

Competition Authority

Annual Report 2002



Competition Authority

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Foreword

2002 continued a period of growth at the Competition Authority. Staffing grew from 25 to 36 over the year (with several additional people due to join in early 2003). Our new colleagues bring expertise in economics, law, forensic investigation and administration. The process of building capacity, both in staff numbers and the development of their expertise and experience, is necessarily a slow process, but 2002 was an enormously positive year in continued development of the Authority's capability to analyse comprehensively the effects on competition of private or public actions.

This growth in the Authority's capacity happened against a background of significant legal reform through the 2002 Competition Act. This Act consolidated existing legislation, strengthened the Authority's powers and expanded its functions.

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

The Act also moved the Authority from the civil service to the public sector. This enabled us for the first time to run a direct competition for new staff. The Authority completed a large recruitment process within a short period. This has helped in building staff numbers.

European law was profoundly altered in November with the modernisation of Regulation 17, which will come

into effect in May 2004. This will enhance the Authority's role in the enforcement of EU competition law, and, as with the 2002 Act, presents enormous opportunities and challenges for the Authority over the coming years.

The Authority's output in 2002 reflects its growing capacity over the year.

On the enforcement side, an enormous clean up review of "old files" took place, reducing the number of open files from 427 to 247 (a 70% reduction). This enabled the enforcement divisions to focus resources on investigating the most serious matters. Two decisions to initiate criminal proceedings were taken late in the year. Many other large investigations resulted either in agreement to change behaviour or in conclusions that the Act had not been breached.

On the advocacy side, the Authority completed one study (casual trading), continued another (professions) and commenced two new ones (banking and insurance). It also produced reports or other commentaries on promoting competition in sectors such as transport, energy, financial services, healthcare and motor vehicle distribution.

The Authority organised two very successful conferences during the year, the first in September on the new Merger Regime, and the second in November on Competition in Medical Markets.

The division that looked after notifications had its work schedule altered most dramatically mid-year, switching its efforts to mergers. Only two decisions on notified agreements were made in 2002, but the refusal to licence or certify the IPSO/An Post agreement and the withdrawal of the certificate from the Irish League of Credit Unions were not without significance.

The Authority owes a debt to many organisations and individuals for cooperation or assistance during the year. This includes the offices of the Director of Telecommunications Regulation, the Commission for Electricity Regulation, the Commission on Aviation Regulation, the Director of Consumer Affairs, the Director of Public Prosecutions, and An Garda Síochána. Thanks are also due to the Department of Enterprise, Trade and Employment both for the many core services (finance, personnel, etc.) that they provide and to the Competition Policy Section, headed by Brian Whitney, that is responsible for the mandate and resources of the Authority. The members of the Authority's Advisory Panel, Gerald Fitzgerald, Gerard Hogan, Frances Ruane and John Travers provided wise and practical advice and support during the year. We are grateful to those who assisted the Authority by speaking at conferences or sitting on interview boards.

Within the Authority, I would like to thank my fellow Members, Isolde Goggin, Paul Gorecki, Declan Purcell and Terry Calvani for their hard work, wise counsel, and ongoing commitment to our common goals, and the Secretary of the Authority, Ciaran Quigley, for his efficient and calm (some say unflappable) management. The Authority is fortunate to have

attracted talented, bright and enthusiastic people.

Rather than thank each person individually here, I refer to the full list of staff in the Report itself and thank each colleague. I would like to thank also staff of the Authority who left during the year to take up other employments and to wish them success in their careers.

Personally, I would like to thank a number of individuals who have given valuable time and/or counsel:

Margaret Bloom, Damian Collins, Etain Doyle, Paul Haran, John Vickers, and Brian Whitney.

These remarks would not be complete without expressing my enormous gratitude to Isolde Goggin who resigned from the Authority and left in December to become a Member of the Commission for Communications Regulation. Her knowledge of competition law, practical good sense and wise judgement made her an invaluable colleague, and our collective good wishes go with her.



John Fingleton,
Chairman.

Summary

For the Competition Authority, 2002 is most likely to be remembered as the year in which a significant change in competition legislation was made to our statute books. The Competition Act, 2002 was enacted. The Act consolidated competition law in Ireland and repealed the Mergers, Take-overs and Monopolies (Control), Act, 1978, the Competition Act, 1991 and the Competition (Amendment) Act, 1996. It enhanced the Authority's powers in several different respects and transferred to it the responsibility for the review of mergers.

2002 was also a year in which great strides were finally made in equipping the Authority with the necessary staff resources to execute its mandate. One of the most striking aspects on reviewing 2002 is the increase in staff in the Authority by the end of the year. This is graphically illustrated when one looks at the table, later in this section, of staff in the Authority on 31st December and compares it with previous annual reports. Thirty five posts out of forty four had been filled by the end of the year with a further five posts in the process of being filled in early 2003. Staff retention rates have improved.

The increase in staff numbers in the Authority allowed it to make considerable progress in 2002 in dealing with the huge backlog of complaint files that built up at a time when the Authority was understaffed. It allowed the Authority to plan for adopting the new merger function from 1 January 2003 and to expand its advocacy brief in line with its legislative powers.

Having taken over responsibility for its own recruitment in July, the Authority has successfully concluded its first recruitment process that attracted in excess of 220 candidates. It has continued its study on the professions and initiated new studies on banking and insurance. It has articulated a pro-consumer, pro-competition message on bodies such as the Liquor Licensing Commission and the Pharmacy Review Group.

Introduction

Membership of the Authority

The members of the Authority during 2002 were:

John Fingleton	Chairman Director of Competition Enforcement (to June 2002) ¹
Isolde Goggin	Director of Regulated Markets Division (resigned December 2002)
Declan Purcell	Director of Competition Policy Division
Paul Gorecki	Director of Monopolies Division Acting Director of Cartels Division (to May 2002)
Terry Calvani	Director of Cartels Division (from May 2002)

John Fingleton was appointed Chairman of the Competition Authority and its Director of Competition Enforcement during 2000. John is a graduate of the University of Dublin (1983-1987) and the University of Oxford (1987-1991). He previously taught at Trinity College Dublin from 1991 until April 2000.

Isolde Goggin graduated from Trinity College Dublin with an engineering degree and worked for the following nine years with Telecom Éireann during which time she completed an MBA in University College Dublin. After working in Brussels with the European Commission from 1989 to 1991 she returned to Ireland to work as a Business Unit Manager with Ericsson Systems Expertise Ltd until her appointment to the Competition Authority in 1996. In December 2002 Isolde Goggin was appointed as a Member of the newly formed Commission for Communication Regulation. She resigned as a member of the Authority on 31 December 2002 to take up that post.

Declan Purcell was appointed to the Competition Authority in April 1998 and was reappointed for a further five year term by the Tánaiste in November 2001. Declan previously worked in the Department of Enterprise, Trade and Employment and in its predecessor, the Department of Industry and Commerce, for over twenty years. During that time he held a wide range of management positions that included responsibility, at various stages, for policy development in relation to industry, human resource development and company law.

Paul Gorecki graduated from University of London with a B.Sc. (Econ) in 1969 after which he took an MA in economics at Queen's University, Ontario, Canada and a PhD at the London School of Economics. After working for the Canadian competition authorities for several years, Paul joined the Economic Council of Canada in 1978 before becoming Director of the Northern Ireland Economic Council in 1992. He has

¹ Position ceased to exist following the repeal of the 1996 Competition (Amendment) Act.

published extensively on drug reimbursement programmes, Canadian competition policy and industrial organisation. Paul took up his appointment as a Member of the Competition Authority in June 2000.

Terry Calvani became a Member of the Authority and Director of the Cartels Division on May 20 2002. Previously he was a partner in the antitrust practice group of Pillsbury Winthrop LLP, resident in both its San Francisco and Washington, D.C. offices. Mr. Calvani was Commissioner of the US Federal Trade Commission (1983-1990) and was acting Chairman of the Commission during 1985 and 1986.

Following his graduation from the Cornell Law School, where he was Articles Editor of the Law Review, he practiced with the Pillsbury firm in San Francisco. From 1974-1983 Terry was Professor of Law at Vanderbilt School of Law teaching courses on antitrust law. More recently he has taught antitrust law at Duke University School of Law (2000) and at the Harvard Law School (1998-2001).

Competition Authority Staff

There were several recruitment processes to the Authority in 2002. In February the Civil Service and Local Appointments Commission conducted competitions for appointments to the Authority to Divisional Manager, Legal Advisor and Analyst/Case Officer positions. Arising from that competition Martin Maloney and Ray Leonard were appointed Divisional Managers of the Monopolies and Cartels Divisions respectively, Noreen Mackey returned to the Authority as one of its Legal Advisors and Colm Treanor, Ibrahim Bah, Anne Ribault O'Reilly, Andrew Rae and Derek Charles were appointed Analyst/Case Officers. Mr. Maloney's tenure with the Authority was short-lived as shortly after taking up his appointment he left the

Authority to become interim Secretary to the Irish Financial Services Regulatory Authority (IFSRA).

In March Detective Sergeants Michael Prendergast and Anthony Mulligan were seconded to the Authority from the Garda Bureau of Fraud Investigation on foot of an arrangement agreed between the Authority, the Department of Enterprise, Trade and Employment, the Department of Justice and the Garda Commissioner in 2001. Both officers were assigned to the Cartels Division to investigate criminal breaches of competition law.

In May, the Tánaiste appointed Terry Calvani as a Member of the Competition Authority, filling the position vacated in September 2001. Mr. Calvani's appointment followed a competitive process organised by the Department of Enterprise, Trade and Employment on the Tánaiste's behalf. On his appointment Terry Calvani assumed responsibility for the Authority's Cartels Division.

With the enactment of the Competition Act, 2002 the Authority became responsible for its own recruitment and in September advertised competitions to fill vacancies at Divisional Manager and Analyst/Case Officer level. Following competitive interviews held in October and November, Vivienne Ryan, an economist with the Authority, was appointed Divisional Manager of the Monopolies Division and Emily O'Reilly and Reuben Irvine joined the Authority as Analysts/Case Officers by year's end. At time of writing two more Analysts/Case Officers had joined the Authority – Arshad Khan and Barry O'Donnell – and four more offers of appointment had been accepted for appointment at this level in the coming months.

