the decision to rebuild the Irish banking system on the 'two pillars' of Bank of Ireland and AIB. Of the four other Irish banks covered by the blanket guarantee of September 2008, two (Anglo Irish Bank and Irish Nationwide Building Society) will be wound down. Another, EBS Building Society was merged with AIB while the Government is still considering options regarding the future of Permanent TSB.

48. Since the onset of the financial crisis in 2008, competition has taken second place to the urgent need for financial stability. The Competition Authority has, however, been involved in efforts to promote the longer term benefits that a competitive, well-regulated banking sector can bring to the wider economy.

49. The EU/IMF programme provides an envelope of €35 billion to assist in the fundamental restructuring of the Irish banking system. As part of the programme agreed between the Troika and the Irish authorities, Ireland committed to undertake a number of measures to restore competition and improve consumer protection. The Competition Authority participates in a steering group, alongside senior representatives of the Department of Finance, the Central Bank of Ireland and the National Consumer Agency, which will review and report on an annual basis on progress in implementing measures to improve competition among banks.

50. Tighter regulation and competition enforcement will have to work side-by-side to reform the Irish banking sector and make it more stable and transparent in the future. Financial stability and competition are ultimately complementary rather than conflicting objectives, as outlined in a paper published by two staff members of the Authority in 2011.⁹

3.1.2 Electricity

51. Competition among electricity companies is now a reality in Ireland. In April 2011 the Commission for Energy Regulation (CER) took the decision to remove tariff regulation on Electric Ireland, (formerly ESB Customer Supply) following the successful entry of Bord Gáis and Airtricity into the retail electricity market. However, there is considerable scope for further market reforms before the full potential for competition in the electricity sector can be realised. The Competition Authority made two submissions to the CER in 2011 on how competition in electricity can be improved.

52. In our submission on *Market Power in Wholesale Electricity*, we reiterated our support for directly addressing the issue of market power through the sale of certain plants owned by the ESB. The purpose of any sale should not be to maximise revenue on the sale of State assets. Instead any asset sales should be aimed at increasing the competitive rivalry in electricity generation.

53. In our submission on *Price Discrimination and Consumer Protection*, we called on the CER to focus on removing the remaining barriers to switching and improve consumers' ability to make better informed decisions rather than setting social tariffs for vulnerable consumers. The CER should ensure that all consumers get clear information about when their electricity supply contracts are ending and what renewal options are open to them. Competition works best when well-informed consumers can choose suppliers and switch if they are not happy with the service they receive.

54. We also met with a number of stakeholders - including the Department of Communications, Energy and Natural Resources, the Sustainable Energy Authority of Ireland and the International Energy Agency - to promote the development of competition in the electricity sector.

3.1.3 Waste

55. We contributed to two Department of the Environment, Community and Local Government (DECLG) public consultations on its ideas for reforming Ireland's waste sector. *Altering the Structure of Household Waste Collection Market* proposed to introduce competitive tendering for local markets (instead of the current model where waste collection companies operate alongside one another); and *National Waste Policy* set out steps towards an agreed coherent, comprehensive, and consistent national waste policy.

56. In our submission on *Altering the Structure of Household Waste Collection Market*, we point out that, although in theory competitive tendering is superior to side-by-side competition, there are pitfalls associated with both models. In the real world, either model can result in a cartel or private local monopoly. Our submission provided specific advice on ways to avoid competitive tendering resulting in either a cartel or a series of entrenched monopolies.

⁹ Hanley C. and Rae A. (2011), *Competition Policy and Financial Stability: Friends or Foes?*, Paper presented to Dublin Economics Workshop, Annual Conference, Kenmare. 14 October 2011.

57. We also pointed out that introducing competitive tendering for household waste collection will have a significant impact on the structure of all related waste markets, including treatment and disposal. Directing collected waste to particular treatment facilities could harm competition between treatment facilities at the same level of the Waste Management Hierarchy. The question facing the DECLG is which model of competition will facilitate the best environmental management of waste, in line with the Waste Management Hierarchy, while also minimising the cost of waste collection.

