

Unclassified

DAF/COMP/AR(2014)19

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

06-Jun-2014

English - Or. English

**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE**

DAF/COMP/AR(2014)19
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN IRELAND

-- 2013 --

18-19 June 2014

This report is submitted by Ireland to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 18-19 June 2014.

JT03358943

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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. 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. We investigate suspected breaches of competition law and either take legal proceedings ourselves in court, or, in relation to hardcore cartels, send a file to the Director of Public Prosecutions, who decides whether to prosecute on indictment. 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 courts.
2. 2013 continued to prove challenging for Ireland. Our focus remains firmly on how competition can help to rebuild the Irish economy and measures aimed at supporting the Government's Action Plan for Jobs. Increased competition in the local economy will help improve our competitiveness at a domestic and an international level.
3. As part of the Action Plan for Jobs, the Competition Authority carried out a study into competition in the Irish ports sector. The report was published in November 2013. It found that characteristics of the port sector in Ireland meant competition was always going to be limited, however competition could still be improved. The report made six recommendations to improve competition between and within ports.
4. In 2008 the Government announced the amalgamation of the Authority with the National Consumer Agency as part of a rationalisation of State agencies. The legislation to enact the amalgamation was published in March 2014. We have been working away behind the scenes with the NCA on amalgamating the two organisations.
5. 2013 also saw us continue with our outreach activities. One of the highlights of our events calendar was the 2013 European Competition and Consumer Day which we hosted jointly with the National Consumer Agency. The conference was attended by over 200 delegates in Dublin Castle and was part of Ireland's Presidency of the Council of the European Union 2013.

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

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

6. No relevant new legal provisions were introduced in 2013.

1.2 Other relevant measures, including new guidelines

7. There were no other relevant measures or new guidelines introduced in 2013.

1.3 Government Proposals for New Legislation

8. In 2013, the Department of Jobs, Enterprise and Innovation continued to prepare new legislation (the *Competition and Consumer Protection Bill*) to give effect to the announced amalgamation of the Competition Authority and the National Consumer Agency and to comprehensively update existing competition law.

9. 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 Competition and Consumer Protection Bill.

10. The Bill will also transfer responsibility for approving media mergers, from the point of view of plurality and diversity, from the Minister for Jobs, Enterprise and Innovation to the Minister for Communications, Energy and Natural Resources.

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

11. One of our core functions is to enforce competition law and to take legal action when we believe the law has been broken. Our enforcement work can be divided into two categories:

- The first relates to hardcore cartels. These are treated as criminal breaches of competition law and therefore must be proven beyond a reasonable doubt. Where we have enough evidence of a criminal cartel agreement, we refer a file on that case to the DPP for prosecution on indictment.
- The second relates to abuse of dominance and anti-competitive agreements which do not amount to a cartel, for example vertical agreements. These are treated as civil breaches of competition law.

2.1.2 Current Cases

2.1.2.1 The Competition Authority v Irish Medical Organisation

12. On 2 July 2013, the Minister for Health announced that he had decided to reduce the fees payable by the Health Service Executive to General Practitioners (GPs) for providing services to eligible patients under the General Medical Scheme (GMS). He proposed to do this by means of regulations made under the Financial Emergency Measures in the Public Interest (FEMPI) Act 2009. On 10 July 2013, the GP Committee of the Irish Medical Organisation (IMO) issued a press release condemning the proposed reduction in fees and stating that it had been decided that GPs would withdraw from the provision of certain services, including

- participation by GPs in Primary Care Teams,
- participation by GPs in Community Intervention Teams,
- participation by GPs in Clinical Care Programmes (Chronic Disease), and
- any other services not specified in the GMS contract (i.e., the contract which governs the provision of services by GPs under the GMS).

13. In the Authority's opinion, GPs are undertakings within the meaning of the Competition Act 2002 and the IMO's action therefore constituted a decision by an association of undertakings which would limit collectively the range and quality of services provided by GPs to GMS patients. As such, it was a decision which had the object and/or effect of preventing, restricting or distorting competition in the State and which might also affect trade between EU Member States.

14. On 11 July 2013, the Authority wrote to the IMO stating its view that the decision of its GP Committee constituted collective action by GPs and was in breach of competition law, specifically section 4 of the Act and Article 101 TFEU. It called on the IMO to rescind its decision immediately and to publish its agreement to do so on its website.

15. Following the IMO's failure to comply with the Authority's request, the Authority instituted proceedings in the High Court on 16 July 2013 seeking certain orders against the IMO, including an interlocutory injunction requiring the IMO to rescind the decision of its GP Committee to withdraw from providing certain services to GMS patients.

16. On 23 July 2013, the IMO gave voluntary undertakings to the High Court whereby it agreed, pending the final determination of the case, to suspend the decision of its GP Committee to withdraw services; to remove the press release of 10 July 2013 from its website and to inform its members of the giving of the undertakings. Pleadings have since been exchanged between the Authority and the IMO and the case is due to begin in May 2014.

2.1.3 Completed Investigations

17. In 2013, the Authority concluded a number of cases, some of which are summarised below.

2.1.3.1 FitFlop Branded Footwear

18. The FitFlop brand of footwear, which claims to tone leg muscles, is distributed in Ireland by Double Bay Enterprises, trading as Brazil Body Sportswear (BBS). In September 2011, the Authority received a complaint that BBS had engaged in resale price maintenance (RPM) by various means in recent years. RPM is the practice where distributors or suppliers dictate the price at which goods or services must be sold by retailers. It is anti-competitive because it results in consumers paying more than they might otherwise have if retailers were free to set their own prices.