Staff of the Competition Authority as of 31 December 2002

By the end of 2002, thirty-five positions in the Authority from a sanctioned staff complement of forty-four² had been filled, one on the basis of a job sharing arrangement between two members of staff and one temporarily vacant as a result of the officer being on a career break. This compared to a figure of twenty five at the end of December 2001. The majority of the unfilled positions were new positions sanctioned in 2001 and 2002. The following list gives details of the staff of the Authority and when they were recruited.

Name	Position	Year joined	Name	Position	Year joined
David McFadden	Legal Advisor	2000	Andrew Rae	Analyst/Case Officer – Economist	2002
Noreen Mackey	Legal Advisor	2002	Anne Ribault O'Reilly	Analyst/Case Officer – Economist	2002
Patrick Kenny	Divisional Manager	2000	Emily O'Reilly	Analyst/Case Officer – Economist	2002
Dermot Nolan	Divisional Manager	2000	Reuben Irvine	Analyst/Case Officer – Economist	2002
Ray Leonard	Divisional Manager	2002	Michael Prendergast	Detective Sergeant (on secondment)	2002
Vivienne Ryan	Divisional Manager	2000	Anthony Mulligan	Detective Sergeant (on secondment)	2002
Ciaran Quigley	Secretary to the Authority	1998	Ann Geraghty	Higher Executive Officer	1991
Vincent Clarke	Communications Officer	2001	Catherine Ryan	Higher Executive Officer	1991
Colette Hegarty	Analyst/Case Officer - Economist	1999	Maura O'Donoghue	Executive Officer	2000
Tressan McCambridge*	Analyst/Case Officer - Economist	2000	Sandra Rafferty	Staff Officer	2000
John Evans	Analyst/Case Officer - Economist	2000	Stephen Lalor	Clerical Officer	1996
Carol Boate	Analyst/Case Officer - Economist	2000	Laraine Cooper (J/S)	Clerical Officer	1998
David Hodnett	Analyst/Case Officer - Lawyer	2000	Elizabeth Heffernan (J/S)	Clerical Officer	2000
Patrick Neill	Analyst/Case Officer - Lawyer	2000	Patrick Downey	Clerical Officer	2001
Colm Treanor	Analyst/Case Officer – Economist	2002	Sheila Dunne	Clerical Officer	2001
Ibrahim Bah	Analyst/Case Officer – Economist	2002			
Derek Charles	Analyst/Case Officer – Investigator	2002			

* Tressan McCambridge commenced a career break in September 2002.

Structure

The Authority has, since 2001, an organisational structure whereby each of five distinct areas of responsibility is headed by a Member of the Authority.

Division	Functions	Director
Chairman's office	Coordination, administrative services, public relations and external/international representation	John Fingleton
Regulated Markets (Advocacy)	Study, analysis and advocacy of competition in markets where the State restricts competition and liberalising markets	Isolde Goggin
Cartel enforcement	Investigation and prosecution of and enforcement against hard-core cartels under Section 4	Terry Calvani
Competition Policy (Mergers)	Notifications, studies, merger referrals.	Declan Purcell
Monopoly enforcement	Investigations and enforcement in abuse of dominance cases and for non-cartel (horizontal and vertical) agreements under Sections 4 and 5	Paul Gorecki

² The number of authorised posts increased from 44 to 47 from 1 January 2003 to take account of the transfer of the merger control function from that date. These three posts were transferred from the Department of Enterprise, Trade and Employment.

In December the Authority renamed the Regulated Markets Division to the Advocacy Division in recognition of the fact that it now carries the main responsibility for the advocacy function in the Authority. The Competition Policy Division was renamed Mergers Division as it now takes on the responsibility for merger notifications, a new function transferred from the Department of Enterprise, Trade and Employment under the Competition Act, 2002.

Arising from Isolde Goggin's appointment to the Commission for Communications Regulation, the Authority announced in December that Declan Purcell would take over directorship of the Advocacy Division and that Terry Calvani would direct the work of the new Mergers Division pending the appointment of a new member.

Training Programme

The large influx of new staff to the Authority in 2002 together with the Authority's commitment to implementing individual staff development programmes for all its staff means that the Authority must provide the necessary training that will equip its staff to carry out their duties in a professional and competent manner. During 2002, the Authority provided training itself or sourced providers of relevant training courses. In that regard, the Authority facilitated the attendance of its staff at relevant national and international conferences, seminars and workshops; provided for on the job training; engaged outside consultants to provide training in areas such as communication skills, management development, team building, interviewing techniques and IT applications; and organised an ongoing weekly series of in-house seminars on topics of work related interest delivered by a combination of in-house and external experts.

In addition to training courses, the Authority facilitated and funded the attendance by nine of its staff to participate in formal third level courses of education relevant to their duties. During 2002, six staff participated in the King's College, London, distance learning course on EC Competition Law while two members of staff participated in the Trinity College Dublin M.Sc in Economic Policy (Competition Stream) course. Another member of staff completed an IT course in Griffith College, Dublin.

Staff Exchange Programme

In late 2002, the Authority agreed a staff exchange programme with the Australian Competition and Consumer Commission (ACCC) whereby each agency would assign one of its officers to the other agency on a 12 month placement. Patrick Neill, a solicitor with the Authority, was selected to go to Australia and took up duty with the ACCC in January 2003. Vanessa Holliday of the ACCC commenced her placement with the Irish agency in February 2003.

Legislative Changes

The enactment and coming into effect of the Competition Act, 2002 was the most significant legal development in 2002. The new Act enjoyed a speedy passage through the Oireachtas having been first published in December 2001 and enacted by the legislature in April 2002. Parts 1, 2, 4 and 5 of the Act commenced on 1st July 2002 while Part 3 of the Act, dealing with mergers and acquisitions, commenced on 1st January 2003.

The Act provides for major changes in the administration of competition law in Ireland. The Competition Authority becomes a public body as opposed to an agency of the Department of Enterprise,

Trade and Employment. Changes are provided for in the manner in which the Authority can investigate and enforce competition legislation and the penalties for those convicted of breaches of Irish competition law have been altered. The system of voluntary notification by businesses of agreements between undertakings has been abolished and, with effect from 1 January 2003, the Competition Authority takes over responsibility from the Minister for Enterprise, Trade and Employment for the control of mergers and acquisitions. A brief outline of the main provisions of the 2002 Act is contained in Annex 6 to this report while the Act itself is available on the Authority's website at www.tca.ie.

With the new Act coming into force in the middle of the year, this Annual Report spans both systems of enforcement of competition law in Ireland. The report, in Section 4, contains details of the last of the notifications made to the Authority under the old legislation and the last of the Authority's formal decisions under that system. The report also contains details of the Authority's decisions under the new regime and of the transitional arrangements provided for by the Authority to ensure a smooth move from the old to the new laws. The report also details for the last time mergers referred to the Authority by the Tánaiste under the old legislation.

Authority Website

The references throughout this report to the availability of a huge range of documentation on the Authority's website is evidence of the site's importance to the Authority as a communication tool. Indeed in many cases the Authority's website is the sole or prime means of publication of opinions and policy statements. During 2002 the Authority sought to ensure that all documents for publication were posted on its site

immediately on completion thus ensuring their instantaneous availability to the widest possible audience.

In drawing up its procedures for dealing with mergers from 1 January 2003 onwards, the Authority decided that notice of all mergers notified to it will be published on its website only and that all merger decisions will be similarly published. The various recruitment processes to the Authority during the year were advertised on its website and the level of applications from overseas strongly suggests that the Authority's site is regularly visited abroad and that its impact is favourable. It is the Authority's intention to further develop its site during 2003 with the installation of a search engine to give speedier access for users to its contents. Members of the public may elect to receive an email notification of updates to the Authority's website by sending an email to info@tca.ie.

Strategy

Simultaneous to the publication of this annual report, the Authority is publishing a new Strategy Statement for the period 1 January 2003 to 31 December 2005. The production of this statement is a requirement under section 33 of the Competition Act, 2002. The new statement replaces the Authority's Strategy Statement 2002 – 2004 published in February 2002. The new statement takes account of the new responsibilities given to the Authority in the 2002 Act and sets out the Authority's key strategic goals for the period in question.

Authority Decisions

While the Authority has numbered its formal decisions sequentially since its establishment in 1991, these decisions related only to decisions taken regarding

notifications made to it under section 7 of the 1991 Act. On the abolition of the notification system the Authority's last decision was numbered 596. Under the provisions of the new legislation, there are several different types of decision that the Authority can make and it was felt that a more transparent and meaningful system for numbering those decisions would be of use to customers. Accordingly, a new system of decision numbering was introduced on 1 July. From that date all decisions will be numbered using the year of the

decision and a unique number. In addition each number is preceded with a letter indicating the type of the decision. So, decisions relating to mergers are preceded with the letter M, decisions relating to publication of declarations with the letter D and decisions relating to publication of notices with the letter N. Also, submissions made by the Authority and published by it are numbered in the same way as decisions and are preceded with the letter S.

Section 1: Enforcement

General Issues

One of the core functions of the Competition Authority is to enforce competition law and to bring legal proceedings where it believes that contraventions of the law have occurred. Competition Authority practice from 1996 distinguished between two different types of contraventions – hard-core cartel offences, such as price fixing and market sharing on the one hand, and rule of reason offences, such as abuse of dominance, vertical restraints and non-cartel horizontal agreements, on the other. The Competition Act, 2002 reinforced that distinction. This distinction arises because certain offences are harmful to competition almost without exception while others, particularly offences relating to vertical agreements, may or may not restrict competition depending on the facts of the individual case. For this reason, the penalties provided for in the 2002 Act are less serious for the latter set of “rule of reason” matters. In contrast, on conviction on indictment for hard-core cartel offences, the penalty for an undertaking is up to €4m or 10% of turnover while the penalty for an individual is a similar fine or up to 5 years imprisonment, or both. Penalties for non-cartel offences include the same level of fines but the possibility of jail sentences is removed.

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

Under the 1996 legislation, decisions relating to enforcement cases could be taken only by the Authority

and only on the recommendation of the Director of Competition Enforcement. The 2002 Act abolished that position and allowed the Authority greater powers of delegation with the result that any cases opened after the coming into effect of the new Act on 1 July may be processed by the divisions themselves. This has led to more efficient processing of cases.