58. In our submission on *National Waste Policy*, we pointed out that to achieve effective competition among Producer Responsibility Schemes (PRS) – ie, packaging recycling, WEEE recycling, batteries recycling - the DECLG would be required to plan out a road map to effective competition among PRSs. The DECLG would have to play a bigger role in dealing with many of the social and environmental issues involved.

3.1.4 *Water*

59. A major reform of water services provision in Ireland began in 2011. PricewaterhouseCoopers (PWC) were appointed as consultants to undertake an independent assessment of the transfer of responsibility for water services provision from the local authorities to a water utility. In line with the Programme of Financial Support for Ireland agreed between the Government and the EU/IMF, PWC were asked to recommend the most effective assignment of functions and structural arrangements for delivering high quality competitively priced water services to customers.

60. Within this context, the Competition Authority advised PWC on various areas where competition could develop in the future, for example: competition for the market and the procurement of major works, as well as retail and wholesale competition. These views are reflected in PWC's final report.

61. Water services are normally considered natural monopolies - chiefly the transport of water to final customers and waste water collection. However, there is increasing recognition that competition in certain areas has the potential to contribute many benefits to the Irish water sector, including

- the efficient use of water,
- value for money,
- effective regulation,
- the avoidance of over-spending and inappropriate assets, and
- cost competitiveness for all businesses in Ireland.

62. Introducing competing water companies is not likely to be feasible or desirable in the short term. However, it should be considered in the medium to long term. In the meantime, it is important that the initial set up of Irish Water avoids putting in place anything that could prevent the introduction of competition in the future.

3.1.5 *Other Areas of Advice*

63. In addition to the major areas of work outlined above, we engaged with Government Departments and public bodies in 2011 on a range of other policy issues. These are summarised in Table 2 below.

Table 2: Advice Provided to Government Departments and Public Bodies in 2011

Department/Pubic Body	Topic
Central Bank	Variable rate mortgages
Department of Agriculture	Aquaculture - licensing of fish farming Beef 2020 Action Group & Food Harvest 2020
Department of Communications, Energy and Natural Resources	Energy-saving measures in the oil sector Single Energy Market Unbundling the electricity grid
Department of Finance	Oil emergency planning Section 149 of the Consumer Credit Act Variable rate mortgages
Department of Health	Bank of Ireland state aid assessment Pharmaceuticals: reference pricing and generics Health (Provision of GP Services) Bill 2011 Private health insurance Relevance of competition law for discussions on the new GP contract
Department of Jobs, Enterprise and Innovation	23 Topics
Department of Public Expenditure and Reform	Household Benefits Scheme
Dept of Social Protection	Household Benefits scheme
Department of Transport	Airport competition
Forfás	Retail planning
Working Groups / Committees	Working Group on Credit Histories Business Regulation Public Procurement Subgroup. Taxi Review Group Banking Sectoral Commitments

4. Resources of the Competition Authority

4.1 Resources Overall

64. The Competition Authority is funded by way of annual grant from the Department of Jobs, Enterprise and Innovation. In 2011 the Competition Authority's grant was €5.1m. The Authority's accounts are subject to audit by the Comptroller & Auditor General and the audit of the 2011 accounts is unlikely to be completed until the second quarter of 2012.

Table 3: Competition Authority Budget 2010-2011

Budget	2010	2011	% Change
Euro	4.7 million	4.6 million	
USD	6.1 million	6 million	

Table 4: Number of employees by profession

Lawyers	9
Economists	18
Other professionals	8
Support staff	4
Total Staff	39

4.2 *Human Resources*

65. 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 2011 the number of people working in the Competition Authority had fallen to 39. This is the level at which the Authority's staffing has been capped under the Government's Employment Control Framework.

