Compecon - Competition Economics Newsletter

Issue No.11 May 2007.

In this issue:
Supreme Court Upholds Appeal by Irish League of Credit Unions………...Page 1
US Supreme Court to Decide on Resale Price Maintenance………………..Page 4
Mergers Analysis by the Competition Authority……………..……………..Page 7

Supreme Court Upholds Appeal by Irish League of Credit Unions.

Introduction.
In a unanimous judgment delivered on 8th May, the Supreme Court upheld an appeal by the Irish League of Credit Unions (ILCU) against a High Court judgment which found that the ILCU had abused a dominant position.[1] The case was the first civil action brought by the Competition Authority under the Competition Act, 2002.

Background to the Case.
The ILCU is a representative body for credit unions and its members include the vast majority of credit unions in the Republic of Ireland. It was originally established in 1960 when four credit unions came together to try and ensure that credit unions would conduct their affairs on the basis of a set of agreed operating principles and to present a united front to government and state agencies in relation to the legislative problems of credit unions.
Since 1976 the ILCU has provided loan protection/life savings (LP/LS) to its member credit unions through its wholly owned subsidiary, ECCU, which is an authorised insurer. All ILCU member credit unions are required to obtain LP/LS cover from ECCU. ILCU rules provide that member credit unions may be expelled by the board of directors for breaches of ILCU rules.[2]

In 1968 ILCU established a savings protection scheme (SPS). The SPS is not a deposit insurance scheme. It is a fund which is controlled by the ILCU. At the ILCU's discretion loans may be advanced from the SPS fund to member credit unions that are in financial difficulties. There is also a discretionary power to pay individual credit union members up to €12,700 from the SPS fund in the event of a collapse of a credit union. All ILCU member credit unions are required to participate in the SPS; while participation in the SPS is confined to credit unions which are ILCU members. Credit unions participating in the SPS are required to provide the ILCU access to their books and records to enable it to monitor their activities.
Up to 2004, the activities of the ILCU were funded by surpluses earned by ECCU, most of whose income came from the provision of LP/LS insurance to member credit unions.[3] Around 2000/2001 a number of credit unions became unhappy with the level of LP/LS premiums being charged by ECCU. Some voluntarily disaffiliated while a number of others that sought to obtain LP/LS cover elsewhere were threatened with expulsion. A number of the larger credit unions in the State formed a new association, known as CUDA. It had 21

members in 2002. In January 2003, the ILCU moved to disaffiliate 12 credit unions for failing to purchase LP/LS insurance from ECCU. The disaffiliation proceedings were postponed following initiation of proceedings by the Competition Authority.

ILCU notified its rules to the Competition Authority in September 1992 in accordance with the provisions of the Competition Act, 1991. In a decision dated 20th November 1995, the Authority issued a certificate in respect of the notified rules including the requirement to obtain LP/LS insurance from ECCU. In a decision dated 28th June 2002, the Authority revoked the certificate on the grounds that circumstances had changed since the original decision.[4] In particular it argued that the emergence of some ILCU members who now objected to the LP/LS arrangements and the fact that participation in SPS had been made compulsory constituted a change in circumstances.

The Authority's Case.

The Authority issued proceedings against the ILCU on 22nd July 2003. The Supreme Court judgment notes how the basis of the Authority's action changed on several occasions. It points out, for example, that it wrote to the ILCU solicitors on 4th April suggesting "admittedly rather tentatively, for the first time, that the conduct of ILCU (in relation to the supply of LP/LS) '*might constitute a breach of section 5 in the market for representation of credit unions, where ILCU arguably holds a dominant position*'."[5]

In a subsequent letter dated 27th May 2003, the Authority "formally advanced the new contention that the '*relevant market is credit union representation*' and that '*there is a market for credit unions representation in the State*'." The Court noted that this contention was "still not the one advanced at the trial".[6]

In that letter the Authority also stated that it was not stating that the ILCU could not make LP/LS insurance mandatory or disaffiliate members for not complying with that rule. Instead it argued that the breach of section 5 arose from the associated loss of access and/or no refund from the SPS.

The Authority's statement of claim defined the relevant market as the market for "credit union representation services". It defined such services as the entire composite of all ILCU services including advocacy, lobbying, financial services and the SPS. It claimed that the ILCU was dominant in that market and went on to state that the refusal by the ILCU to supply access to the SPS to non-member or disaffiliated credit unions constituted an abuse of its dominant position in the market for credit union representation.