Cartels

The Cartels Division is principally responsible for the enforcement of Section 4 of the Competition Act. That law prohibits collusion among otherwise competing firms. Such collusion can take many forms. Agreements to fix prices and allocate markets are common varieties. The latter may involve allocation by territory, customer

or product. Collusive tendering (or “bid-rigging”) is another common form. Such cartel behaviour increases the costs of goods and services and also injures the national economy.

Violation of the cartel provisions of Irish law is a criminal offence, and the Division generally treats such conduct accordingly. Where the Authority obtains sufficient evidence of illegal cartel activity, it may (a) refer the matter to the Director of Public Prosecutions (“DPP”) with a recommendation that the parties be prosecuted on indictment, (b) itself initiate summary criminal proceedings in the District Court, or (c) file civil proceedings.

Terry Calvani became Director of the Cartels Division in May 2002. Ray Leonard was appointed Manager of the Division in April 2002. The Division has six case officers including two detective sergeants seconded from the Garda Bureau of Fraud Investigation and one former member of An Garda Síochána. Other case officers have backgrounds in law, economics or criminal investigations. The Division also jointly shares two clerical officers and a legal advisor with the Monopolies Division.

Complaint Profile

The Division received 54 complaints during 2002. Understaffing in previous years had resulted in a large number of open investigational files. This year the Division was able to complete and close its investigations in ninety four (94) matters. As a result, the Division is now better able to focus its limited resources on the most promising investigations.

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

Figure 1: Cases by Sector

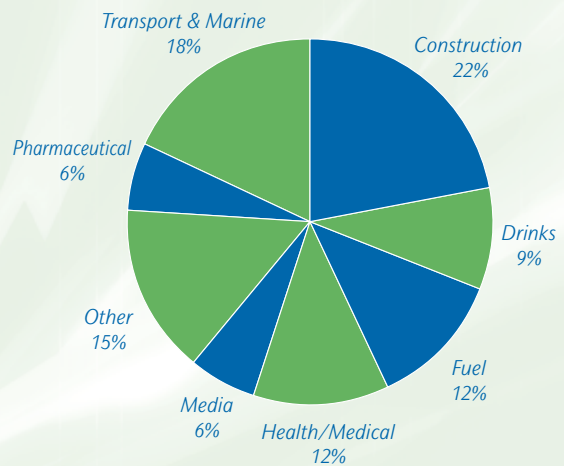
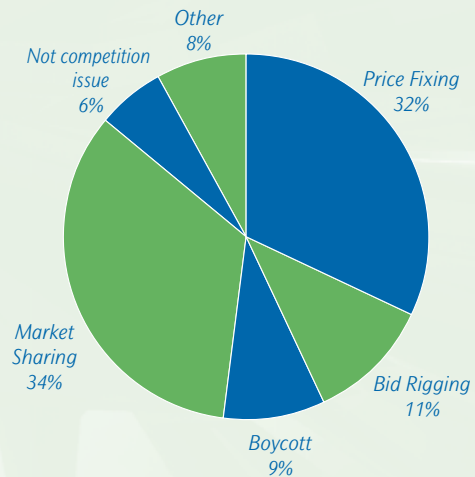
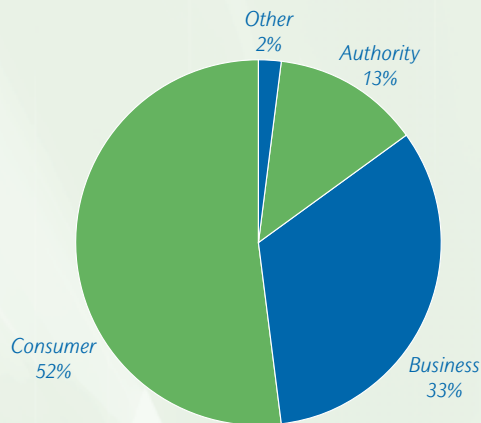


Figure 2: Cases by Category



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

Figure 3: Complaints by Source

Enforcement Activity

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

Fifty two investigational summonses were served and returned in 2002. In addition, the Division sought and obtained seventeen search warrants from the District Courts. The Authority decided in the fourth quarter to initiate criminal proceedings in two matters that the Division had investigated. Of these one file was sent to the D.P.P. for direction on whether to proceed on a Summary or Indictable basis. On the other matter the Authority is working with the D.P.P. in the preparation a file with a view to prosecution on Indictment. Currently the Division has seventy nine open investigational files. These are the first decisions to bring criminal proceedings since 1999 and reflect the increased staffing available to the Division in the second half of

2002. As these cases involve investigations of alleged criminal breaches of the law the Authority will not make public details of the cases.

In addition to reacting to alleged contraventions of the law, the Authority seeks to prevent such contraventions occurring where it becomes aware that a possible contravention might occur. This is sometimes done without resort to legal proceedings. In April, the Irish Pharmaceutical Union (IPU) threatened to withdraw certain pharmacy services from the State. The Authority issued a public statement of its view that such an action would represent a breach of the Competition Acts. As the IPU did not carry out its threat to withdraw services, the Authority did not initiate proceedings.

Monopolies

The Monopolies Division is responsible for the administration and enforcement of competition law issues covering:

- Abuse of a dominant position;
- Vertical restraints, including resale price maintenance (RPM), and refusal to sell; and,
- Non-cartel horizontal agreements, covering subjects such as R&D, group purchasing, standard setting, market research, and copyright.

Such breaches of the Competition Act 2002 are typically classified as rule of reason rather than per se offences.

A number of issues cut across Divisions within the Authority. This is particularly the case concerning markets such as gas, electricity and telecommunications where large regulated undertakings possess market power. The Division works closely with the Regulated Markets Division in this respect.

Staffing

For much of 2002 the Division was seriously understaffed. For several months there were only two case officers. By the end of 2002 the Division was close to its staff complement, with a Divisional Manager, three case officers³ and another two case officers due to join the Division in January 2003. Two clerical officers and a legal advisor are shared with the Cartels Division. Since the Divisional Manager and three of the case officers were appointed in late 2002/early 2003, a major challenge for the Division in 2003 will be the creation of a cohesive, well functioning team.

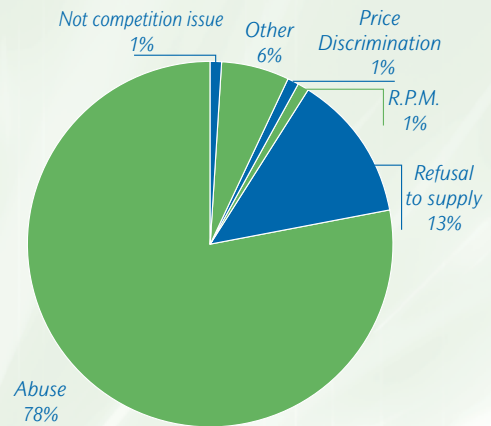
Legal Matters

As noted in the Authority's 2001 Annual Report (page 25) there was one civil case before the Courts against *Eircom* with regard to the introduction of local loop unbundling in the Irish telecommunications market. Due to regulatory changes the case has not proceeded and the legal proceedings have been discontinued.

Complaint Profile

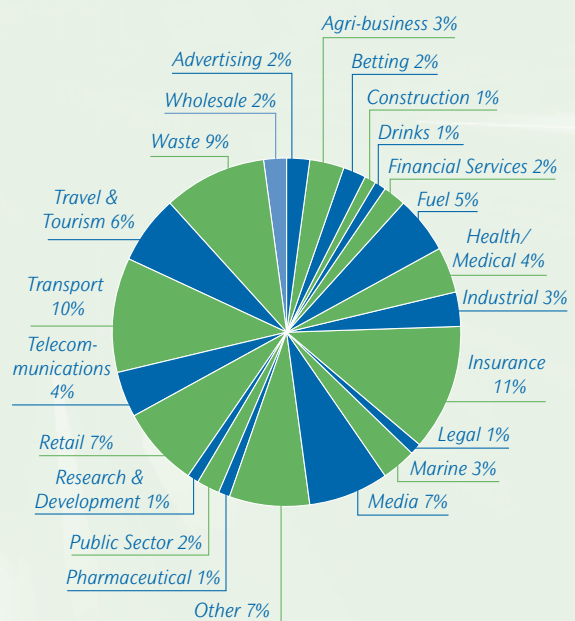
In 2002 the Monopolies Division received 94 complaints that resulted in files being opened. This compares to 146 in 2001. The composition of Monopoly Division files is shown in Figure 4 below. Alleged abuse of a dominant position is the most important category, as was the case in 2001.

Figure 4: Cases by Category



The most important sectors in terms of files opened in 2002 were insurance, transport and waste respectively, which together accounted for a third of all files opened. A complete sector breakdown is provided below in Figure 5.

Figure 5: Cases by Sector



³ One Division case officer is on leave for a year.

Use of Enforcement Powers

In conducting investigations, usually on foot of a complaint, the Division did not often need to resort to witness summonses or searches as undertakings and others typically complied with requests for information and documents. Nevertheless in 2002, the Division issued four witness summonses in one case due to the non-co-operation of a particular undertaking. In another case a search warrant was executed.

Cases

Public Awareness

Authority decisions that arise from detailed investigations may frequently be of public interest because they clarify the Authority's interpretation of the law or its enforcement stance. In some instances what is of interest are the Division's grounds for *not* taking action on the foot of a complaint (e.g., the allegations of abuse by Vodafone or the National Lottery), while in others it might be the nature of a negotiated arrangement reached by the Division with the parties (e.g., amending the criteria for admission to the JNRR).

Moreover, the Authority is aware of the considerable reduction in reasoned decisions that will result from the abolition of the notification system. During 2002, the severe resource constraint in the Monopolies Division prevented it from taking many measures to address this issue. This is an issue that the Authority proposes to address during 2003.

On four occasions in 2002, the Authority did issue a brief public statement (in the form of a press release) announcing a decision and some brief explanation surrounding it⁴. This Annual Report contains details of several other decisions.

⁴ These were released on 1 October (Irish Retail Newsagents Association), 4 October (JNRR), 8 November (Xtravision) and 21 November (Vodafone). The releases may be found on the Authority's website, www.tca.ie, under 'press'.