19. Following an investigation, the Authority formed the view that BBS had infringed section 4 of the Act by:

- Engaging in RPM and
- Implementing a passive sales ban with respect to the FitFlop brand of footwear

20. This conduct meant that consumers who wished to purchase FitFlop products were unable to shop around for better value.

21. The Authority gave BBS the opportunity to cease engaging in RPM and the passive sales ban as outlined above. In November 2012, BBS and the Authority entered into an agreement under which BBS undertook to refrain from engaging in these practices and to inform its retailers accordingly. In return, the Authority agreed not to bring proceedings against BBS.

22. On 18 December 2012, the High Court granted the Authority an Order under section 14B of the Competition Act 2002 (as inserted by the Competition (Amendment) Act 2012), in relation to this Agreement. This means that the commitments given by BBS are now an Order of the High Court. This also means that if BBS were to breach the undertakings, it would be in contempt of Court. Section 14B also provides that an Order made under the section does not come into effect until the expiry of a 45-day period following the making of the Order. This is to allow third parties who may be affected to apply to the Court to have the Order varied or annulled. No such application was made in this case and the Order therefore came into effect on 2 February 2013.

23. The Authority subsequently issued an Enforcement Decision setting out in detail the issues which arose in the FitFlop case, which was published on the Authority's website in April 2013¹.

2.1.3.2 Fees at Rosslare Europort

24. On 20 April 2012, the Authority received a complaint from a ferry operator regarding the fees charged by Irish Rail to ferry operators at Rosslare Europort. The complainant alleged that Irish Rail charged fees in a discriminatory manner, with the fees charged to it being higher than those charged to its competitor for the same services. According to the complainant, this alleged discrimination placed it at a competitive disadvantage vis-à-vis its competitor.

25. During the assessment of this complaint, the Authority gathered a substantial amount of information from Irish Rail and other sources. The information obtained by the Authority showed that Irish Rail may hold a dominant position in the market for the provision of port services at Rosslare to operators providing ferry services on the relevant route. However, the analysis of the data obtained did not show a substantial difference in the rates applied by Irish Rail to ferry operators providing ferry services on the relevant route, including those charges levied on the complainant. This meant that the Authority did not find any evidence that Irish Rail had engaged in discriminatory behaviour which might have amounted to the abuse of a dominant position in breach of section 5 of the Act.

2.1.3.3 Bulk LPG

26. In October 2013, the Authority closed a long-running investigation into supply arrangements in the bulk LPG sector. The Authority has previously assessed, on a number of occasions, exclusive purchasing agreements between bulk LPG suppliers and commercial users.

27. In 2005, and again in 2010, the Authority publicly consulted on whether to issue a Declaration² in respect of Bulk LPG. Following receipt of submissions, and detailed analysis, the Authority decided in October 2013 not to issue a separate Declaration in respect of bulk LPG. Accordingly, bulk LPG agreements are subject to the Authority's 2010 Verticals Declaration and, more broadly, to the Act.

28. The Authority closed its investigation on a number of grounds:

- Insufficient evidence of consumer harm

29. There is insufficient evidence of consumer harm to justify the further expenditure of resources. Bulk LPG accounts for less than 1.5% of annual energy consumption in the State, and this figure has been

¹ This is available at <http://www.tca.ie/EN/Enforcing-Competition-Law/Notices-Declarations-and-Guidance-Notes/Enforcement-Decisions/Decisions/E1301--Resale-price-maintenance-of-FitFlops-branded-footwear.aspx?page=1&year=0>

² The Act permits the Authority to declare in writing that a specified category of agreements, decisions or concerted practices complies with certain conditions, set out in section 4(5) of the Act. The effect of such a Declaration is that agreements within the category in question are not prohibited by section 4 of the Act.

shrinking for a number of years. Accordingly, the resources to be expended were not considered justified, due to the small (and shrinking) size of the relevant market.

- Small number of complaints & possible remedies are unsatisfactory

30. The number of complaints received by the Authority has been small and has declined in recent years. In addition, the Authority believes that the remedies at its disposal are unlikely to be effective tools for addressing any competition problems which may exist in the market. The majority of complaints have been received from domestic, rather than commercial/industrial customers. Domestic consumers are not undertakings and agreements between them and suppliers of bulk LPG are therefore not subject to Irish or European competition law. Very few complaints were received from commercial/industrial customers (who, in contrast to domestic consumers, are undertakings and whose agreements with suppliers would be subject to competition law). However, the Authority's assessment of these cases was that the supply agreements did not restrict competition and did not, therefore, warrant enforcement action by the Authority. The Authority also concluded that the adoption of a Declaration in respect of the type of supply agreements used in the sector was unlikely to resolve any of the issues raised in the complaints it had received.

- Difficulty of securing an abuse of dominance ruling

31. The Authority also considered the possibility that suppliers had abused a dominant position on the market. Given the current structure of this market, it seems likely that the Authority would have to prove that the two principal suppliers enjoy a position of joint dominance in the relevant market. The Authority decided that in light of the small number of complaints received and based on its review of the market, launching complex, lengthy and expensive court proceedings arguing that abuse of dominance had occurred was not warranted.

32. However, it is important to add that this decision applies only in the context of current circumstances in the bulk LPG market. The Authority remains at liberty to investigate any competition issues that may arise in this market in future, or to issue a Declaration in respect of bulk LPG should the circumstances warrant such action.