The Authority, however, advanced a new argument at the trial. It now contended that there were in fact two separate products, SPS services and credit union representation services and that there were two relevant markets, one for SPS and one for credit union representation services. It argued that the ILCU had abused a dominant position in the SPS market because the requirement that only member credit unions could participate in the SPS amounted to tying SPS and credit union representation services. The Supreme Court noted that these claims had not been included in the list of issues to be decided dated 18th June 2004, although the trial commenced on June 22nd.

> "The concept of a market for SPS was first introduced in the expert report of

> Professor Seabright on behalf of the Authority. That report was dated 24th May 2004 and was delivered shortly before the hearing."

The Court referred to the fact that the learned trail judge had recognised that ILCU's economic expert had had no opportunity to address the contention "advanced so late in the day by the Competition Authority" that SPS constituted a separate market.[7]

The High Court accepted the Authority's argument that there were two separate markets and held that the ILCU had abused its dominant position by tying credit union representation services to the provision of SPS services. ILCU then appealed the judgment to the Supreme Court.

The Supreme Court Judgment.

The judgement of the Court was delivered by Mr. Justice Fennelly. In the judgment, the judge referred to the roles of the courts and the Competition Authority in the application of competition law, noting that in contrast to the EU and some other Member States, in Ireland the issue of deciding breaches of competition law is a matter for the courts. Referring to the role of the Authority, he stated:

> "The Authority has not made any decision other than to institute proceedings. It identifies market conduct and invites the Court to condemn it. There is no *prima facie* legal presumption in favour of the Authority's view. The Authority carries the normal civil burden of proof."[8]

The Court found that the Authority had failed to establish that SPS constituted a distinct product and a distinct product market which it noted was essential for the Authority's claim of abusive tying to succeed. The Judge stated:

> "To consider that the representation services and SPS, which has always been provided to their own members, are distinct products is counter-intuitive. In my view it is artificial."[9]

He noted that there was no evidence of an independent commercially provided SPS anywhere in the world. The learned judge went on to state:

> "It is not altogether surprising that the Authority had failed to provide a convincing analysis of ILCU's activities as being anti-competitive. The history shows that it has changed its position in relation to ILCU on several occasions. It was permitted finally to change its stance from that advanced in the statement of claim only because Mr Collins decided not to object, believing that this radical change of position demonstrated the lack of credibility in the Authority's case. It certainly seems to me to undermine confidence in the Authority's consistency."[10]

While noting that it was not necessary to deal with the question of whether there was a market for credit union representation services, once it had held that SPS did not constitute a separate product or separate product market, the judge nevertheless addressed that issue indicating that he found "it troubling that any and ever association of business undertakings should be held, for the purposes of competition law, automatically to be engaged in a business consisting of the provision of services for reward."[11] He referred to the evidence of ILCU's economic expert that one did not find "suppliers of representation services generally" which might be expected if there were a market for representation services. Instead

"representative services" were "provided by representative organisations comprising their own members". All sorts of organisations had concluded that it was not possible to buy adequate representation services in the market and there was therefore no such market. The learned judge stated:

> "This seems to me to represent common sense observation."[12]

The learned judge then observed:

> "If it is to arise in another case, I would hope that the Authority would produce cogent factual evidence of the existence of such a product market in representation services."[13]

Comment.

The Supreme Court overturned the High Court judgement on the grounds that there was no evidence to support the Authority's contention that SPS constituted a distinct product and that there was a market for the provision of SPS services. It appears that the Court was uncomfortable with the fact that the Authority had repeatedly shifted its position. The case ultimately argued by the Authority only emerged rather late in the day and was rather different from that on which it had initially decided to bring proceedings. The members of CUDA who had complained to the Authority about the actions of the ILCU comprised a number of the larger credit unions in the State. Given that the Authority can only bring a limited number of actions, one might ask why it felt it necessary to bring proceedings, when it would appear that the complainants would have been quite capable of bringing their own private action.