Abuse of a Dominant Position

As noted earlier, the largest category of complaint files opened by the Division refer to abuse of a dominant position. In 2002 three categories of alleged abuse were particularly important. These are discussed below.

Selection Criteria

In many instances the complainant argues that the alleged dominant undertaking has unfairly excluded the complainant in some way. For example, several complaints asserted that the National Lottery unfairly selects agents thereby adversely effecting competition or does not cover certain parts of the State thereby limiting production. Several complaints were made that the procurement procedures of a large insurer restricted competition across a number of different markets. An important consideration in these cases is whether or not there is an objective justification for the alleged restriction. After a thorough investigation the conclusion reached in these and other instances is that where the selection criteria used by the alleged dominant undertaking were transparent, objective, justified and proportional they are unlikely to breach the Act. These investigations are therefore closed.

Protecting Competitors or Promoting Competition

In two cases complaints were received that allegedly dominant undertakings had reduced the margin/commission payable to retailers. The first involved allegations against Vodafone in the pre-paid mobile phone sector; the second against Aer Lingus in the 'full service' airline market. However, in both cases the Division's conclusion was that no abuse had taken place. Consumer welfare was either unchanged or

improved. Competition between different methods of distribution remained. While some undertakings may have been adversely affected by the alleged abuse, the purpose of the Competition Act is not to protect undertakings but to increase consumer welfare and promote competition.

Merger Under Section 4/5

Mergers below statutory notification thresholds may breach Section 4 or 5 of the Act. For example, if a dominant undertaking acquires a dynamic, price-cutting, smaller rival in a market where entry is difficult this may constitute an abuse of a dominant position.

In 2002 an undertaking voluntarily brought to the attention of the Authority its proposed acquisition of a small competitor. The proposed transaction raised a number of concerns, including a concern that the merger might lead to higher prices to consumers. When these concerns were brought to the attention of the acquiring undertaking it immediately informed the Authority that it no longer intended to proceed with its proposed acquisition.

Vertical Restraints

After abuse of a dominant position, vertical restraints, such as refusal to sell and RPM, were the next largest category of complaints. In such cases the Division is often asked to intervene in what after some investigation is found to be a private contractual dispute between a manufacturer/wholesaler and a retailer with little or no implication for consumer welfare or the competitive process. The Authority's assistance is sought by one side in a conflict. However, in a number of instances, there appear to be grounds for believing that the alleged vertical restraint might breach the Act. In several such cases the intervention of the Division led to the resumption of supply. Two examples are:

- An undertaking with a large market share (50 per cent plus) refused to supply a retail outlet on the grounds that it was already supplying another retailer in the area. Other sellers of the product did not take such a restrictive view; and,
- Two undertakings would not supply a retailer because of pressure allegedly exerted by other retailers who objected to the lower prices charged by the particular retailer.

The two cases illustrate that refusal by a manufacturer/wholesaler to supply a downstream undertaking particularly concern the Authority when either a manufacturer/wholesaler is dominant or the refusal to supply has an horizontal element.

Rewarding Risk Taking

Not all vertical restraints fall into the category of refusal to deal or RPM. As noted in the 2001 Authority Annual Report an important source of complaints is the impact of supply and distribution agreements. One such case concerned arrangements made between Xtravision and several small film independent film producers.

Several complaints alleged that an Xtravision marketing arrangement with certain small independent film producers was anti-competitive and a breach of competition law. Under the arrangement, Xtravision receive films produced by the small independent producers four to six weeks before other video libraries.

The investigation found that Xtravision had entered into an arrangement whereby it invests in the production and marketing of films made by small film producers in return for an exclusive period of advance release of their titles. The undertakings with which Xtravision has the arrangement only account for approximately 1% of all titles released in Ireland.

This arrangement allows Xtravision to protect its investment in the production and marketing of certain titles. Its beneficial effects outweigh any possible anti-competitive concerns about the exclusive nature of the arrangement for consumers and the small effect on the overall market. This arrangement gives customers a wider range of film titles to choose from. In the absence of the investment by Xtravision in the film titles concerned, it is less likely that those titles would be available on the Irish market. Overall consumers have benefited from greater availability and choice of titles under this particular arrangement.

Non-Cartel Horizontal Arrangements

The Division dealt with a small number of non-cartel horizontal agreements. Such agreements typically have as their object improved efficiency, development of better market data, innovative selling methods and the creation of buying groups. However, the effect of such agreements may also be to restrict or distort competition due to the presence of various restraints, which may not be necessary to the attainment of the objectives of the agreement. In instances where such restrictions are not severable from the agreement careful balancing of the benefits and costs is required.

Three sets of non-cartel horizontal arrangements are discussed below where the Division has devoted considerable resources in 2002.

Innovative New Selling

A small group of undertakings used an innovative method to sell a service to consumers. One of the conditions under which new undertakings joined the arrangement was that they could not sell their services through another third party for a period of two years. Third parties complained to the Division about the two-year exclusivity period. After carefully reviewing the

arrangements the Division accepted that the two year, all-inclusive, exclusivity clause contained in the standard contract was both necessary and proportionate for the initial two-year period. The Authority accepted the claim that the term and scope of the exclusivity clause was necessary to ensure that the costs incurred during the start-up period were covered. Concerns about intentions for new/renewal contracts after the two-year period were addressed by undertakings secured from the parties.

Better Information

Markets work well when participants have good information about consumer preferences and tastes. Market surveys frequently provide such data. In some instances competitors in a market organise such surveys. Two complaints were dealt with in 2002 concerning the conditions or criteria under which undertakings gain inclusion in the surveys.

In the first case News International plc complained to the Authority that the exclusion of its titles from the Joint National Readership Research (JNRR) Survey was in breach of Irish competition law. It was further alleged that the JNRR excluded certain Irish titles owned by UK-based newspaper groups from its national readership surveys. The JNRR is a non-profit making joint industry research survey with four partners, including newspaper publishers.

The survey contains information on the Irish readership of newspapers and magazines that is considered essential for advertisers as a resource for planning advertising campaigns. News International plc contended that the exclusion of its titles from the survey denied it access – without objective justification – to a vital information resource, thereby placing it at a competitive disadvantage in the Irish market for advertising.

Following discussions with the Division, the JNRR agreed to change its criteria and the applications for six additional newspapers were accepted for its 2002 survey⁵. The Authority considers that the admission of these titles will enhance competition in the Irish advertising market by allowing advertisers to target their markets more effectively and thereby offer greater choice to consumers.

Agreements between competitors that enhance efficiency – by, for example, providing better information or establishing industry standards – can breach the Competition Act, 2002, if they are not open to all firms in the market. Such exclusion damages the competitive process to the detriment of consumers.

In the second case in a survey not dissimilar in purpose to the JNRR, a smaller market participant complained that the costs of participating in the survey were disproportionately high. The complainant argued that the object was to exclude smaller undertakings from the survey with a view to putting them out of business. The Division is currently evaluating the merits of this case.

Future Enforcement

Virtually all of the cases discussed above refer to cases that are closed, either because the Division did not think that a breach of the Act had taken place or that the situation had been resolved to the satisfaction of the Authority. In other words the Division has not used the Courts as an enforcement option. However, in a small number of cases the Division is currently considering recourse to the courts.

New Responsibilities

Under the Competition Act, 2002 the Authority may issue a declaration that a specified category of agreements may contain necessary desirable restrictions or identifying certain restrictions that should not be included. If an agreement falls within a category of agreements subject to a declaration then it shall not be prohibited under Section 4 of the Act. At the EU level Block Exemptions such as those in relation to cars are analogous to declarations. The Monopolies Division will represent the Authority on matters relating to block exemptions.

On December 31 2003 the License and Notice⁶ with respect to agreements between suppliers and resellers will expire. In 2003 the Division will hold a consultation process to consider the way forward in the area of vertical agreements.

International Activities

The Cartels Division actively participated in the Council Working Group on the modernisation of Regulation 17, which work was successfully completed in November 2002. It also participates in the Modernisation Advisory Committee which comprises of two special committees on the European Competition Network (agreeing the partialities of modernisation and CIRCA (dealing with electronic information exchange) as a part of the same Modernisation process. Officers from the Division attended a number of Advisory Committee meetings during the year, including the decision to impose fines in the Nintendo and the Auction House cases. The

⁵ The six titles are the *Sunday Times*, *The Irish Sun*, and the *Irish News of the World*, the *Irish Mirror*, the *Sunday Mirror* and the *People*. The JNRR was in the midst of conducting a review of its survey at the time of the complaint.

⁶ The Authority issued a *Category Certificate/Licence* in respect of agreements between suppliers and resellers, Decision No 528 on 4 December 1998. Under the transitional provisions of the Competition Act 2002 on 1 July 2002 the *Category License* continues in being as if it were a declaration (under Schedule 2, section 3(2)). The *Category Certificate* lapsed. However, the Authority on 1 July 2002 issued a *Notice in Respect of Agreements Between Suppliers and Resellers*, Decision No. N/02/002, to replace the *Category Certificate*. Notices are issued under section 30(1)(d) of the Act for the purposes of providing practical guidance as to how the provisions of the Act may be complied with.

Division has also participated in bilateral consultations with the cartel authorities within Directorate-General Competition and with those of the United Kingdom and the United States. Mr. Leonard represented the Authority at the annual meeting of cartel enforcement officials in September.

The Monopolies Division acted as rapporteur in the Visa/MasterCard case concerning the rules and regulations covering membership of the VISA association. In particular, a proposed scheme for the introduction of an agreed VISA EU fee, paid by an

acquiring bank to a card issuing bank, for clearing and settlement of Visa transactions across EU Member State borders. The Division also attended a workshop on “New Framework for Electronic Communications”, which discussed the relationship between Member State competition and regulatory agencies. Finally, the Division is the Authority’s representative on the European Competition Authority Air Traffic Working Group. The Group is developing guidelines for exchange of information between member states on notifications, proceedings and decisions in the field of air transport.