2.1.3.4 Dairy Sector

33. The Authority has assessed a number of complaints related to the supply of milk by farmers to dairy co-ops over the past year. The context of these complaints is the pending abolition of milk quotas in 2015 and the corresponding expected increase of 50% in raw milk production nationally by 2020. In response to this increase, co-ops are taking steps to (a) safeguard their milk supplies and (b) invest in additional milk processing infrastructure to accommodate the increased volumes of milk which, under standard co-op membership agreements, they are obliged to buy, subject to certain conditions.

34. Since 1984, the milk quota regime, together with the Society Rules of co-ops, has governed supply arrangements between farmers and co-ops. In preparation for the abolition of quotas in 2015, a number of co-ops are introducing milk supply agreements. These will result in farmers contracting with co-ops to supply their milk to that co-op for a number of years, typically on an exclusive basis.

35. In certain circumstances, exclusive supply agreements (which, by their nature, involve some restriction of competition) can create efficiencies which benefit consumers. In recognition of this, such agreements may qualify for exemption from the general prohibitions of restrictive agreements provided for in EU and Irish competition law. This has been recognised by the adoption of general exemptions under both EU and Irish law that permit exclusivity agreements of up to five years' duration where certain conditions are met. These include, for example, a condition that the market shares of the supplier in the market in which it sells, and of the buyer in the market in which it purchases, must not exceed 30%, as well as conditions providing that the agreements must not contain certain other restrictive clauses (such as resale

price maintenance or a ban on passive sales). Exclusive agreements in excess of five years or which do not comply with the other conditions for general exemption will fall to be assessed on a case-by-case basis.

36. In the Irish liquid milk market, there are a number of reasons why exclusive supply agreements may be justifiable on efficiency grounds, including security of supply and, in some cases, the funding of additional processing infrastructure. However, funding and supply mechanisms must not be used as tools to tie farmers to particular co-ops for unreasonably long periods of time. If this were to occur, new entrants would be unable to enter the milk processing market, as they would be unable to source supplies of milk. Moreover, farmers located in the catchment areas of multiple co-ops would be unable to switch co-ops to take advantage of better supply terms, including more attractive pricing. Accordingly, excessively long supply contracts may act as barriers to both entry and switching. For this reason, the Authority reviews such agreements carefully to ensure that any exclusive supply arrangements are justifiable on efficiency grounds and contain only restrictions that are indispensable to the achievement of those efficiencies.

37. The Authority also closed an investigation into the National Dairy Council's "Farmed in the Republic of Ireland" campaign. The Authority found that the NDC campaign promoted the point of origin of liquid milk products and that this, in itself, did not amount to a breach of competition law. However, the Authority cautions that great care must be taken in the use of NDC Mark campaign, to ensure the campaign does not become a vehicle for potentially anti-competitive activity.

2.1.3.5 Other Investigations

38. Two investigations concerning alleged hardcore breaches of section 4 of the Act were concluded in 2013. These investigations concerned allegations of criminal behaviour, but there was insufficient evidence to warrant the Authority referring a file to the DPP. In the interests of natural justice and to protect the rights of those companies and individuals investigated, the Authority will not provide any further detail on these investigations.

2.1.4 Other Enforcement Matters

2.1.4.1 NAMA

39. While NAMA's activities with respect to the acquisition of bank assets are exempt from the Competition Act 2002, its post-acquisition conduct falls within the remit of the Act.

40. The Authority is aware of the importance of NAMA in the Irish economy and the impact it may have through its various activities. The position taken by the Authority in relation to any complaints made against NAMA is without prejudice to any action it may take in the future if evidence of anti-competitive behaviour comes to light.

41. Because of NAMA's potentially significant effects on competition, it is required to report on an annual basis to the European Commission and the Competition Authority on the use of its post-acquisition powers. The purpose of this is to allow the Commission and the Authority to take any action they consider adequate if they deem that NAMA's use of its powers has resulted in a distortion of competition. Having reviewed NAMA's use of its powers in 2012, the Authority concluded that no distortion of competition resulted.

2.2 Mergers and acquisitions

2.2.1 A Statistical Overview

42. In 2013, the Authority made 39 merger determinations, of which six were carried over from 2012. There was an increase in the number of mergers notified to us in 2013 (37) compared to 2012 (33).

2.2.2 Mergers Requiring a Full (Phase 2) Investigation

43. 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 2013, two phase 2 investigations were initiated. Both phase 2 investigations involved notifications originally received in December 2012, namely:

2.2.2.1 M/12/027 – Uniphar / CMR

44. This transaction was notified by the parties on 12 December 2012. The Authority cleared it on 30 April 2013. Uniphar and CMR are full-line wholesalers of pharmaceutical, healthcare, and veterinary products to pharmacies, hospitals and veterinary surgeons in the State. Both parties are active in the market for the full-line wholesale supply of pharmacy-only, human pharmaceutical drugs in the State.

45. At the conclusion of the preliminary (phase 1) investigation on 13 March 2013, the Authority announced that it was unable to conclude that the acquisition would not substantially lessen competition in markets for goods or services in the State. The Authority therefore proceeded to a full (phase 2) investigation.

46. Following an intensive full investigation, which included ongoing contacts with the parties, a survey of pharmacies carried out by Ipsos MRBI on behalf of the Authority, obtaining the views of competitors and suppliers of the parties, obtaining the views of industry representative bodies, the Department of Health and the Health Service Executive, and econometric analysis of pricing data, the Authority formed the view that the transaction will not substantially lessen competition in markets for goods or services in the State. In particular, the Authority concluded that the proposed transaction would not make it sufficiently more likely that Uniphar and United Drug would engage in tacit co-ordinated behaviour as to substantially lessen competition.

