Compecon - Competition & Regulatory E-Zine.

No.10 October 2012.

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Editorial.

Welcome to the latest edition of Compecon's Competition and Regulatory E-Zine.

October 1st 2012 marked the 21st anniversary of the coming into force of the Competition Act, 1991, which introduced a modern prohibition based competition regime largely based on EU competition rules. The first article in this issue based on a speech delivered at the Annual Competition & Regulatory Law Conference in the Radisson Hotel on 27th September reviews the past 21 years and the influence of economics on competition law both nationally and at EU level.

Our second article reviews the National Transport Authority's public consultation which primarily focused on whether or not the majority of bus services in Ireland which are currently operated by State operators should be opened to competitive tendering.

The final article in this issue analyses a recent issue by the UK Office of Fair Trading to refer a merger to the Competition Commission for an in-depth investigation. The case involves potential failing firm issues.

Patrick Massey

Director

Irish Competition Law at 21.

1: Introduction.

It is 21 years since the passage of the Competition Act, 1991, introduced what is generally regarded as a modern prohibition-based system of competition law in Ireland.[1] The key prohibitions in sections 4 and 5 of the original 1991 Act and replicated in sections 4 and 5 of the Competition Act, 2002, mirror the EU competition rules now enshrined in Articles 101 and 102 of the Treaty for the Functioning of the European Union (TFEU). Ireland's criminalisation of hard-core cartels and the absence of administrative fines mean that our enforcement regime is more akin to the US. Consideration was given to introducing a prohibition-based regime based on the US Sherman Act back in the 1950s, but this option was ultimately rejected in favour of a control of abuse model under the Restrictive Trade Practices Act, 1953. To paraphrase the Minister responsible for the 2002 Act, it is arguable whether Irish competition policy is closer to Boston than Berlin.

> *"Boston stands for the exclusion of criteria other than economic efficiency; Berlin stands for recognition of other policy objectives in executing policy."*[2]

This contrast in approaches still provides a useful framework and international context against which to assess the evolution of Irish competition law.

2: Irish Competition Law at 21.

Ireland's competition legislation mirrors EU competition rules in prohibiting two broad categories of anticompetitive behaviour (a) agreements between competing undertakings and (b) abuses of a dominant position. The legislation also defines certain types of *"hard-core"* cartel behaviour such as price-fixing, market-sharing and bid-rigging as more egregious than other infringements of the law and consequently provides for more serious penalties for such practices, namely possible imprisonment for up to 10 years under the 2012 Act. This approach is wholly consistent with economic thinking on competition. There is virtual unanimity among economists that "hardcore" cartels are almost inevitably harmful and are extremely unlikely to produce any redeeming benefits, although whether it was necessary to increase the maximum prison sentence for such behaviour from five to ten years is open to debate.

In contrast there is a greater divergence of opinion among economists

[1] This article is based on a speech given by Compecon Director, Patrick Massey at the Annual Competition & Regulatory Law Conference at the Radisson Hotel Dublin on 27th September 2012.

[2] P. Lyons, P. Massey & M. McDowell, (2011), Boston v. Berlin: A Half-Century of Irish Antitrust, in *Evolution of Competition Laws and their Enforcement: A Political Economy Perspective,* Routledge.

regarding non-cartel behaviour while it is also widely accepted that in non-cartel cases it is not always easy to distinguish between harmful behaviour and pro-competitive or efficiency enhancing behaviour. The decision to provide criminal sanctions for individuals including imprisonment for "hard-core" cartels places Ireland firmly at the Boston end of the spectrum.

The experience to date is that the criminalisation of *"hard-core"* cartels has worked reasonably well. Those who initially expressed the view that it would be impossible to meet the *"beyond a reasonable doubt"* threshold of proof and to convince a jury to convict in such cases have been proven wrong. The

Competition Authority's record in criminal prosecutions of cartel cases has been reasonably good to date, although its claim to have secured the first criminal conviction of a cartel in Europe has been disputed.[3] If there is a criticism it is that virtually all of the cartel prosecutions to date have involved relatively small undertakings. This has created a perception, rightly or wrongly, that the Authority has tended to focus on small undertakings.

Apart from cartels, however, enforcement by the Competition Authority has been virtually non-existent. In 16 years, the Authority has brought only one abuse of dominance case, which was ultimately unsuccessful, to court. Similarly, there has been virtually no enforcement action in respect of non-horizontal agreements.[44] This is further evidenced by considering the Authority's *"enforcement decisions"* of which there have been only 14 in the past ten years.