Section 2: Advocacy

Section 30(1) of the 2002 Act has continued the Authority's function of studying and analysing competition matters, including developments abroad. The Act has extended advocacy functions to include:

- advising Government and Ministers concerning the implications for competition, in markets for goods and services, of proposals for legislation, including statutory instruments;
- advising public authorities generally on issues concerning competition which may arise in the performance of their functions;
- identifying and commenting on constraints imposed by any enactment or administrative practice on the operation of competition in the economy; and
- carrying on such activities as it considers appropriate so as to inform the public about issues concerning competition.

This wide range of functions was carried out by two non-enforcement divisions of the Authority during 2002 – Regulated Markets Division and Competition Policy Division.

Staff

The Regulated Markets and the Competition Policy Divisions functioned for the first four months of 2002 without the services of a dedicated legal advisor. Towards the end of April this vacancy was filled by Noreen Mackey. The Regulated Markets Division gained a number of new staff with three new Analysts/Case Officers joining during the year. Two of these, Colm Treanor and Anne Ribault O'Reilly, arrived in the middle of the year and the final one, Reuben Irvine, arrived in December. The Division has one remaining vacancy at the Analyst/Case Officer level and this is due to be filled in the coming months.

The Competition Policy Division's staffing levels remained static during 2002. One of its staff, Patrick Neill, left at the end of the year to take up an exchange with an officer in the Australian Competition and Consumer Commission. One additional Analyst/Case Officer position was allocated to the Division but is unlikely to be filled before mid-2003. At the end of the year the Division had one Analyst/Case Officer, a Higher Executive Officer and was awaiting the arrival of an Analyst/Case Officer as part of the exchange programme with the ACCC.

Both Divisions share the services of one of the Authority's legal advisors and of one clerical officer.

Formal Studies

Professions Study

Work on the Professions study continued throughout 2002. Following a tendering process, Indecon Economic Consultants were chosen as external consultants. Indecon analysed the replies to the questionnaires that were received from professional bodies and met and discussed the relevant issues with these bodies. There were regular meetings with Indecon to monitor the progress being made and deal with any issues arising. In October, Indecon delivered a preliminary report to the Authority. This report consisted of a survey of the literature relating to the market for professional services, and, for each of the professions chosen, an examination of the restrictions operating within the profession and an analysis of the benefits and costs of these restrictions.

The Authority provided detailed comments on the report. A final version of their report will be published in March 2003, after which the Authority will complete the Study by issuing reports on each profession (or sub-group of professions) on a phased basis. On conclusion of any part of the Study, the Authority may offer a clean bill of health, seek changes to existing practices; present recommendations and, where appropriate, best practice guidelines to Government, relevant regulators, professional bodies and others with a view to the removal of unnecessary impediments to competition; and/or generally publish information about the market/sector/practice that improves knowledge and understanding of or stimulates and improves competition generally in some or all of these areas.

Casual Trading Study

The Tánaiste requested in 2000 the Authority, under Section 11 of the Competition Act, 1991, as amended,

to undertake a study into the implementation by local authorities of the Casual Trading Act, 1995. The Tánaiste's request to the Authority arose from concern regarding complaints received from casual traders about the operation of the Act by local authorities.

MRBI was contracted (following a tendering process) to gather factual data and opinions from each of the 88 Local Authorities and from a representative sample of 326 casual traders and 154 local businesses. MRBI delivered its final report to the Authority on 10 December 2001.

In 2002, the Division used this report as the basis for the study. The Study was completed and was sent to the Tánaiste in August.

Banking Study

In September the Authority embarked on an own initiative study of non-investment banking in the State. The study will examine all markets in which the clearing banks operate. Thus, to the extent that other credit institutions (e.g. the Credit Unions, An Post) operate in the same markets as the clearing banks, they will fall within the scope of the study.

The study will identify barriers to entry into non-investment banking in the State, analyse their origin, their intended effects and their actual effects and, where appropriate, make recommendations to have disproportionate barriers to entry removed.

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

The aim of the Study is to:

- Advise the Government concerning the implication for competition of existing primary and secondary legislation and, where appropriate, to identify and make recommendations for change to legislative restrictions on competition that are disproportionate.
- Make recommendation for change to any enactment or administrative practice that is limiting competition in the State to the detriment of consumers.
- Identify issues relating to consumer inertia, information problems etc. and make recommendations to ensure that consumers can exercise their full rights so as to best advantage themselves using the competitive process.

Any practice or arrangement that appears to be in breach of the Competition Act, 2002 will be brought to the attention of the Cartels and/or Monopolies Divisions of the Authority.

Following a tendering process, independent consultants LECG were commissioned in December to assist in the banking study. It is envisaged that the bulk of the work for the study will be done in 2003 and will be carried out by the Authority's Advocacy Division.

Insurance Study

In October the Authority, in conjunction with the Department of Enterprise, Trade and Employment, launched a study on the non-life insurance market in Ireland, with particular reference to motor insurance, employers' liability and public liability insurance.

Following a period of public consultation in October - November 2002 on draft terms of reference, the terms of reference were finalised as follows:

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

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

Study Criteria

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

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

Other Advocacy by Sector

Communications

During 2002 a number of advocacy issues arose in relation to the communications sector.

In March the Authority raised concerns at EU level about the proposed system of relating significant market power (SMP) obligations in telecoms to competitive effects analysis and the impact that this might have on the decisions of national Courts in competition cases. The Authority was pleased that its concerns were taken on board in the final Recommendation.⁷

As part of the new framework process, the division drafted with the ODTR (now ComReg.) a Joint Response to Consultation on the European Commission's Draft Recommendation on Relevant Product and Service Markets within the Electronic Communications Sector (S/02/003). The submission highlighted a number of concerns with regard to the implementation of the recommendations.

Energy

During 2002 a number of important issues arose in the energy sector.

In April, the Authority published a submission it had previously made to the CER consultation on the Infrastructure Agreement. Consultations were also held with the CER on a number of other issues including the conditions attached to the Synergen-Statoil JV and proposed amendments to the ESBIE supply licence.

In November the Authority made a submission to the Department of Communications, the Marine and

Natural Resources on the draft Electricity Bill 2002 (S/02/005). The submission stressed that legislative provision was required to allow for meaningful restructuring of the electricity sector. In particular, the Authority recommended:

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

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

Taxis

In April, the Regulated Markets Division formalised the Authority's views on taxi market regulation in a submission to a consultation process run by the Department of the Environment and Local Government on *Qualitative Improvements in Services and Future Regulation of those Services*. The Authority argued that

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

the completion of the regulatory reform process, begun by the liberalisation of entry in 2000, required that:

- A systematic fare review process should be developed and implemented;
- Fares should be re-balanced to reduce excess supply and ensure adequate service at all times;
- Maximum fare controls should be retained and fare competition below these levels should be encouraged;
- Quality standards should be tightened and the threat of enforcement made credible; and
- The structure and process of regulation should be reformed so as to make it efficient, rational and immune to capture.

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

Ports

In July the Authority made a submission (S/02/002) to a consultation run by the Department of Communications, the Marine and Natural Resources on the High Level Review of the State Commercial Ports Operating under the Harbours Acts, 1996 – 2000. The high level review was undertaken to assess the current model for the governance of the State port companies. The submission stressed that an efficient and competitive system of ports and port services is crucial to our national competitiveness. The chief recommendation of the submission was that a full competitive assessment of the port sector be undertaken.

Financial Sector Regulation

In September the Authority made a submission (S/02/004) outlining its main concerns with the proposed Bill to establish the Irish Financial Services Regulatory Authority (IFSRA). Reservations were expressed about the industry consultative panels which, it was felt, might provide an avenue by which the proposed new regulator might become captured, i.e. come to reflect the interests of industry players and not, as it should, consumers.

Health

In April the Authority made a submission to the Health Insurance Authority on the subject of risk equalisation. The Authority echoed the views of the Advisory Group on the Risk Equalisation Scheme (RES) that it represents a barrier to entry, as it could potentially lead to significant transfers from new entrants to the incumbent. However, the Authority pointed out that it is only one of a range of factors that discourage entry. Also important is the high market share of the former State monopoly and the role that the Minister plays as regulator and owner of the largest player in the market.

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

Liquor Licensing

During 2002 Ms Isolde Goggin (Director of the Regulated Markets Division) represented the Competition Authority on the Liquor Licensing Commission. She also chaired a sub-committee established to examine the issue of licences for interpretative centres and other areas where the sale of alcohol is ancillary to the main business carried out. In supporting the introduction of competition in this sector, during 2002 Ms Goggin made various presentations to interested groups and at conferences.

Pharmacies

The main advocacy role of the Competition Policy Division was in relation to the Pharmacy Review Group, where Dermot Nolan, the divisional manager, was a member of this group. The Review Group was set up in November 2001 by the Minister for Health to report on the appropriate regulation of the retail pharmacy sector. Representatives on the group come from a range of government departments and sectoral interests.

The group met 13 times during 2002, with the Division attending each meeting. In general, the Division put forward arguments that suggested liberalisation of the retail pharmacy sector would be good for the consumer by permitting more entry and thus greater choice, lower prices, and higher quality of service. It pointed out the benefits liberalisation had brought in other sectors, such as the market for taxi plates. The Review Group will finish its deliberations, and issue a report to the Minister at the end of January 2003.

In January 2002, the Minister for Health removed the "location restrictions" in the pharmacy market. The Authority had consistently argued that, in restricting new entry, these seriously impeded competition in the pharmacy retail market, and that they were

disproportionate because they did not clearly relate to any public policy objective.

High Level Group on Regulation

During the year Isolde Goggin represented the Authority at the High Level Group on Regulation. In July the Authority produced a submission (S/02/001) in response to the consultation on better regulation. In August, the Authority also provided written observations to the Department of the Taoiseach on the issue of Regulatory Impact Analysis.

International Activities

The Authority was represented at two advisory committee meetings (in March and June) in relation to the revised motor vehicle block exemption. The Authority supported the broad thrust of the Commission's approach to the liberalisation of this market. In November, the Chairperson appeared before the Joint Oireachtas Committee on European Affairs in relation to this matter (and the modernisation of Regulation 17). The Authority's submission to the Joint Committee is available on the Authority's website.

In October representatives of the Authority and the Commission for Energy Regulation attended a roundtable on competition issues in liberalized electricity markets as part of the work of the OECD's Competition Law and Policy Committee Working Party 2. Prior to this the Authority and the Commission for Energy Regulation had prepared a response to a questionnaire in relation to competition in the energy sector in Ireland.