2.2.2.2 M/12/031 – Top Snacks / KP Snacks

47. On 18 December 2012 the Authority was notified of a proposed transaction whereby Intersnack International BV, through its subsidiary Top Snacks Limited, would acquire certain assets, comprising the business known as KP Snacks, from United Biscuits (UK) Limited.

48. Intersnack BV is part of the Intersnack Group, a major European manufacturer of branded and non-branded crisps and snack products. Intersnack BV’s UK-based subsidiary Top Snacks has a controlling interest in Irish-based Largo Foods. Largo Foods brands include Tayto, King, Hunky Dorys, Perri and Sam Spudz.

49. KP Snacks, the target business in the merger, is a UK-based manufacturer and supplier of crisps and snacks. KP Snacks brands sold in Ireland include KP Nuts, Hula Hoops, McCoy’s, Meanies, Rancheros and Skips.

50. On 22 April 2013 following an intensive full investigation, which included ongoing contacts with the parties, obtaining the views of both competitors and customers of the parties, a survey of consumers and econometric analysis, the Authority formed the view that the transaction would not substantially lessen competition in markets for goods or services in the State.

2.2.3 Extended Phase 1 Merger Investigations - Requirements for Further Information

51. 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 it 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.

52. An RFI requires parties to respond within a specified timeframe. During the phase 1 period, 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.

53. In 2013, 10 formal RFIs were issued in five merger cases.³ None of these cases were carried over to 2014. Three of these cases were cleared in phase 1 following an extended investigation lasting, on average, two to three months. Two of these involved subsequent phase 2 investigations, both of which were ultimately cleared and are discussed above. Of the extended phase 1 investigations the following case is of interest.

2.2.3.1 M/12/030 – C&C / Gleeson

54. On 18 December 2012 the Authority was notified of a proposed acquisition by C&C Group plc, through its wholly owned subsidiary C&C (Holdings) Limited, of the entire issued share capital of M&J Gleeson (Investments) Limited. On 16 January 2013 the Authority issued an RFI to each of the parties, both of whom duly complied on 29 January 2013.

55. C&C is involved globally in the manufacture, marketing and supply of branded long alcoholic drinks (LADs), specifically cider and beer products, to wholesalers and retailers in both the on-trade and off-trade sectors. C&C manufactures, markets and supplies cider in the State under the Bulmers brand, manufactures various Tennent's beer brands and acts as the exclusive supplier for a range of AB InBev's products.

56. Gleeson is involved in the wholesale distribution of beverage products (both alcoholic and non-alcoholic), such as LADs, wine, spirits, soft drinks and water. Gleeson manufactures several non-alcoholic products including mineral waters, soft drinks and freeze pops. Gleeson is not engaged in the brewing or manufacturing of alcoholic drinks but acts as the exclusive agent in the State for the supply of some products including soft drinks, beers and wine.

57. During the investigation, which included ongoing contacts with the parties and obtaining the views of both suppliers and competitors, the Authority focused on vertical issues such as input foreclosure and customer foreclosure along with other potential competition issues. The Authority sought the views of a number of third parties, comprising competitors, customers and suppliers of both C&C and Gleesons. In particular, the Authority sought the views of third parties involved in the distribution of cider and beer.

58. The Authority concluded that the proposed transaction would not substantially lessen competition in any market for goods or services in the State. The Authority cleared the transaction on 27 February 2013.

2.2.4 *Mergers Involving Media Businesses*

59. The Act allows for the possibility that a media merger cleared by the Authority on competition grounds after a full investigation may still be blocked by the Minister for Jobs, Enterprise and Innovation on public interest grounds. Of the five media mergers notified to the Authority in 2013, four were cleared following a phase 1 investigation during the year. Table 1 provides a summary of these four media mergers. No direction was made by the Minister for Jobs, Enterprise & Innovation during 2013, under section 23(2) of the Act, to the Authority to carry out a full investigation under section 22 of the Act.

³ Namely: Notifications M/12/027 - Uniphar / CMR, M/12/030 - C&C / Gleeson, M/12/031 - Top Snacks / KP Snacks, M/13/001 - BlackRock / CS ETF Business, and M/13/003 - BT / ESPN Global. See: <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications.aspx> for more details. Two RFIs were issued in each of notifications listed above.

Table 1: Notified Media Mergers in 2013

Notification	Economic Sector	Date of Notification	Status
M/13/003 - BT / ESPN Global	Broadcasting	27/02/2013	Cleared (phase 1)
M/13/005 - BSkyB / Be Un Limited	UK residential fixed broadband and telephony	04/03/2013	Cleared (phase 1)
M/13/006 - Clare FM / Terence and Gay Mangan / Tipp FM	Radio advertising in County Tipperary and County Clare	14/03/2013	Cleared (phase 1)
M/13/029 - Fox / Setanta Africa	Broadcasting	07/10/2013	Cleared (phase 1)

60. The fifth media merger notified in 2013 - M/13/033 – Sappho / TCH – was carried forward into 2014 as the parties submitted proposals to the Authority which extended the phase 1 deadline to 45 days into January 2014.

2.2.5 *Review of Non-notifiable Mergers*

61. Although the main role of the Mergers Division is to perform the statutory task of reviewing proposed mergers that are notified to the Authority it also investigates non-notified mergers that risk breaching sections 4 and/or 5 of the Act. The Mergers Division undertakes this task in co-operation with other divisions of the Authority.