[1] Compecon's Director, Patrick Massey was an expert witness for the ILCU in the High Court case.
[2] LP/LS insurance pays off any outstanding loans of an individual credit union member on the death of that member and also pays up to twice the level of the member's savings to the member's next of kin, although there are limits on the amounts covered in the case of individuals over a certain age.
[3] ILCU amended its funding arrangements in January 2004.
[4] By virtue of the Competition Act, 2002, all certificates and licences issued or granted under the 1991 Act were revoked with effect from 1st July 2002.
[5] Judgment at para 43.
[6] Para 44.
[7] Para 56.
[8] Para 104.
[9] Para 134.
[10] Para 135.
[11] Para 138.
[12] Para 140.
[13] Para 142.

US Supreme Court to Decide on Resale Price Maintenance.

Introduction.

The judgment of the US Supreme Court is awaited in respect of an important case involving the treatment of minimum resale price maintenance (RPM) under US competition law.[14] The Court has been asked to decide whether minimum RPM should continue to be illegal *per se,* which has been the position since the Supreme Court judgement in *Dr. Miles Medical* in 1911.[15] In the case of practices that are deemed illegal *per se* it is only necessary to show that the parties had engaged in

the alleged behaviour, there is no need to establish that the behaviour is harmful, since this is effectively taken as read.[16]

The case has generated considerable debate with the Department of Justice and the FTC filing a joint *amicus curiae* brief arguing that the *per se* rule should no longer apply to such arrangements although some FTC Commissioners have publicly expressed their support for a retention of the *status quo.* Last month the *Wall Street Journal* carried a discussion between economists F.M.Scherer and Lawrence White arguing the case for and against.

Background.

The case involves Leegin a firm that manufactures women's accessorises including handbags, shoes and jewellery that are sold through retailers under the *Brighton* brand. In 1997 it adopted what it termed the "Brighton Retail Pricing and Promotion Policy" under which it would sell its products only to those retailers that followed its suggested retail prices. Subsequently as part of this policy, it insisted that retailers pledge to comply with its pricing policy in order to become a "Brighton Heart Store."

PSKS is a retailer which had sold Leegin's products. After Leegin discovered that PSKS had discounted its entire product range, Leegin suspended all shipments of its products to PSKS. PSKS sales and profits decreased substantially and it brought proceedings alleging that Leegin had entered into agreements with retailers to fix the price of its products in violation of Section 1 of the Sherman Act.

During the original court hearing, Leegin sought to introduce a report by its expert economist, Professor Kenneth Elzinga, who argued that the strategy adopted by Leegin was procompetitive. The District Court excluded Prof. Elzinga's evidence on the grounds that "[v]ertical minimum price fixing agreements…remain per se unlawful." The jury found in favour of PSKS and awarded it damages of $1.2m. The decision of the lower court was upheld by the Court of Appeals. The appeal court also held that the lower court had been correct in excluding economic evidence in support of Leegin as "[w]ith the per se rule, expert testimony regarding economic conditions and the pricing policy's pro-competitive effects is *not* relevant." Leegin subsequently appealed to the Supreme Court which heard the appeal in March.

As noted the *per se* prohibition on minimum RPM dates back to 1911, although the Supreme Court has refused to alter its position on minimum RPM on two previous occasions. In 1977, it distinguished between RPM and other non-price vertical restraints such as exclusive distribution, ruling that the latter should be subject to a rule of reason standard while holding that RPM should be remain subject to a *per se* prohibition.[17] Ten years ago, the Court held that maximum RPM should no longer be subject to the *per se* rule but should be decided on a rule of reason basis, while again retaining the *per se* prohibition on minimum RPM.[18]

***Amicus Brief* Arguments.**

In their *amicus* submission the Justice Department and FTC advanced a number of arguments for subjecting minimum RPM to a rule of reason analysis, i.e. an assessment of each individual case on the basis of the facts in the case, rather than a *per se* prohibition.

1. The *Dr Miles* judgment is inconsistent with modern economics

based analysis and is "irreconcilable" with the Court's modern antitrust jurisprudence.

2. The presumptive standard for assessing conduct challenged under the Sherman Act is rule of reason and *per se* treatment is exceptional and is reserved for behaviour that always or almost always reduces competition and reduces output and consumer welfare.
3. Because the effects of RPM may be pro or anti-competitive, *per se* treatment is inappropriate.
4. The principle of *stare decisis* does not justify the reaffirmation of the *Dr. Miles* precedent.