Outcomes of Competition Authority Enforcement Decisions.		
	Possible Infringement	No Infringement
Section 4 Of which Horizontal Vertical (Possible RPM)	5 2 3	0 0 0
Section 5	1	7
Merger	0	1

Eight of the 14 enforcement decisions involved possible abuse of dominance but seven of these were dismissed. In contrast the five section 4 cases were all resolved by the parties amending the agreements concerned indicating a possible competition concern by the Authority. Two of these involved horizontal agreements while the other three involved possible RPM.

Thus, if we combine both actual court cases and enforcement decisions we find only one instance of a possible abuse of dominance since the passage of the 1996 Act. Similarly, the only vertical restraints cases in which the Authority has taken action have involved possible RPM. The only other instance where the Authority has considered a vertical arrangement in detail involves LPG where it has repeatedly failed to put forward any economic basis for its findings. Thus,

[3] C. Vollmar, (2006), Experience with Criminal Law Sanctions for Competition Law Infringements in Germany, in K.J. Cseres, M.P. Schinkel & F.O.W. Vogelaar eds., *Criminalization of Competition Law Enforcement Economic and Legal Implications for the EU Member States*, Edward Elgar.

[4] The *"BIDS"* case essentially involved a horizontal agreement.

apart from cartels there has been little or no enforcement of competition law.

3: Economics and Competition. Economics has played a key role in the evolution of Irish competition law since 1991. However, at times, the role of economics and economists has been criticised by lawyers.

Part of the reason for this lies in the fact that lawyers and economists approach competition cases from two quite different perspectives. To lawyers, competition cases involve trying to achieve justice as between the opposing parties rather than focusing on the wider effects of particular behaviour. For economists, competition is about maximising the welfare of society.

A common criticism is that two different expert economists can express conflicting views in the same case. The tendency for opposing experts to express quite different views in court is hardly unique to economists.

While economists are largely united in regarding cartels as "bad" there is a much greater divergence of opinion in respect of non-cartel practices. This is partly because in many instances such practices can have both good and bad features. For example, vertical restraints are generally seen as efficiency enhancing and therefore beneficial to both business and consumers. At the same time, it is recognised that they may have harmful effects when firms have significant market power and when inter-brand competition is weak. In those cases, the costs of anti-competitive effects are likely to outweigh any efficiency benefits. Similarly, economists would generally regard price cuts as clearly benefitting consumers. It is recognised by most economists, however, that dominant firms may sometimes cut prices to an unsustainable level in order to eliminate competitors. Undoubtedly such price cutting will benefit consumers in the short-run, but they may face higher prices in the future if competition is eliminated. Distinguishing aggressive price competition from predation is not always easy.

The essential point to recognise is that the dividing line between what is pro- or anti-competitive is frequently not clear cut in non-cartel cases. The available statistical data and other evidence may genuinely be open to different possible interpretations. Thus, it is perfectly possible for experts to legitimately come to different conclusions in such cases. Essentially such cases come down to judgment calls.

Undoubtedly this may give rise to uncertainty. Eliminating uncertainty would require bright-line rules which are clearly inappropriate in cases where it is not possible to distinguish *a priori* whether behaviour is anti-competitive or not. Such rules would be either too lenient and allow anti-competitive behaviour to go unchecked or would be too restrictive and prohibit behaviour that is efficient and thus desirable from society's perspective. Uncertainty involves costs for litigating parties but reducing or eliminating uncertainty involves very real costs for society.

The view of economics and economists has not been helped, however, by the quality of the Competition Authority's economic analysis in a number of cases. For example, the Authority has incorrectly claimed, when applying the SSNIP test on market definition in a number of merger cases,

that whether or not a hypothetical price increase would be profitable depends on whether many or even a majority of customers would switch to another supplier in response to such a price increase. The reality is that only a minority of customers need to switch to render a price increase unprofitable. The Authority has recommended that legal disciplinary partnerships between solicitors and barristers should be permitted on the grounds that it would eliminate double mark-ups. From an economics perspective this is incorrect. No double mark-up arises from the separation of solicitors and barristers. The Authority should follow the EU Commission's example and appoint a chief Economist in order to improve the quality of its economic analysis.

4: The EU Economic Reformation.