2.2.6 *Corrib Oil / Suttons Oil*

62. Corrib Oil Limited and Suttons Oil Limited are both heating oil suppliers based in the west of Ireland. The Authority became aware in early September 2013 that Bord na Móna had reached an agreement to sell its oil distribution business, namely Suttons Oil, to Corrib Oil. The Authority received a complaint from a member of the public in relation to this proposed merger. It centred on the fact that Corrib Oil has a previous conviction under the Competition Act 1991 (as amended) for price-fixing.⁴

63. Under the circumstances, and given the characteristics of the industry, the Authority decided to investigate the likely competitive impact of the proposed transaction. The investigation included requests for information from the parties, and obtaining the views of a large number of third parties, including competitors and customers of both parties.

64. Following its investigation, the Authority informed the parties that, based on the information available to it, it did not intend to challenge or object to the completion of the proposed acquisition. The Authority also informed the parties, however, that since this acquisition was not notified to it under section 18 of the Act, it retains and reserves the right to consider any competition issues under the Act at some future date should the need arise.

2.3 *Kerry / Breeo Case*

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

⁴ For information on this case see: <http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Home-Heating-Oil.aspx>

66. On 7 April 2009, the Authority appealed the High Court decision to the Supreme Court. The appeal was in accordance with section 24(9) of the Act, which specifies that an appeal to the Supreme Court may only be made on a question of law.

67. In 2010, the Authority made an application for a priority hearing of the Supreme Court appeal in the Kerry / Breco case. This application was not granted. Work on the case however continued and the Authority submitted documentation to the Courts in early 2013 and has liaised with the Supreme Courts Office and the legal advisors to Rye Investments Limited (Kerry Group) in an effort to fix a date for the hearing of the appeal. It is now anticipated that the hearing of the case will take place during the second or third law term of 2014.

2.4 Merger Guidelines

68. The Authority concluded its review of its current merger guidelines, *Notice in respect of Guidelines for Merger Analysis, Decision No. N/02/04*, published in December 2002. The Authority issued revised draft merger guidelines for consultation on 13 September 2013 requesting submissions by 26 October. Ten submissions were received.⁵ “*Guidelines for Merger Analysis - Notice N/13/001*” was published on 20 December 2013. These Guidelines replace the Authority’s previous 2002 Guidelines. They reflect the Authority’s experience in reviewing mergers since it was given this power by the 2002 Act and also take account of international developments in merger review over the last decade or so. They include detailed explanations of the Authority’s approach to merger review and provide guidance on the issues that are central to the Authority’s review of mergers and acquisitions.

Table 2: Statistics on mergers evaluated 2010-2013

	2013	2012	2011	2010
Notified Mergers	37	33	40	46
required notifications [section 18(1)]	37	33	40	46
voluntary notifications [section 18(3)]	0	0	0	0
Carried from previous year	6	4	6	3
carried as phase 1	6	4	5	3
carried as phase 2	0	0	1	0
Referred from the EU Commission (ECMR Art 9)	0	0	0	0
TOTAL CASES	43	37	46	49
of which media mergers	5	3	5	8
of which entered phase 2 in year of determination	2	0	1	1
of which entered phase 2 in year previous to determination	0	0	1	1
Cases Withdrawn	0	1	0	0

⁵ These are available to view at <http://www.tca.ie/EN/Mergers--Acquisitions/Legislation--Guidance/Guidance-on-Mergers/Merger-Analysis.aspx>

withdrawn at phase 1	0	1	0	0
withdrawn at phase 2	0	0	0	0
Determinations Delivered	39	30	42	43
phase 1 determinations cleared without proposals	37	30	40	41
phase 1 determination with proposals	0	0	0	1
phase 2 positive determination without conditions or proposals	2	0	2	1
phase 2 determination with proposals	0	0	0	0
phase 2 determination with conditions	0	0	0	0
phase 2 prohibition	0	0	0	0
Referral to EU Commission (ECMR Art 22)	0	0	0	0
Carried to next year	4	6	4	6
carried as phase 1	4	6	4	5

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

69. The Competition Authority promotes competition in many different ways. We highlight areas of the economy where competition is restricted, we publish reports on how competition may be improved in certain sectors, we advise Government Departments and other State agencies on competition issues relevant to their work, including procurement and tendering for public contracts, and in particular, we comment on proposed legislation and we make responses to public consultations. We promote the idea of a competition culture to the wider community through the publication of guidelines, the organisation and participation in conferences and seminars and interaction with business organisations. We advise Government Departments and public authorities on competition issues such as procurement and tendering for public contracts.

3.1 Submissions

3.1.2 Registration of Architects

70. In May 2013, the Authority made a submission to the *Independent Review of the Arrangements for Registration of Architects* established by the Department of the Environment, Community and Local Government. The Authority raised a number of concerns however about aspects of the current registration system. Among the issues raised were questions regarding the registration of practically-trained architects, concerns about the recognition of Irish architects in Europe and concerns about the lack of part-time or modular courses in architecture.

71. Mr Gareth Fennell, of GFC Consulting, who was appointed by the Minister to carry out the Independent Review, published his report in September. He made a number of recommendations for reforming the system for registering architects, which we welcome. Implementation of the proposed reforms will provide those applying for registration with greater clarity, transparency and certainty on the registration process; will enhance the actual and perceived independence of the regulatory functions of the

Royal Institute of Architects in Ireland (RIAI); and will give greater protection and assurances to the consumers of architectural services.

3.1.2 *Government Statement on Economic Regulation*

72. The Authority made a submission to the Draft Consultation on the Government Statement on Economic Regulation. The Authority raised concerns regarding powers given to regulators in Ireland compared with other jurisdictions, particularly other EU Member States. In the Authority's view, the relative weakness of Irish regulators' enforcement powers with regard to the imposition of fines and other sanctions means that structural reform in regulated sectors in Ireland will likely lag behind that experienced in other EU Member States.