Section 3: Mergers

Merger Reports to the Tánaiste

Under Section 7 of the Mergers, Take-overs and Monopolies (Control) Act, 1978, (as amended), the Tánaiste could send a merger notified to the Department of Enterprise, Trade and Employment, to the Authority for a detailed investigation of the transaction's impact upon competition and a variety of other factors.

GEHE/Unicare

In December 2001, the Tánaiste referred the merger between Unicare, a chain of retail pharmacies, and GEHE, a company active both in the retail pharmacy market and in the wholesale pharmacy market, to the Authority. The Competition Policy Division conducted the investigation, which focussed on competition issues in both distribution and retail pharmacy markets.

Although there was some overlap between the two companies' retail pharmacies in some local markets in the Dublin area, the Authority's investigation found that, using local markets as a guide, there would still be a significant number of other retail pharmacies in competition with the merged companies pharmacies, and thus concluded that there would be no significant decline in competition in the retail pharmacy sector.

The Authority also studied whether GEHE's share of the pharmacy wholesale market would permit it to tie-in a large number retail pharmacies, and thus potentially prevent new entrants into the wholesaling business and/or disadvantage retail pharmacies who did not use GEHE as a supplier. Again, the investigation showed that this would not occur as a result of the merger and the Authority reported back to the Tánaiste in early February with the recommendation that the transaction be allowed to proceed.

The Authority also recommended that as long as the 1996 Pharmacy Regulations were extant, any merger involving retail pharmacies in local geographic areas be notified to the Minister. This recommendation was due to the Authority's concern about the possibility of harmful concentration in local pharmacy markets.

USITNow

At the end of February, the Tánaiste referred a merger between USITNow, a student travel company based in the State, which had affiliates overseas, with STA Travel, a large travel company with worldwide links. The Authority's investigation focussed on whether there was a specific student travel market, and what products composed that market. The investigation was complicated by the fact that USIT was in serious financial difficulties, with its Irish operation and many of its affiliates, being in examinership.

After a close study of the complex vertical relationships that governed the supply and distribution of student tickets and travel products, the Authority concluded that the transaction would not seriously lessen competition and recommended in its report to the Tánaiste that it be allowed to proceed. This was subject to the recommendation that STA be required to supply certain student travel tickets to other Irish retailers of such tickets for a certain duration under specified terms.

Maxol/Estuary

In late July, the Tánaiste referred a merger between Maxol, a company active in oil and petroleum retailing, with Estuary, a company operating in the same general area. The Authority's investigation looked at a number of different markets at both wholesale and retail level. Of particular interest was whether there was significant overlap in some local geographical market in the retail sale of petrol, particularly given the existence of schemes for supplier support of retail stations should they experience financial difficulty. The Authority concluded that the degree of overlap was not sufficient to significantly lessen competition, and recommended the approval of the merger in its report.

Development of Irish Merger Policy

Under Part 3 of the Competition Act, 2002, all notifiable mergers occurring within the State will be notified to the Authority. The Competition Policy Division will be renamed Mergers Division, and will be responsible for dealing with all mergers. It spent a significant amount of resources during 2003 preparing for this new function. Under the Act, mergers are to be evaluated on the basis of whether the merger would lead to a substantial lessening of competition. The Act also provides for more transparency in the assessment of mergers, allowing for submissions from third parties, the publication of reasoned decisions by the Authority and the possibility of appeals to the High Court against negative decisions.

In July the Authority published drafts of

- (i) the procedures it will use to administer the new system;
- (ii) the substantive economic rules by which it will interpret the new test; and

(iii) the forms which notifying parties will use when submitting notifications.

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

The Division also engaged in internal planning of how the merger process would work internally, and looks forward to implementing the new regime in 2003.

International Activities

The Authority contributed extensively to the development of international merger policy. It participated in the EU Advisory Committee on Concentrations, which considers large mergers notified to the European Commission. The Authority also contributed to the International Competition Network and the European Competition Authorities.

The Authority has been particularly active in the debate on the reform of the EU Merger Regulation, most notably in initially proposing and campaigning for the substantial lessening of competition test to be used by the assessing mergers at the EU level. The Chairman made presentations on this subject at a number of international conferences and at meetings of Directors General of Competition. A paper on the subject is available on the Authority's website.⁸

⁸ Presentation at EU/IBA Merger Review Conference, Brussels, November 8th 2002 under "speeches".

Section 4: Notifications

Notifications

At the start of 2002, the Authority had dealt with 1,385 of the 1,417 cases notified to it since October 1991, leaving it with 32 cases on hand. The Authority received three new notifications and made two decisions⁹, detailed below, in other cases. With the abolition of the notification system on 1 July 2002, all notifications with the Authority where a decision had not been reached by the Authority lapsed at that point. All certificates and licences previously granted or issued by the Authority also lapsed.

IPSO/An Post

In decision 595, which related to a notification of an agreement between Irish Payment Services Organisation Ltd. and An Post concerning the migration of bill payment services from a group of commercial banks to An Post, the Authority refused to grant a certificate or issue a licence. The decision was based on its opinion that the agreement amounted to a collective withdrawal of a service by a group of undertakings that would diminish competition and choice in the bill payment market and so was in breach of section 4(1) of the Competition Act, 1991. It decided also that the agreement did not meet the conditions required for a licence, and accordingly issued a negative decision.

A Buying Group – the ILCU

In decision 596, the Authority revoked a certificate previously granted by the Authority in Decision No 440 dated 20th November 1995. The matter related to the Rules of the Irish League of Credit Unions (ILCU). These rules provided that ILCU members had to purchase those services relating to life assurance cover in respect of the credit unions' individual members' loans and

savings (LP/LS cover) through a wholly owned subsidiary of the ILCU – the ECCU Assurance Company Ltd (ECCU). In Decision 440 of 1995, The Authority took the view that any credit union that did not want to participate in such arrangements could leave the ILCU and could continue its operations. The arrangement prevented other insurance companies competing for this particular business but, in reality, this only applied to 0.6 per cent of total life assurance premiums. The Authority did not believe, given the tiny proportion of the market involved and the fact that credit unions could opt out of these arrangements, that this provision could be said to prevent, restrict or distort competition. The Authority issued a certificate.

In Decision No 596 dated 28th June 2002, the Authority revoked this certificate on the grounds that two material changes of circumstance had taken place.

These were:

- The emergence of a number of ILCU member credit unions that objected to the joint buying arrangements for LP/LS cover by the ILCU members; and,

⁹ The two Authority Decisions mentioned are available on the Authority's website, www.tca.ie, under Documents¹.

- The making of savings protection scheme (SPS) cover compulsory by the introduction of Rule 55(1). In respect of LP/LS cover, a credit union pays an annual premium to ECCU or some equivalent insurer, in respect of which no fund builds up. As a result any ILCU credit union can obtain such LP/LS cover from insurers other than ECCU without incurring any penalty, if it left the ILCU either voluntarily or through disaffiliation. Hence switching costs with respect to LP/LS cover are low or zero. However, this is not the case with respect to the SPS. Here the member credit union contributes to the SPS fund. Should it leave the ILCU, voluntarily or otherwise, it has no claim on any of the accumulated fund. However, to be placed in a similar situation when it leaves the ILCU it would need to set aside 1 per cent of its savings. This would impose a considerable financial penalty on any ILCU member credit union that wished to avail of lower priced LP/LS cover than that offered by ECCU, and hence may deter any such credit union from opting for such alternative LP/LS cover, in circumstances where it might otherwise do so.

The Authority revoked the certificate on the grounds that it was no longer prepared to certify that the rules of the ILCU did not offend against section 4(1) of the Act. Since the Authority's decision in this case, the Monopolies Division of the Authority has been in active discussion with the ILCU and its legal advisers as to the implications of the revocation of the certificate granted in respect of the ILCU rules.

Transition Arrangements

With the abolition of the notification system in the Competition Act 2002, all existing certificates and licences, including category certificates and licences, granted or issued by the Authority since 1991 ceased to have effect. The Authority made two decisions at its first meeting under the regime of the new legislation as regards transitional arrangements in respect of the Category Certificates and Licence that were in existence on 30th June. On 1st July, the Authority, in exercise of its power under Section 30(1)(d) of the 2002 Act, decided, as decision numbers N/02/001 and N/02/002, to issue two new Notices:

- N/02/001 is a Notice in respect of Agreements involving a Merger and/or Sale of Business. It replaced the Category Certificate granted under the old legislation. The Notice expired on 31 December 2002.
- N/02/002 is a Notice in respect of Agreements between Suppliers and Resellers and replaced the Category Certificate/Licence granted/issued under the old legislation. It expires on 31 December 2003.

Section 5: Policy

Management Issues

Strategy Statement

In February 2002 the Authority published a Strategy Statement for the period January 2002 to December 2004. In the statement, the Authority defined its key strategic goals for the period in question. The goals centred on:

- Enforcing and otherwise encouraging compliance with competition law,
- Advocating, promoting and raising public awareness and understanding of the benefits of competition, and
- Implementing Irish competition policy to the highest international standards.

The Strategy Statement defined the major strategic management and policy issues likely to face the Competition Authority from January 2002 to December 2004. It elaborates strategic priorities and provides a framework for the Authority to address strategic issues and strengthen its capacity to focus clearly on the overall direction of competition policy.

The genesis for the statement was the Government's Strategic Management Initiative (SMI) which requires Government Departments and offices to publish 3 year Strategic Plans. The detailed elements of the Authority's strategy are put in place through its annual business plans, which are implemented at division level under the guidance of individual members and monitored by the Authority. The business plans provide a structured basis for developing and implementing the many objectives that flow from the high level goals of the Strategy Statement and are concerned with translating the relatively abstract aims of its strategy into realisable steps and activities.

The Strategy Statement 2002 – 2004 is available on the Authority's website but will be replaced in March 2003 with the publication of a new Strategy statement for the period 2003 to 2005. The requirement to produce a new statement derives from Section 33 of the Competition Act, 2002. As the Act changed the statutory basis of the Authority from being an office of a Government Department to an independent public body, the Authority was no longer covered by the Government's SMI. In order to ensure therefore that the Authority operated under the principles of SMI, the requirement to produce a strategy statement and business plans was provided for in the Act by the legislature. Given the changes to competition law contained in the 2002 Act, the Authority believed it necessary to revise its Strategy Statement at the earliest opportunity, hence the imminent publication of a second three-year strategic plan in two years.