The submission argues that the Supreme Court has never analysed the likely economic effects of RPM, much less found that RPM has a predictably "pernicious effect on competition and lack[s]…any redeeming virtue" citing the standard set by the Court for application of the *per se* rule in *Northern Pacific*.[19]

Economic Arguments.

The joint brief submitted by the Government agencies sets out a number of theoretical economic arguments on vertical restraints including RPM. In particular it argues that RPM:

- While reducing intrabrand competition promotes interbrand competition.
- Is designed to prevent "free riders"; and
- Provides quality certification.

Economic theory recognises that although RPM limits intrabrand competition it may enhance interbrand competition. In other words although it restricts competition between retailers in respect of an individual brand, it may increase competition between brands as it encourages retailers to devote greater efforts to promoting different brands.

When consumers require information about a product and its uses, retailers who provide such information and pre-sales services may find themselves undercut by others who do not offer such services and therefore do not have to bear the cost of providing them. In those circumstances, it is argued, no retailers will provide such services and sales of the product will be reduced. RPM is designed to prevent such free-riding and encourage retailers to provide pre-sale training and advice, thus increasing overall sales. The counter to this argument is that, it is only applicable to a limited number of products, consumers do not require pre-sales information in respect of most products. In addition, even in the case of complex products, not all consumers will require pre-sale information, as some will be well informed. Thus pre-sales service and information only benefits some consumers, so whether paying a higher price in order to obtain such information benefits all consumers is open to question. Admittedly as the DOJ/FTC document points out, this tends to support the view that a rule of reason test is the appropriate standard.

The quality certification argument states that having a product sold by certain prestige or upmarket retailers can provide a degree of quality certification for the product as it benefits from the upmarket reputation of the retailer. If the product is sold at a lower price by discount outlets, prestige retailers may be unwilling to stock it; its availability at a lower price in discount stores may harm the prestige outlet's image. By imposing RPM and preventing such undercutting the manufacturer can

encourage prestige outlets to sell the product.

Comment.
The case has given rise to a considerable amount of debate. One of the FTC's Commissioners has come out publicly in favour of retaining the *per se* prohibition on minimum RPM.[20]
It is not the first time that the Federal enforcement agencies have argued for the abolition of the *per se* rule for RPM. In 1984 the Justice Department filed an *amicus* brief urging an end to the *per se* treatment of RPM in *Monsanto.*[21] This prompted Congress to pass legislation, which has since lapsed, preventing the agency from using appropriated funds to argue for the overturn of the *Dr. Miles* precedent.
The EU Commission has generally taken a hostile approach to RPM. It has found that RPM was contrary to Article 81(1) on a number of occasions. The Commission's 1997 Green Paper on Vertical restraints stated:

> "The policy of treating *resale price maintenance* and *impediments to parallel trade* as serious violations of the competition rules would continue. It is proposed that they be treated as *per se* contrary to Article 8[1](1), as long as the agreement, concerted practice or decision concerned may affect trade between Member States. They are also unlikely to benefit from an exemption under Article 8[1](3)."

If the US Supreme Court decides to overturn the *per se* prohibition on RPM, then it would result in a significant difference in approach between US and EU competition law.

---

[14] *Leegin Creative Leather Products, Inc., v. PSKS, Inc., dba Kay's Kloset…Kay's Shoes.*
[15] *Dr.Miles Med. Co. v John D. Park & Sons Co.,* 220 US 373 (1911).
[16] Horizontal price fixing, minimum RPM and, in certain circumstances tying are considered *per se* illegal under US law.
[17] *Continental T.V. Inc., v GTE Sylvania Inc.,* 433 US 36 (1977).
[18] *State Oil Co. v. Khan,* 522 US 3 (1997).
[19] *Northern Pacific Railway. v.United States* 356 US 1 (1958).
[20] P. Jones Harbour: Vertical Restraints: Federal and State Enforcement of Vertical Issues, ALI-ABA, March 8-10 2007, Coral Gables, Florida.
[21] *Monsanto Co.* v. Spray-Rite Services Corp., 465 US 752 (1984).

Merger Analysis by the Competition Authority.