73. Economic regulation is a policy response to a market failure. In some cases, the need for regulation could be lessened by restructuring previously State-owned monopolies in advance so that only those areas that cannot support competition are left subject to regulation. Failure to do this will make regulation more complex and, as a result, more costly. Consumer welfare will also be reduced relative to its potential.

3.1.3 *Reforming the Dental Profession*

74. The Authority made a submission to the Department of Health's public consultation on new legislation to replace the Dentists Act 1985. The public consultation put forward a number of legislative proposals which will implement most of the outstanding recommendations in the Authority's 2007 report on competition in the dental profession (Dentists Report 2007) and yield benefits to consumers.

75. The Authority welcomed the proposal to amend the composition of the Dental Council to provide that the majority of Council members are not dentists.

76. The Authority agreed with the proposal to introduce regulations to allow the public to directly access some classes of auxiliary dental professionals.

77. It also endorsed the proposal to remove the prohibition on the incorporation of dental practices as this will offer benefits to dentists by giving them more flexibility to choose between establishing their own practice and working on a full or part-time basis as an employee.

78. The submission supports the proposal to give power to the Dental Council to make rules – within reasonable and limited circumstances - regarding advertising. Informative advertising of the services provided by healthcare professionals helps consumers make better choices and leads to lower prices.

3.1.4 *Producer Responsibility Initiative*

79. Producer responsibility initiatives (PRIs) create a duty for the producers of waste to treat or have the waste they produce treated in accordance with EU requirements. They try to ensure that producers involved in a particular waste stream pay the full costs of waste management services provided including collection, treatment and disposal. The waste streams covered by PRIs in Ireland include packaging, waste electrical and electronic equipment, end of life vehicles, batteries, farm plastics and tyres.

80. The Authority made a submission to the Department of Environment, Community and Local Government's public consultation on the Report on Corporate Governance in the Producer Responsibility Initiative sector in Ireland.

81. To facilitate effective competition among compliance schemes, we made the following recommendations:

- There should be limited restrictions on waste producers' ability to switch between compliance schemes where possible, and on the ability to switch to self-compliance.
- PRIs should limit the opportunities for waste producers and compliance schemes to share commercially sensitive information.
- Regulatory functions – e.g., ensuring Ireland achieves its recycling targets, enforcing contingency plans in case of failing schemes, and carrying out educational and promotional activities for encouraging “reduce, reuse and recycle” – should rest with an existing State agency or Government Department to avoid potential conflicts of interest.

3.1.5 Proposals to directly award Public Bus Services Contracts to Dublin Bus and Bus Éireann in 2014

82. The Authority made two separate submissions to the National Transport Authority (NTA) regarding its public consultation on Directly Awarding Public Bus Services Contracts to Dublin Bus and Bus Éireann in 2014. The NTA proposed directly awarding new contracts for the operation of all services covered by the current public contracts to Dublin Bus and Bus Éireann on 1 December for five years.

83. The Authority queried the grounds for the NTA's decision to directly award contracts to Dublin Bus and Bus Éireann in 2014. The Authority felt that it was not clear from the consultation documents that continued adequacy of public bus passenger services could “only be guaranteed” by another direct award contract to Dublin Bus and Bus Éireann - the relevant legal test⁶ to be applied.

84. Although the NTA also proposes to open up part of the services covered by the current public contracts held by Dublin Bus and Bus Éireann to competitive tendering in 2016, at least 90% and 93% respectively will still be covered by the directly awarded contracts until 2019. Moreover, there is no indication whether the market is to be opened further after 2019, which could affect investment decisions by new entrants.

85. The Authority urged the NTA to reconsider its proposals and to facilitate the introduction of effective competition in the bus services sector as early as possible.

3.2 Advice to Government Departments and Agencies

3.2.1 Medium Term Economic Strategy

86. The Authority provided input to the development of the Government's Medium Term Economic Strategy (MTES). It outlined the current state of play in key sectors to identify any competition-related issues which might need to be addressed by the MTES. In a small, open economy like Ireland, the key driver of economic growth is international competitiveness: this is the ability of Irish-based companies to export. By exporting goods and services, businesses in Ireland create wealth and employment.

87. Competition is the catalyst that drives innovation and creativity and has brought us exciting new products and services. While there has been some progress made in introducing competition in previously sheltered sectors, there are still a number of sectors where opportunities exist for further reform. These include: banking, energy, professions, transport, groceries/retail sector and utilities.

88. It is important that competition principles form the bedrock of the MTES and that no exemptions from competition law are granted. The Irish economy can no longer afford the cost of sheltering certain sectors from competition, the cost of which is paid for by consumers and businesses in the form of higher prices, by the economy in the form of lost jobs and by the State and taxpayers in public services.

⁶ Section 52(6)(c)(ii) of the Dublin Transport Authority Act 2008

3.2.2 *Banking*

89. The Authority and the NCA made a joint submission to the Department of Finance's review of the regulation of bank fees. Bank fees in Ireland are currently regulated under section 149 of the Consumer Credit Act 1995, as amended.

90. Given the current conditions in the banking sector and in the absence of convincing evidence to the contrary, the two agencies concluded that removing section 149 at this time would eliminate important consumer protections. In normal competitive conditions price regulation is less effective than competition as a means of protecting the consumer interest. In a competitive banking market there would be no need for regulation of bank fees. However, competition in the Irish banking market is so weak at present that any removal of price regulation of incumbent banks is likely to lead to higher prices to the detriment of consumers.