It is widely recognised that EU competition law historically had twin objectives of promoting competition and market integration. Market integration rather than efficiency or consumer welfare was the primary objective of EU competition policy through most of its history. The EU Commission has conducted a major re-orientation of competition policy over the past 15 years with the avowed aim of adopting a *"more economics based"* approach.

This process began with the decision by the Commission to rethink its traditional approach to vertical restraints in the mid-1990s. Traditionally the EU Commission tended to treat all vertical restraints with suspicion. This largely reflected a legalistic approach and ignored the economic literature which indicated that most vertical restraints and certainly non-price restraints could not be regarded as automatically pro- or anti-competitive. Rather their effects depended on the circumstances of each specific case. Although this view had been accepted by the US Supreme Court in its 1977 judgment in *Sylvania*,[5] the Commission clung to the view that all vertical restraints were in breach of then Article 81(1) but satisfied the exemption requirements of Article 81(3).[6] During the mid-1990s there was a considerable, sometimes heated, debate between the Commission and a number of national authorities who argued that the Commission's position was inconsistent with economic principles.[7] Many external commentators were also highly critical of the Commission's approach. Eventually the pro economics arguments won out and the Commission revised its treatment of vertical restraints, albeit almost 20 years after this change had occurred in the US.

The move to a decentralised EU competition law regime under Regulation 1/2003 and, subsequent Commission Guidelines in respect of abuse of dominance, represent further elements in the move to a more *"economics"* approach.

[5] *Continental TV, Inc. et. al v. GTE Sylvania, Inc.*, 433 US 36 1977.

[6] This approach is seen to have been driven by market integration concerns.

[7] See, for example, C.D. Ehlermann & L. Laudati eds., (1997), *Proceedings of the European Competition Forum*, Chichester, Wiley; P. Massey, (1996), Reform of EC Competition Law: Substance, Procedure and Institutions in B. Hawk ed. (1997), *International Antitrust Law & Policy*, Juris Publications reproduced in B. Hawk ed. *EC Competition Law Reform,* Juris Publications, 2002.

The Commission's traditional approach in Article 102 cases has been criticised for concentrating on protecting competitors rather than protecting competition. In the past even slight reductions in competition could be found to infringe Article 102. This has given way to a new approach centred on the concept of consumer harm. Many economists argue that, particularly, in cases of alleged abuse of dominance, it should be a requirement to demonstrate that the behaviour in question harms consumers.

The issue of whether there should be a requirement in every case to show consumer harm has been hotly debated in the economics literature. Such a requirement obviously greatly increases the burden of proof for competition agencies and private litigants.

Following the modernisation programme, the Commission has increasingly emphasised consumer welfare as the objective of competition law. For example, Commissioner Kroes stated:

> *"Our aim is simple, to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy...competition is not an end in itself but an instrument for achieving consumer welfare and efficiency."*[8]

The Commission's subsequent discussion paper on exclusionary abuses repeated the manta that *"the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."*[9]

The European Courts, however, have taken a somewhat different view. The European Court of Justice Judgment in *Michelin II "raises a fundamental question regarding Article 82 – whether it prohibits certain behaviour per se or only as a result of its effect in the market."*[10] Similarly, in *British Airways* the General Court prohibited rebate schemes even when they resulted in lower prices and thus benefited consumers. In *GSK* the Court of Justice in overturning a judgment of the General Court ruled:

> *"Consequently for a finding that an agreement has an anticompetitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price. It follows that by requiring proof that the agreement entails disadvantages for final*

[8]N. Kroes, (2005), speech at Competition Day in London, 15 September 2005.

[9] E.U. Commission (2005), *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, Brussels, DG Comp, p.4. The Discussion Paper somewhat paradoxically stated that *"it may sometimes be necessary in the consumer's interests to also protect competitors that are not (yet) as efficient as the dominant company."* P.21. In Ireland, the Supreme Court has stated *"The entire aim and object of competition law is consumer welfare."* *Competition Authority v John O'Regan & Ors,* (ILCU).