Introduction.
Almost four years have passed since responsibility for adjudicating on merger cases was transferred from the Minister for Enterprise, Trade and Employment to the Competition Authority on the coming into force of Part III of the Competition Act, 2002 on 1st July 2003. This article provides a brief review of the Authority's merger decisions.[22]

Overview of Merger Notifications.
Table 1 provides a summary of mergers notified to the Competition Authority and their outcome for the period from 1st July 2003 to 31st December 2006.
310 mergers were notified to the Authority over the three and a half year period. Of these 295 were cleared after an initial phase I investigation. In five of these cases, all in 2006, the transaction

was cleared after undertakings were offered by the parties. In one 2006 case, a merger was cleared at phase I because the Authority missed the deadline for taking a decision, although the parties had offered certain undertakings and agreed to abide by them although they were under no obligation to do so. This is included in the overall total of ten cases where clearance was given on foot of undertakings/subject to conditions.

Table 1: Notified Mergers 2003-6

	N	I	II	C	P	W
2003	47	42	3	1		2
2004	81	78	3	2	1	
2005	84	82	1	6		1
2006	98	93	4	2	1	1
Total	310	295	11	10	2	4

Key: N: total notifications.
I cleared at phase I.
II phase II investigation.
C Conditions attached/undertakings given.
P Prohibited.
W Withdrawn/referred to EU.

Only 11 cases went to a full phase II investigation, while three were withdrawn and one was referred to the EU Commission by the Authority. In other words only 3.5% of all notified mergers were subject to a phase II investigation. In five of those cases the merger was cleared subject to conditions while just two mergers have been prohibited. If we assume that the six cases cleared at phase I on the basis of undertakings would otherwise have been subject to a phase II inquiry, the proportion of phase II cases would increase to 5.5% which is certainly not out of line with international comparisons.

What the overall figures do not reveal, is that many notified mergers have no impact on the Irish market. They are transactions between overseas firms where one of the parties happened to have an Irish subsidiary. Such mergers pose no concerns from a competition perspective. In reality such cases should not have to be notified and simply represent an unnecessary burden both for the Authority and for the firms concerned. The Authority has indicated that it would like to see changes in the legislation that would greatly reduce if not eliminate such notifications. It is not easy to discern from the information published by the Authority the exact number of such cases. It would be useful if the Authority published some breakdown of total merger notifications, showing the number that had no competition nexus in the Irish market. This would provide a clear indication of the extent of such notifications and also provide a clearer indication of the output of the Authority. Figures on the ratio of phase II investigations to total notifications clearly have little meaning if many of the notifications have no competition nexus in Ireland.

Overall the Authority has performed well. It has dealt with a large number of merger notifications and, with one exception, has processed cases within the statutory deadlines.

The real test of the efficacy of a merger control regime is whether or not it arrives at the correct decisions. Two types of errors may arise in merger cases. The Authority might wrongly find that a harmless merger was anti-competitive, or it might fail to identify a merger that actually was anti-competitive.

The fact that only two cases have been prohibited outright of itself limits the potential number of false positives. The low refusal rate, however, raises questions about possible false negatives, i.e. anti-competitive mergers that were not identified by the Authority.

Of course false negatives are not the only possible explanation for the low number of refusal decisions. For example, if parties recognise that anti-competitive mergers are unlikely to be approved they may well be deterred from entering into such transactions to begin with. As against this one might anticipate that in the early stages of a new merger control regime, parties might be tempted to see if they could get anti-competitive deals past the regulator, in which case one might expect a higher failure rate in the early years of a new regime if it is working effectively. It is simply not possible to quantify how many potential anti-competitive mergers have been discouraged by the new regime.

From a public policy perspective it is important to identify possible wrong decisions and to ask whether such errors reflect any systematic failures in the merger review process. This would require some independent review of merger decisions. The point of such an exercise is not to re-open such cases, in fact there is clearly no scope to do so. Rather the aim is to identify whether such errors have occurred and if so why they occurred. In particular do they reflect weaknesses in analysis or in the quality of evidence relied upon by the Authority in reaching its decisions? In recent years competition agencies in other jurisdictions have commissioned similar reviews of merger decisions.

A detailed review of the sort just outlined is beyond the scope of the present article. Nevertheless, while stressing that the Authority has provided well reasoned decisions incorporating a high level of analysis in the vast majority of cases, it is possible to identify some grounds for improvement in a limited number of cases.

Customer Surveys.