3.2.3 *Waste Sector*

91. The Authority has consistently advocated for effective competition in the household waste collection market. The Waste Management Policy Statement 2012 asked the Authority to

- maintain an ongoing oversight of household waste collection markets, and
- produce a report in 2016 as part of a mid-term review of the implementation of the new waste management policy.

92. To help the Authority and/or the Minister decide whether a report on competition in the waste sector is appropriate in 2016, we will need access to data that allows us to examine how competition is working. We therefore engaged with the Department of Environment, Community and Local Government in 2013 to explore the availability of the relevant data regarding the waste collection market.

93. The Department of Environment, Community and Local Government published two public consultations in the area of producers' responsibility initiatives for Tyres and Waste Tyres and End Life Vehicles in 2013. Although the Authority did not make formal submissions to those consultations, we engaged with the Department of Environment, Community and Local Government to welcome most of the proposals that will tighten up the current regulatory regimes for these waste streams. However, we expressed some concerns about removing the self-compliance option for tyres and waste tyres and cautioned that any decision to use end consumers as a source of funding for producers' responsibilities for End of Life Vehicles should be carefully considered.

3.2.4 *Water*

94. Irish Water was established in 2013. The Authority recognises that the role of competition in the provision of transport of water and collection of waste water is generally limited. However, the Authority has continually advocated that the government should avoid putting in place anything which could prevent the emergence of competition in the future. It is equally important not to create a state-owned monopoly water company with expectations that such a model may continue indefinitely. To signal and prepare for that eventuality at the outset, the regime should establish the possibility of "yardstick" competition, where the performance of comparable units can be examined so that best practice can be established and efficiency rewarded.

3.2.5 *Taxis*

95. The Authority has a representative on the Taxi Advisory Council to provide ongoing guidance and advice on any issues that may arise that could have a negative impact on competition. We participated in three meetings of the Taxi Advisory Council in 2013.

3.3 *Advice on Proposed Legislation, Regulation and Competition*

96. Government legislation and regulations can have competition implications. The Authority is asked from time to time to provide observations for different Government Departments' Memoranda for Government which is at the very latest stage of a proposed legislation. In 2013, the Authority provided observations on 21 Memoranda for Government. Sometimes, the Authority has the opportunity to engage with the relevant Government Department at an earlier stage of newly proposed legislation or regulations. In 2013, the Authority engaged with relevant bodies including the Departments of Finance; Public Expenditure and Reform; Communications, Energy and Natural Resources; Justice; and Environment, Community and Local Government. Specific topics included:

3.3.1 *Grocery Code of Practice*

97. The Authority appeared before the Joint Oireachtas Committee on Agriculture on 16 July 2013 to discuss the policy proposals in the grocery sector, which recommend implementing a statutory Code of Practice for Grocery Goods Undertakings.

98. The Authority cautioned that the potential for administration of the Code to impose costs on consumers should be carefully considered in designing it. Overly prescriptive Codes of Practice are not always fit for purpose and may not solve the problems for which they were intended. In addition, Codes of Practice can impose significant compliance costs on small and large businesses alike, which are likely to be passed on to consumers. Furthermore, the effective enforcement of such a code depends on access to credible evidence, and on the willingness of witnesses to go on the record.

3.3.2 *Legal Services Regulation Bill*

99. The Authority welcomed the publication of the Legal Services Regulation Bill which will substantially reform the legal profession and will stimulate competition between legal practitioners, if it is enacted in its current form. The Bill, as it stood at 31 December 2013, builds on recommendations the Authority made in its legal profession report of 2006 and on other recommendations made by the Legal Costs Working Group.

100. The most important innovation of the Bill and the key recommendation of our report is the introduction of an independent regulator for the legal profession – 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. The Bill provides for the establishment of a new regulator of both branches of the legal profession to protect and promote the interests of consumers.

101. The Authority welcomes the proposed introduction of an independent regulator as this should bring more transparency to the regulatory process and should substantially reform the legal profession to the benefit of consumers and the economy as a whole.

102. There are a number of other measures provided for within the Bill that will help modernise the legal services sector and benefit consumers of legal professional services.

- Consumers will have the right of direct access to barristers for legal advice. This means that clients will be in a position to avoid the cost of retaining solicitors in appropriate circumstances.
- Barristers will be permitted to operate in partnerships and not be confined to operating as sole traders. Allowing barristers to form partnerships would allow them to benefit from the economies and efficiencies derived from shared costs, shared work, shared risk and shared professional reputation. Clients would benefit from a choice of service delivery that suits their needs and face less risk of being left without a barrister at short notice due to scheduling issues.

- Qualified barristers employed by firms will be allowed to represent their employers in court, thereby eliminating a restriction which leads to an unnecessary replication of work and raises costs for many firms.

103. The Bill requires the new authority to examine issues relating to the establishment of multi-disciplinary practices (MDPs) with a view to permitting them. Having examined the issues in some detail in our 2006 Report, the Authority acknowledged that there are regulatory hurdles to overcome in establishing MDPs in Ireland, however these hurdles are not insurmountable and the potential consumer benefits are such that this issue should be explored further.

4. Resources of the Competition Authority

4.1 Resources Overall

104. The Competition Authority is funded by way of annual grant from the Department of Jobs, Enterprise and Innovation. In 2013 the Competition Authority's grant was €5.127m.