Public Representation

Speeches and Presentations

A list of speeches and presentations by members and staff of the Authority is contained in Annex 4 of this report. The Authority regards this particular aspect of its activities as being important in spreading the message of the importance to consumers and to the economy generally of vibrant competition. All divisions of the Authority contribute to this advocacy role.

Conferences

Reference is made elsewhere in this report to two conferences organised by the Authority in 2002. In September, the Authority hosted a conference as part of its public consultation programme on its proposed merger guidelines and procedures. In November the Authority hosted the Competition in Medical Markets – Prospects for Ireland conference from which the papers given are available on the Authority's website. Both of these conferences were organised by staff from the Chairman's office.

Media

The Authority places considerable importance on its relationship with the media and has a dedicated Communications Officer, Vincent Clarke, to coordinate the Authority's dealings with the media. Authority members and staff contributed to television, radio and newspaper debates about a variety of competition related issues during 2002.

International Activities

European Union

The Chairman's office coordinates representation at European Union committees on which the Authority represents Ireland. The Authority is generally represented by whichever of its divisions has responsibility for the subject matter of any particular meeting and details about such representation is contained elsewhere in this report. Meetings of Directors General of EU competition agencies are attended by John Fingleton at which the broad policy of the EU in relation to competition is discussed. These meetings are also attended by senior civil servants from the Ministries responsible for competition policy in each Member State and by officials from the European Commission's DG Competition. Meetings are held twice yearly.

ECA

The Chairman also represents the Authority at meetings of the European Competition Authorities (ECA). This is an informal grouping of the heads of competition authorities in the EU, Norway, Iceland and Liechtenstein and the head of DG Competition.

OECD

The Authority represents Ireland at the Committee on Competition Law and Policy of the OECD. This committee usually meets three times per year at the OECD in Paris.

In addition to representing Ireland abroad, the Authority facilitated a number of visits from foreign competition authorities during 2002. Representatives from Armenia and South Korea visited the Authority and held lengthy meetings with officials on the

application of domestic and EU competition law by the Authority. Officials from the Authority also gave a one day presentation to a group of officials from EU accession countries as part of a programme run by the Institute of Public Administration on behalf of the Department of Foreign Affairs.

Other

Professor William Kovacic, General Counsel of the US Federal Trade Commission delivered a lecture entitled “Convergence by Choice: The Transatlantic Competition Policy Experience and Future Progress toward Common Global Norms” on October 14th at the Institute of European Affairs. His lecture, which was arranged by the Authority, addressed the problems that arise with a multiplicity of approaches to competition policy throughout the world, both for companies in terms of uncertainties and competition offices attempting to identify and implement best practice.

Annex 1: Notifications made in 2002

Notification No.	Parties
CA/1/02	Esso Ireland Limited/Mobil Oil (Ireland) Limited
CA/2/02	Beamish & Crawford Plc and others
CA/3/02	Irish Car Rentals Limited trading as Sixth Rent a Car/Aer Rianta

Annex 2: Decisions and cases dealt with in 2002

Individual Decisions

Decision No.	Notification No.	Parties	Decision
595	CA/5/01	Irish Payment Services Organisation Ltd (IPSO)/An Post	Certificate/Licence Refused
596	CA/153/92E	The Irish League of Credit Unions	Revocation of Certificate granted in Decision 440

Category Certificate/Licence

The Authority decided that the following notification, as amended, came within the provisions of, and therefore benefited from, Decision 528 – Category Certificate/ Licence in respect of agreements between Suppliers and Resellers dated 04/12/98

CA/13/99 National Schoolwear Centres/Mr Vincent McElwain and Mrs Frances McElwain

Withdrawals

The following agreements which were notified to the Authority pursuant to Section 7 of the Act were subsequently withdrawn by the notifying parties in 2002:

Rejections

The following notifications were rejected by the Authority in 2002:

CA/9/01 GlaxoSmithKline/Standard GSK Operating Procedure for the Distribution of Pharmaceuticals, rejected on the grounds that the notified arrangements did not constitute an agreement notifiable under Section 7 of the Competition Act, 1991

CA/3/02 Irish Car Rentals/Aer Rianta – non exclusive licensing agreement, rejected on the grounds that the notification did not properly comply with the provisions of the Section 7 (1) of the Competition Act, 1991.

Annex 3: Freedom of Information

The Freedom of Information Act, 1997 asserts the right of members of the public to obtain access to official information to the greatest extent possible consistent with the public interest and the right of privacy of individuals. In accordance with Sections 15 and 16 of the Act, the Authority has published a guide to the functions of and records held by the Authority. The purpose of the guide, which is updated on a regular basis, is to facilitate access to official information held by the Authority by outlining the structure and functions of the Authority, details of the services it provides and how they may be availed of, information

on the classes of records it holds and information on how to make a request under the Act. The Authority's guide is available from the Authority, free of charge, in hard copy format and on its website.

During 2002, the Authority received nine requests for information under the Act as compared with fourteen received in 2001. Four of the requests were granted, one was part granted and four were refused. Of the nine requests made, two came from journalists, six from business and one from an individual.

Annex 4: Speeches and Presentations

Title	Forum	Date	Person
How Economics Drives Competition Policy	Trinity College Economics students, Dublin	16 January	John Fingleton
Upgrading Irish Competition Law: The 2001 Bill Examined	Competition Law Conference, Dublin	26 January	John Fingleton
Liquor Licensing	Rotary Club, Navan	19 February	Isolde Goggin
Promoting Competition in the Marketplace	Marketing Institute Conference, Sligo	26 February	John Fingleton
Oligopoly Theory and Competition Policy	Institut d'Economie Seminar, Toulouse	8 March	John Fingleton
The new test in Irish Merger Law	Competition Press Conference, Dublin	8 March	Dermot Nolan
Competition and Business	Irish Business and Employers Confederation, Cork	15 March	John Fingleton
The Work of the Competition Authority	University College Cork, Dept of Economics	15 March	John Fingleton
Authority Work and How it is Changing	Irish Business and Employers Confederation Executive, Dublin	20 March	John Fingleton
The Role of Competition in Providing Services	Conference on Quality Public Services – Delivering the Future, Waterford	26 March	Patrick Kenny
The Competition Bill 2001	University College Dublin	3 April	Paul Gorecki
Oligopoly Theory and Merger Policy	Italian Competition Authority, Rome	10 April	John Fingleton
The Distribution and Attribution of cses among the Members of the Network	EUI Competition Workshop, European University Institute, Florence	12 & 13 April	John Fingleton
Merger Control, Collective Dominance and the Substantive Test for Mergers	Meeting of European Competition Authorities (ECA), Athens	18 & 19 April	John Fingleton
Recent Developments in European Competition Policy	Wilmer & Cutling Lunch, Washington DC	26 April	John Fingleton
A Competitive Electricity Market	Irish Wind Energy Conference, Mayo	26 April	John Evans
Presentation to Accession Country Delegates	Institute of Public Administration, Dublin	1 May	Vivienne Ryan, Ciaran Quigley, David Hodnett & Patrick Kenny
Competition for General Practice Elective	Law Society PPC Part 11, Dublin	13 May	Isolde Goggin
Public Enforcement of Competition Law: The Irish Experience	British Institute's 2nd Annual International and Comparative Competition Law Conference, London	16 & 17 May	John Fingleton
Competition Policy in Ireland	Harvard Business School Alumni Association, Dublin	23 May	John Fingleton
The New Role of the National Competition Authorities: An Irish Perspective	The New Draft Block Exemption for Motor Vehicle Distribution: Last Lap before Adoption, Spain	14 June	Patrick Kenny

Why Competition must succeed	Energy Ireland Conference	18 June	Isolde Goggin
The New Network of European Competition Authorities	19 Annual Competition Policy Conference of the EU Committee of the American Chamber of Commerce, Brussels	25 June	John Fingleton
The Role of Competition Policy	Tánaiste's Policy Review Conference, Dublin	19 July	John Fingleton
Publicans and the Law	Trinity College Dublin	7 September	Isolde Goggin
Opening and closing remarks	Mergers: The New Regime	9 September	John Fingleton
The Authority's Policy towards Mergers	Mergers: The New Regime	9 September	Declan Purcell
Presentation of Consultation Document	Mergers: The New Regime	9 September	Dermot Nolan
Presentation of Draft Procedures	Mergers: The New Regime	9 September	Noreen Mackey
Presentation of Draft Forms	Mergers: The New Regime	9 September	Patrick Neill
Cooperation in Merger Control with the ICN	IBA 6th Annual Competition Conference, Florence	20 September	John Fingleton
Cartel Enforcement in Ireland	IV International Cartel Workshop, Brazil	20 September	Ray Leonard
Recent Developments in Competition Law	Oil Company Antitrust Attorneys Meeting, San Francisco	8 October	Terry Calvani
Merger Review: What's in Store?	McCann Fitzgerald Seminar, Dublin	10 October	Declan Purcell
Monopoly Enforcement in Ireland	NERA Summit on Competition Policy, Lake Como	12 October	John Fingleton
Regulatory Impact Analysis: An Instrument for Better Regulation	Dublin Economic Workshop, Kenmare	13 October	Colm Treanor
Fostering Better Competition for the Provision of local Public Services: What Matters?	Dublin Economic Workshop, Kenmare	13 October	Anne Ribault-O'Reilly
Developments in Irish Competition Law	AIM Brussels	14 October	Isolde Goggin
Current Topics in U.S. Merger Law	Hawksmere, Brussels	17 October	Terry Calvani
Primary Care	Pharmaceutical Society of Ireland Conference, Dublin	19 October	Declan Purcell
The New Merger Regime	Irish Bank Officials Association Conference, Belfast	19 October	Dermot Nolan
Irish Competition Policy and Developments in EU Policy	Seminar at Business School, Yale University	30 October	John Fingleton
The Competition Act 2002	Institute of Chartered Secretaries and Administrators, Dublin	31 October	Paul Gorecki
The Substantive Test and Efficiencies in EC Merger Review	Paper to Fordham Law Conference, New York	1 November	John Fingleton
Does Collective Dominance provide Suitable Housing for all Anticompetitive Oligopolistic Mergers	EC Merger Control Conference, Brussels	8 November	John Fingleton
Opening Address	Competition in Medical Markets – Prospects for Ireland	11 November	John Fingleton