In its *Grafton/Heiton* decision the Authority undertook a survey of customers in order to help define the relevant market. Such consumer surveys can provide useful guidance for defining markets but it is important that the right questions be asked.

The SSNIP test is generally accepted as the appropriate way to define a market and it asks whether a hypothetical monopolist could impose a small but significant price increase, usually defined as a 5% increase for at least year. Its ability to do so will depend on whether it could profitably do so, i.e. would such a measure lead to higher profits or would it lose so many sales as to render the price increase unprofitable. In seeking to establish whether DIY superstores constituted a separate market in *Grafton/Heiton* the question that shoppers need to be asked is how they would respond in the event that superstores raised their prices while other hardward/DIY outlets did not. According to the Authority's decision, the survey did not ask this question. It asked customers to indicate where they would go if they could not find a particular item in the superstore outlet that they had just visited. That question might help identify which outlets are regarded as the closest substitutes for each other but it does not show that DIY superstores constitute a separate market.

Customer surveys can provide useful information on market definition but the questions posed need to be carefully designed. Advance discussions between the Authority and the merging parties regarding the scope and design of such surveys might prove useful.

Timber!!

In *Coillte/Weyerhaeuser*, while recognising that Coillte would have the ability and incentive to engage in anti-competitive behaviour in order to try and maintain its dominant position in roundwood post merger, the Authority nevertheless found that such behaviour was unlikely to arise or would be unlikely to substantially lessen competition.[23] The Authority cited three main channels through which a potential SLC might arise:

1. Tying – As private growers would be dependent on Coillte's boardplants for the sale of thinnings, it might impose a requirement that those wishing to sell thinnings to the boardplants would have to commit to sell their final crop through the TSS.[24]
2. Raising rivals costs. Private growers would be dependent on Coillte's boardmills to sell thinnings and would recognise that Coillte would have the power to reduce the price for thinnings effectively raising their costs and thus discouraging entry.
3. Margin squeezing – Coillte could increase the price of timber to sawmills while simultaneously reducing the price its boardmills paid for sawmill residues.

Some of the grounds for rejecting the risk of tying are unsatisfactory. Implicit in the Authority's argument is a view that it would not be in growers interests to allow Coillte sell their final crop through the TSS. Since this would mean that buyers would continue to be effectively faced with a single seller rather than competing sources of supply, it would result in higher timber prices. It is not clear that such arrangements would not be in growers' interests.

The Authority also argued that on the basis of the relative price of thinnings and sawlog growers would have no incentive to agree to a tie and would if necessary forego the small income arising from the sale of thinnings. This again presupposes that the tie would result in the grower earning a lower price for the sawlog end product when, in fact, by having Coillte sell their sawlog, growers would benefit from a higher monopoly price.

Secondly in discounting final product prices, the Authority ignores the fact that SMEs (private forest growers are SMEs) tend to apply much higher discount rates than those used in economic/financial models.

Finally on page 35 of the decision the Authority referred to the existence of what it described as "political markets" and argued:

> "Any attempt by Coillte to induce farmers to enter into long-term contracts which commit their pulpwood and sawlog to Coillte is likely to lead to intense efforts by the IFA to encourage the government to subsidise the development of alternative uses for pulpwood. This is likely to discourage farmers from entering into long-term contracts with Coillte."

To speculate that any adverse effects on competition are likely to be offset because customers will be in a position to lobby Government to protect them, is not a satisfactory reason for concluding that a transaction will not substantially lessen competition. There is no guarantee that lobbying would succeed in securing government intervention. There is also no guarantee that any such intervention would be well designed and capable of dealing with the problem. Experience suggests that such interventions may well make matters worse. The Authority has repeatedly

criticised Government intervention in many markets.
Two of the arguments advanced by the Authority for rejecting the possibility that the transaction would deter new entry by private forest growers are also problematic.
First it suggested that the forestry business was already subject to considerable uncertainties and that the merger would only result in a marginal increase in the level of uncertainty. This ignores the reality that marginal changes matter, particularly for SMEs. A marginal increase in risk will increase the return required to justify investment.
Second the Authority argued that if there was a sharp unexpected fall in forest planting, this "might bring about a change in the subsidy regime." Speculation that any adverse effect on competition would be offset by State intervention does not constitute a satisfactory basis for a decision.