Table 3: Competition Authority Budget 2012-2013

Budget	2012	2013	% Change
Euro	€4.654 million	€5.127 million	+10%
USD	million	million	+10%

Table 4: Number of employees by profession (Full Time Equivalents)

Lawyers	12
Economists	19.3
Other professionals	5
Support staff	8.6
Total Staff	44.9

4.2 Human Resources

105. At the beginning of 2012, in the context of the EU/IMF Memorandum of Understanding, the Government committed to review the adequacy of resource levels in the Authority. Arising from that review the Minister for Jobs, Enterprise & Innovation approved an additional 10 posts for the enforcement function of the Authority, bringing the Authority's staff complement up to 49 posts.

106. Of the 10 posts, three were filled in 2012, one on the basis of a secondment from the Department of Jobs, Enterprise & Innovation, one from the redeployment panel in the public service and one by an Authority employee returning from a career break. In September 2012 the Public Appointments Service launched a recruitment campaign to fill the seven remaining posts and interviews were conducted in November. Seven new appointments arising from that competition were made in the first half of 2013.

107. At the end of 2013 the Authority had three vacancies in its staff complement of 49.

Table 5: Number of employees by function⁷

Enforcement	22.7
Mergers	5.3
Advocacy	6.5

5. New Reports and Studies on Competition Policy Issues

108. The Action Plan for Jobs 2012 states that the Department of Jobs, Enterprise & Innovation (DJEI) and the Competition Authority shall “Identify any sheltered areas of the economy where competition is restricted and commission studies on such areas where appropriate”.

5.1 *Irish Ports Sector Market Study*

109. As an island, Ireland is heavily dependent on its ports. Exports have been Ireland’s only net contributor to economic growth in recent years. So ensuring that competition is working as well as it can, and increasing Ireland’s ability to trade internationally, are vital. In that context, the Action Plan for Jobs 2013 required the Authority to publish a report on competition in the Irish ports sector.

110. We published our comprehensive study in November 2013, which made six recommendations aimed at improving competition in the sector.

1. **Recommendation 1** - Leasing and licensing of Dublin Lo-Lo terminals: The Authority recommended that the way that leasing and licensing of Dublin Lo-Lo terminals is managed should be changed to substantially reduce the duration of the leases (sometimes over 100 years) and to change the way in which licences are automatically renewed. The Authority also recommended that performance measures should be incorporated into any future terminal leases or licences.
2. **Recommendation 2** - Stevedore licensing: The Authority recommended that:
 - At least two new general stevedore licences should be issued in Dublin Port.
 - General stevedore licences should be granted to applicants on a fair, reasonable and non-discriminatory basis, or through a tendering process.
 - General stevedore licences should not be automatically renewable.
 - Ports should not require applicants to demonstrate that they will attract new business to the port as a condition for granting new licences.
 - Self handling licences should be granted by Dublin Port Company on a fair, reasonable and non-discriminatory basis.
 - Where stevedore services are provided exclusively by the port directly, this should be clearly justified by the port authorities in question.
3. **Recommendation 3** - Port closure and amalgamation: The Authority did not recommend any specific port closures or amalgamations. Rather, we recommended that the policy focus should be on preserving competition and ensuring larger ports are operating efficiently and competing with one another. While port closures may result in lower administrative costs, they are unlikely to enhance competition among ports. The report recommended that the Department of Transport, Tourism and Sport should be required to seek the views of the Competition Authority on any proposed port mergers, or alternatively, that ports with turnovers below the existing merger thresholds should be designated by the Minister for Jobs, Enterprise & Innovation as a class of merger that must be notified to the Authority regardless of whether it meets the merger thresholds.

⁷ This information was correct as of December 2013.

4. **Recommendation 4** - Management models: The Authority recommended that the Department of Transport, Tourism and Sport should ensure that effective competition within ports is a key objective for port authorities.
5. **Recommendation 5** - Investment in port-related road and rail infrastructure: The Authority concluded in its report that it is unlikely that future Government investment in port-related road and rail infrastructure could be justified purely on the grounds of improving competition between ports, and therefore any decision to invest in infrastructure in this context should be carefully considered.
6. **Recommendation 6**- Data collection and performance measures: Data collection and port performance measures are vital in order to analyse the level of competition within the sector and to guide future policy-making. However, the Authority's study highlighted a lack of both. The Authority recommended that the Department of Transport, Tourism and Sport prioritise the development of performance measures and data collection for the main ports.

5.2 *Government Commitment on Authority Recommendations*

111. The 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.

112. Government has committed that, in respect of recommendations made by the Competition Authority in future market studies, the Minister with relevant policy responsibility for those recommendations will, within nine months of the publication of the report, bring a report to Government giving their position on implementation of the recommendations.

113. Furthermore, it was decided that where any outstanding recommendations or future recommendations made by the Authority are of relevance to the recently launched *Action Plan for Jobs*, their implementation should be monitored in that context.

114. Following the publication of the ports sector market study, the Authority made six recommendations to the Department of Transport, Tourism and Sport and relevant port companies. The Department of Transport, Tourism and Sport has committed to responding to those recommendations within six months. We will work with the Department and relevant port companies in 2014 to ensure that the potential benefits of those recommendations can be realised.

5.2.1 *Government Commitment*

115. The Government has announced that, in respect of recommendations made by the Competition Authority in future market studies, the Minister with relevant policy responsibility for those recommendations will, within nine months of the publication of the report, bring a report to Government giving their position on implementation of the recommendations.

116. Furthermore, it was decided that where any outstanding recommendations or future recommendations made by the Authority are of relevance to the recently launched *Action Plan for Jobs*, their implementation should be monitored in that context.