Competition and Medical Professions	Competition in Medical Markets – Prospects for Ireland	11 November	Dermot Nolan
Closing Address	Competition in Medical Markets – Prospects for Ireland	11 November	Isolde Goggin
Competition Policy in Ireland	Seminar at National University of Ireland, Galway	15 November	John Fingleton
The Role of the Competition Authority	Irish Farmers Association Branch AGM, Castletownroche, Co. Cork,	19 November	Ciarán Quigley
Irish Competition Policy and Developments in EU Policy	Seminar at Frontier Economics Seminar, London	28 November	John Fingleton
Criminalisation of Irish Competition Policy	Presentation to DTI/Linklaters Conference on UK Enterprise Bill, London	29 November	John Fingleton
Criminal Antitrust Enforcement in Ireland Today	Law Society of Ireland, Dublin	30 November	Terry Calvani
Competition issues in Healthcare	Presentation to EU Directors General for Competition	4 December	John Fingleton

Annex 5: Summary of Authority Output in 2002

Work by Sector

Sector	Details
Financial Services	<p>IFSRA Submission of Sept [web] ILCU Certificate Revoked decision of June [web] Commencement of study of competition in banking [web] IPSO/An Post/OTC Bill Payments, Decision No. 595 Insurance study commenced October [web] Enforcement divisions closed a number of complaints in this sector. In some instances, issues raised will be considered in the context of the Banking Study.</p>
Aviation	<p>ECA working group Investigation into commission paid to travel agents Co-operation Agreement under Section 34 of Act with CAR Enforcement divisions dealt with a number of complaints in this sector, some of which were closed due to absence of evidence of breach of Act.</p>
Communications	<p>Joint submission with ODTR on new Telecommunications Framework Directive Joint training programme with ODTR Co-operation Agreement under Section 34 of Act with ComReg Co-operation Agreement under Section 34 of Act with BCI Outcome into investigation of complaint against Vodafone subject of press release. Enforcement divisions dealt with a number of complaints in this sector, some of which were closed due to absence of evidence of breach of Act.</p>
Health	<p>GEHE/Unicare Merger Report to Minister Health conference (conference papers available on website) Enforcement divisions dealt with a number of complaints in this sector, some of which were closed due to absence of evidence of breach of Act.</p>
Retailing	<p>Liquor licensing Commission Pharmacy Review Group Public Statement re proposed action by IPU to withdraw certain pharmacy services Enforcement divisions dealt with a number of complaints in this sector, some of which were closed due to absence of evidence of breach of Act.</p>
Transport	<p>Ports submission Taxis submission USIT merger Enforcement divisions dealt with a number of complaints in this sector, some of which were closed due to absence of evidence of breach of Act.</p>
Car distribution	<p>Participation at EU Council meetings on car block exemption Appearance before Joint Oireachtas Committee re. car block exemption</p>
Energy	<p>CER work on electricity and gas Maxol/Estuary Merger report in September Submission to Dept. of Communications, Marine and Natural Resources on draft Electricity Bill, 2002. Co-operation Agreement under Section 34 of Act with CER</p>
Newspapers	<p>JNRR Survey Enforcement divisions dealt with a number of complaints in this sector, some of which were closed due to absence of evidence of breach of Act.</p>
Other	<p>Refuse collection</p>

Other Work

Area	Details
Irish Merger Policy	Draft procedures and guidelines August [web] Final procedures and guidelines December [web] Conference on merger policy September [web] Attendance at EC advisory committee Renewal of certificate in respect of sale of business for six months July
EU Merger Policy	Submission on green paper Chair speech and paper in Brussels/Fordham
New Legislation	Inputs to legislative process, January-March
Regulation 17	Attendance at Council meetings Attendance at Commission working group on implementation
HLGR	Submission on better regulation Participation in HLGR
Agriculture	Investigation/proceedings in wheat blockade Monitoring of beef "pickades" Enforcement divisions dealt with a number of complaints in this sector, some of which were closed due to absence of evidence of breach of Act.
Other	Roundtable on civil sanctions
Administrative	Organised first set of recruitment competitions under the new act Survey of public awareness of competition policy issues Organised two conferences Held a major recruitment process Financial Management Media Communications

Annex 6: Summary of Provisions of Competition Act 2002

In April 2002 the **Competition Act, 2002** was enacted to consolidate and modernise the existing enactments relating to competition and mergers. It replaces the Mergers, Take-overs and Monopolies (Control) Act, 1978, as amended, the Competition Act, 1991 and the Competition (Amendment) Act, 1996. It also introduces significant changes to Ireland's competition and merger law arrangements. The Act takes account of the proposed modernisation of EU competition law. The following are the main provisions of the new legislation:

Enforcement

Prohibitions

Section 4 of the new Act repeats the general prohibitions of anti-competitive agreements, decisions and concerted practices that were introduced under the 1991 Act. The old Act contained a system for granting individual certificates or licences and the existence of a certificate or licence was a defence against criminal proceedings. Under the new Act, the four "efficiency criteria" which must be met if a licence is to be granted become directly applicable – in other words, it is no longer necessary for undertakings to notify agreements in order to benefit from exemption. This is similar to the approach taken in the EU Modernisation proposal. The notification system and the process for the issue of certificates/grant of licences are abolished, but there is a provision for the Competition Authority to declare that certain categories of arrangements comply with the efficiency conditions. Section 5 of the Act repeats the provisions of the 1991 Act which prohibited the abuse of a dominant position.

Offences and Defences

The new Act abolishes the "ignorance defence" provision under the old legislation in respect of breaches of sections 4 and 5 which constituted offences. The Act creates new offences of breaches of Article 81(1) or 82 to facilitate the enforcement of EU competition law in Ireland. In section 4(1) proceedings it is a defence to show that the four "efficiency conditions" are complied with. It is also a defence to show that an arrangement falls within an EU exemption, or that the act or acts concerned was or were done pursuant to a determination made or direction given by a statutory body.

The 2002 Act introduces a new distinction between "hard-core cartel" offences and other breaches of competition law. Hard-core cartel offences are defined as agreements, decisions or concerted practices involving competing undertakings, the purpose of which is to:

- directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice, or
- limit output or sales, or
- share markets or customers.

This distinction reflects a more economic approach whereby certain offences are regarded as being unequivocally harmful to consumers while others, particularly offences relating to vertical agreements, are less seriously restrictive of competition. The lesser seriousness of the latter offences over the former is reflected in the level of penalties provided for in the

new Act. On conviction on indictment for hard-core cartel offences, the penalty for an undertaking is up to €4m while the penalty for an individual is a similar fine or up to 5 years imprisonment, or both. Penalties for lesser offences (i.e. other breaches of section 4(1) or Article 81(1) and all breaches of section 5 or Article 82) include the same level of fines but the possibility of jail sentences is removed.

Search powers

The new Act also strengthens the Authority's search powers by providing the Authority with the power to enter premises "if necessary by force", and to search private dwellings. The Authority can now take away original documents, rather than copies as under the old Acts, and can keep them for up to six months.

Mergers

Under Part 3 of the 2002 Act, the Competition Authority has taken over, with effect from 1 January 2003, responsibility for merger control from the Minister for Enterprise, Trade and Employment. Mergers above a certain threshold, where at least two of the merging undertakings carry on business in Ireland, must be notified to the Authority. Mergers below the threshold, or where only one party carries on business in Ireland may be notified. However, all media mergers must be notified. There will be a two-stage process whereby mergers can either be cleared at Phase 1 or subjected to a more detailed Phase 2 investigation. The Authority may determine that a merger or acquisition may be put into effect, may not be put into effect, or may be put into effect only subject to certain conditions. The Act requires notification of a proposed merger by each party within one month. The Authority will have thirty days to clear the merger at Phase 1. A Phase 2 determination must be made within four months of notification and published within one month thereafter.

The new Act requires the Authority to approve or reject mergers based on competition criteria only. The test is whether the result of the merger or acquisition will be to substantially lessen competition in markets for goods or services in the State. The new system involves more openness and transparency: all notifications are to be published and the Authority must consider all submissions made to it, whether in writing or orally, by the parties concerned or by any other party. Media mergers are treated separately under the Act. This is not unusual. In view of the important role of the media in protecting democracy, many countries make specific provision for safeguarding plurality and diversity, and plurality of the media is one of the criteria under which a Member State can safeguard its "legitimate interest" under Article 21(3) ECMR. When the Authority receives notification of a merger which it considers to be a media merger, it must inform the parties of this opinion, and forward a copy of the notification to the Minister. The Minister can direct the Authority to carry out a Phase 2 investigation and can override Authority approval with or without conditions. In other words, if the Authority blocks a media merger, the Minister cannot unblock it, but if the Authority approves a merger, either absolutely or conditionally, the Minister can block it or can apply new or stricter conditions.

Advocacy

Section 30(1)(c) of the Act gives the Authority the function of studying and analyzing competition matters, including developments abroad. The Authority now also has the power to advise Government and Ministers concerning the implications for competition in markets for goods or services of proposals for legislation, including statutory instruments; the power to advise public authorities generally on issues concerning competition which may arise in the performance of their functions; the power to identify and comment on

constraints imposed by any enactment or administrative practice on the operation of competition in the economy; and the power to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition.

Co-operation agreements with statutory bodies

Section 34 of the Act obliges the Authority to enter into co-operation agreements with the Broadcasting Commission of Ireland, the Commission for Electricity Regulation, the Commission for Aviation Regulation and the Director of Telecommunications Regulation. The purpose of these agreements are to facilitate co-operation, to avoid duplication of activities involving

determinations on competition issues and to ensure consistency in decision making. The agreements must include provisions on exchange of information, on forbearance of performance of functions by one party where the other is already performing similar functions in relation to a matter and provisions regarding consultation.

Arrangements with foreign competition bodies

Section 46 of the Act permits the Authority to enter into arrangements with competition authorities in other countries for the exchange of information and the mutual provision of assistance.



Competition Authority