Motor Fuels.
The final case that merits some mention is *Topaz/Statoil.*[25] In this instance the transaction was inadvertently cleared by the Authority due to an administrative error. The Authority has provided a full explanation as to how this arose and more importantly has outlined publicly the measures that have been put in place to avoid a repetition. There is therefore no reason to revisit such issues.
Although there was no formal decision in this case the Authority has nevertheless stated publicly that undertakings offered by the parties and implemented by them despite their being under no obligation to do so, were sufficient to address any competition concerns that arose. Some of the points put forward by the Authority to support this view are somewhat unsatisfactory.

In a presentation to the Joint Oireachtas Committee on Enterprise and Small Business on 25th October 2006, the Authority Chairman indicated that the level of concentration in the retail motor fuel market post merger did not give rise to competition concerns at national level. The Authority Chairman cited figures for the percentage of the two brands' filling stations both those owned and operated by the companies and those operated by independent dealers. Using market shares based on the number of outlets is wholly inappropriate in the same way that estimating shares of the retail grocery market on the basis of grocery shop numbers would be. A company owned station in a key urban location has far higher sales volumes than a small dealer owned outlet in the West of Ireland. While the two brands might only account for 16% of all filling stations, indications suggest that their market shares based on volume sales were about twice this level. The real problem, however, is that, even though not contained in a formal decision, such arguments may be advanced as precedents in other cases. Of course the Authority might well reject such arguments but in doing so may simply increase uncertainty.
The Authority concluded that the motor fuel market was essentially local in nature. This is certainly true from a consumer perspective, as consumers are unlikely to travel very far in order to benefit from small price differences. This does not, however, rule out the possibility that there may also be a national retail motor fuel market. The main oil companies all operate a number of company owned stations. The question is whether they set prices for company owned stations at a national level or do company owned stations set

prices individually. In *Grafton/Heiton*, for example, the Authority cited the fact that the two groups operated a national pricing policy to support the view that the relevant market was nationwide. A similar view has been adopted in cases in other jurisdictions. Similarly in its report on *Statoil/Conoco*, the Authority recognised that while competition at the retail level was rather localised and for most consumers competition was between outlets near to where they lived or along their normal travel route, it nevertheless stated: "As both Conoco and Statoil operate throughout the State, the proposal would have effects throughout the State."[26] That report concluded that there would be an adverse effect on competition at a national level.

In other words, if oil companies set prices at national level for their company owned stations, even if individual managers are allowed some discretion to adjust them in response to local competition, it would suggest that there is also a national retail market for motor fuels. The level of post merger concentration in that market would appear to be relatively high and suggests that the impact on competition on national level also needs to be considered.

Conclusions.

At the time of the introduction of the 2002 Competition Act there was strong opposition to the proposal to transfer responsibility for merger decisions from the Minister to the Competition Authority. Four years on, one wonders what all the fuss was about. The Authority has certainly done a good job. The main conclusion emerging from a brief examination of the 300+ mergers dealt with by the Authority in the first three and a half years of the Act is that some change is required to reduce the number of notifications involving cases which have no competition nexus in the Irish market. The Authority's reasoning, in a small number of cases is open to question, but that is almost inevitable. Nevertheless the Authority might usefully follow the example of other competition agencies that have commissioned reviews of merger decisions in order to identify possible errors. The object of such an exercise is to identify whether there is scope to improve the Authority's analysis in merger cases.

---

[22] This article is based on a presentation given by Compecon's Director Patrick Massey at the Competition Authority's conference on merger control held at Croke Park on 11th April 2007.

[23] Compecon advised a party objecting to the merger.

[24] Forests take approximately 40 years to grow to maturity and it is necessary to thin plantations after around 15 years. Such thinnings are sold as pulpwood to board manufacturing plants.

[25] Compecon advised a party objecting to the transaction.

[26] Report of Investigation of the Proposal whereby Statoil Ireland Limited would acquire the Entire Issued Share Capital of Conoco Ireland Limited, p.9.

© Compecon Limited 2007.

This note is for guidance purposes only. Compecon Ltd. cannot accept any responsibility whatsoever for loss or damage occasioned or claimed to have been occasioned, in part or in full, as a consequence of any person acting, or refraining from acting, on the basis of this note.

Compecon Limited is a private limited company registered in Ireland Number 343962.
Registered office: 37 Willowbank Park, Rathfarnham, Dublin 14.