66. Departures from the Authority in 2011 arose from Declan Purcell's retirement in September having served as a Member of the Authority since 1998 and its Chairperson since April 2010. In February of 2011 Dr Stanley Wong left on the expiry of his five year term of office and, in May and July respectively, Isolde Goggin and Gerald FitzGerald left briefly on the expiry of their terms of office as temporary Members. Both were subsequently to return later in the year with Isolde's appointment as Chairperson and Gerald as a Member, following an open competition. They were joined on the Authority by Professor Stephen Calkins in December 2011 and Patrick Kenny in January 2012. Arising from the vacancies at Member level during 2011, the Minister for Jobs, Enterprise and Innovation appointed Ciarán Quigley, Noreen Mackey and David McFadden as temporary Members under the Competition (Amendment) Act 2010 pending the appointment of full-term Members under the 2002 Act.

67. The only other departures in 2011 were Elizabeth Heffernan, the Authority's Finance Officer, who retired in June, and Elisa Ryan, a Case Officer – Solicitor, who left in November.

68. As a result of the moratorium on recruitment and the cap on the number of staff permitted in the Authority under the Employment Control Framework, the number of people working in the Competition Authority in 2011 was at its lowest level since 2003.

Table 5: Number of employees by function

Enforcement	17
Mergers	5
Advocacy	6.5

69. This information was correct as of May 2012.

5. **New Reports and Studies on Competition Policy Issues**

70. No new studies were completed in 2011. However, we have published 12 comprehensive market studies since the enactment of the Competition Act 2002. Since then we have seen a number of important developments regarding the recommendations in these reports.

5.1 *Recommendations from Previous Reports*

71. The Competition Authority continually advocates for the implementation of recommendations we have previously made in market study reports. We do this by creating public awareness and engaging in public debate. We advise decision makers of the benefits that our recommendations will bring to consumers and businesses.

72. Over 50% of the Authority's 173 formal recommendations since the Competition Act 2002 have now been implemented. More will be put into effect in 2012 if legislation and regulations currently being debated in the Oireachtas and by the Government are passed into law.

73. The most important pro-competition policy developments in 2011 were in

- legal services,
- general medical practitioners,
- retail planning, and
- competition among TV providers in apartment blocks.

5.2 *Legal Services*

74. In October 2011, the Legal Services Regulation Bill was published as the Government's proposal to meet commitments made to the EU/IMF regarding the legal services sector. Overall, the proposed new regulatory set-up encompasses many of the features we would recognise in a competitive, transparent and accountable profession.

75. The Bill builds on recommendations in our *Solicitors and Barristers* Report¹⁰ and the Legal Costs Working Group.¹¹ Our most important recommendation was the introduction of an independent regulator - instead of the present system of self-regulation by the Bar Council and the Law Society. This would be in line with better regulation principles and mirror reform in other sectors and in the legal profession in other countries.

76. The Bill provides for the establishment of a new regulator of both legal professions that will protect and promote the interests of consumers. At the time of writing, the Bill does not appear to provide for sufficient independence of the regulator from Government, though the Minister has stated he will address this. The Bill will also make it possible for the new regulator to implement other key outstanding recommendations from our report, such as

- greater transparency and protection for clients regarding fees and quality of service,
- allowing modern business structures and new professions to develop, and
- the end of the monopolisation of legal training.

77. The Competition Authority made constructive suggestions in 2011 for improvements to the Bill - to the Department of Justice and in a paper delivered at a UCD conference (available from our website) on our initial views of the Bill.

5.3 *General Medical Practitioners*

78. Government proposals in 2011 to meet commitments made to the EU/IMF and implement Competition Authority recommendations will bring a series of benefits to GPs and patients. It will be easier for doctors to qualify as GPs and to set up in business and compete with established GP practices. Patients will have a greater choice of GP practices. There will be more incentives for GPs to be innovative in the type of service they provide and to compete on price for private patients.

¹⁰ *Competition in Professional Services: Solicitors and Barristers*, December 2006.

¹¹ *Report of the Legal Costs Working Group*, November 2005.

79. GPs who wish to set up in practice will in future find it much easier to do so thanks to proposed new legislation published in September 2011. The Health (Provision of General Practitioner Services) Bill gives effect to four of the recommendations in our 2010 report.¹²

80. The Bill provides that:

- access to State contracts will be open to all fully qualified and trained GPs,
- GPs will be free to establish a practice and treat public patients in the location of their choice,
- protecting the viability of existing GP practices in an area will no longer be a factor in awarding State contracts, and
- GPs who received a State contract under the 2009 interim entry provisions will be free to accept any patient who chooses to attend them, including existing medical card holders who wish to transfer from another practice.

81. Progress was also made in 2011 in addressing Ireland's shortage of qualified GPs. In our report, we expressed concern about the inflexibility of the four-year GP training programme - the sole route to qualification as a GP in Ireland (MICGP). We recommended a fast-track training programme be introduced for doctors who had already completed relevant hospital-based training. Under the terms of the EU/IMF programme, the Government committed to introducing a new route to the specialist qualification – 'MICGP-Alternative Route' - for doctors who are currently working as GPs in Ireland but who do not meet the standard requirements for registration set down by the Medical Council. This is a welcome development. It will regularise the position of up to 250 doctors who are already working as GPs in Ireland.

5.4 Retail Planning

82. 2011 saw the publication of draft new Retail Planning Guidelines¹³ that took on board four of the recommendations made by the Competition Authority in our 2008 report on *The Retail Planning System as Applied to the Grocery Sector: 2001- 2007*. More generally, the language and provisions throughout the Draft Guidelines better reflect the benefits of competition and the interests of consumers in retail development.

83. The Draft Guidelines serve to enhance retail competition. They will

- make the planning process faster and less burdensome for new retailers,
- widen the choice of retail outlets for consumers,
- ensure that consumer attitudes and preferences receive more attention in retail planning policies,
- ensure that the planning system no longer unduly favours existing retailers in an area over new retailers but instead looks at the impact of the new retailer on the vitality of the town centre or district centres as a whole.

84. The Draft Guidelines do not implement one recommendation of our report – to remove blanket caps on the size of retail stores. Instead, they propose to apply a different set of caps to the existing caps.

¹² *Competition in Professional Services: General Medical Practitioners*, 2010.

¹³ The new draft Guidelines were drafted and published by the Department of Environment, Community and Local Government.

Therefore, Ireland is unlikely to see the kind of large scale discount retailers that exist in other countries and the lower prices that go with them.

85. Overall, we believe that the newly published Draft Guidelines will strike a better balance in supporting the vitality, viability and competitiveness of city and town centres.

5.5 Competition among TV Providers in Apartment Blocks

86. New legislation introduced in 2011 will help to open up competition among TV providers in multi-unit developments, such as apartment blocks.

87. In 2009, we drew attention to the fact that many apartment residents were unable to choose their preferred TV provider.¹⁴ TV providers require the permission of the management company to enter onsite and install the necessary receiving infrastructure. This permission was often refused because developers had agreed exclusivity deals with providers for lengthy periods of time. In many instances, management companies remained vested in developers long after residents had moved in. They therefore tended to act in the interests of developers rather than residents.

88. The Multi-Unit Developments Act 2011 will make it easier for people living in apartments to choose between different providers of Pay-TV. The new Act requires management companies to be handed over to residents in a timely and orderly manner. Common areas in multi-unit developments must be transferred to the owners' management company within six months. Decisions involving the common areas - such as the decision to install a competing TV operator's infrastructure onsite - can be made by residents, rather than by the developer (through control of the management company).

¹⁴ *Pay TV Exclusivity in Apartment Developments: Guidance for Residents*, Guidance Note, August 2009. *Alleged Anti-Competitive Practices in the Provision of Pay-TV Infrastructure and Services to Apartment Developments*, Enforcement Decision (E/09/001), 14 August 2009.