[10]D. Waelbroeck, (2005), Michelin II A *Per Se* Rule Against Rebates by Dominant Companies, *Journal of Competition Law & Economics*, 1(1) 149-71 at 159. Waelbroeck claims that the ECJ in this case appeared to assimilate quantitative rebates with loyalty rebates and that the judgment appeared to assume that economies of scale were linear when in reality they are rarely, if ever, strictly linear.

consumers as a prerequisite for a finding of anticompetitive object and by not finding that that agreement had such an object, the Court of First Instance committed an error of law."[11]

The apparent conflict between the Commission and the Courts particularly with regard to Article 102 has to some extent re-opened the debate on the more *"economics"* approach.[12]

One strand in this debate rests on the view that Article 102 was based on German ordo-liberal thinking which views the protection of individual economic freedom as a major goal of competition policy. [13] It has been suggested that the ordo-liberal view with its emphasis on individual economic freedom is inconsistent with an economics approach which emphasises consumer welfare and efficiency as the goals of competition law.[14] According to this view the modernisation programme was designed to replace the ordo-liberal approach to Article 102 with a more economics based approach. The claim that Article 102 was intended to reflect an ordo-liberal approach is based on *ex post* evidence. Article 102 prohibits the abuse of dominance rather than a dominant position. Combined with the absence of any merger control provisions in the original Treaties, this suggests that the Treaty drafters were not opposed to the accumulation of economic power *per se*, a view that is central to the ordo-liberal approach. [15] Accordingly it has been claimed that the architects of the Treaty of Rome were only concerned with exploitative abuses not exclusionary abuses and their main focus was on consumers not competitors. Joliet (later a judge of the ECJ) also expressed the view that Article 102 applied only to exploitative abuses.

"If Article 86 [102] were to be applied to policies erecting barriers to entry

[11] *Glaxo Smith Kline et. al. v. Commission,* [2009] ECR I-9291.

[12] Prior to the publication by the Commission of its discussion paper on exclusionary abuses, the then head of the Bundeskartellamt opposed replacing *per se* rules in Article 102 cases with a case-by-case economic analysis. U. Boge, (2005), *Modernisation of Art.82 EC* speech delivered to Competition Commission lecture series, London, 19 April 2005.

[13] Many scholars see the origins of EU competition law in the decision by the allies, driven primarily by the US, to impose a competition law regime on Germany in the aftermath of the Second World War. (For a summary see, P. Massey & D. Daly, 2003, *Competition and Regulation in Ireland The Law and Economics* Oak Tree Press). Gerber, however, argues that the German Ordo-liberal tradition also had a major influence on the introduction of competition law in Germany which in turn influenced EU competition policy. D. J. Gerber (1998), *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford. Folguera pointed out that German competition law contained a *per se* prohibition on vertical restraints which restricted parties' freedom to agree business terms with third parties without any possibility of exemption which again can be seen as reflecting ordoliberal influences while also explaining some of the traditional EU suspicion of vertical restraints. J. Folguera, (2001), The Impact of the Commission's Modernization White Paper and Vertical Restraints Regulation on Member State Antitrust Laws in B. Hawk ed. *International Antitrust Law & Policy*, Juris Publications.

[14] P. Akman, (2005), *Searching for the Long-Lost Soul of Article 82 EC,* CCP Working Paper 07-5, Centre for Competition Policy, University of East Anglia.

[15] The ordo-liberal view would suggest that monopolies should be prohibited as their very existence distorts competition. Akman points out that France had originally sought a prohibition on dominant positions and that it was Germany which favoured a prohibition on abuse.

and consolidating market domination, it is difficult to perceive why in such a case the market dominant position itself should not be dismantled, a consequence which is rejected by all."[16]

While the Commission may regard consumer welfare as the primary driver of competition policy, the Treaty, case law and political objective of market integration do not allow such changes to be made easily. It could be argued that the Commission's approach is in direct conflict with established case law. This is an issue which clearly needs to be resolved.

5: US – Slave of Defunct Economists?

For many years, US competition policy was seen as being more in tune with economics thinking than its EU counterpart. Over the past 20 years, however, the US Courts have adopted an increasingly sceptical approach in monopolisation cases resulting in a growing divergence between the US and EU treatment of dominance.

It should be noted that section 2 of the Sherman Act is fundamentally different to Article 102 in that the former has never been construed as providing a remedy against most forms of exploitative conduct. Rather it is concerned with prohibiting the acquisition and/or maintenance of monopoly power. In its 2004 *Trinko* decision, the US Supreme Court underscored this fundamental transatlantic difference by emphasising that exploitation of a monopoly does not violate Section 2. In an oft-cited paragraph, Justice Scalia explained:

"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element in the free market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[17]

It has been pointed out that Justice Scalia's pronouncement on incentives and the benefits of *"monopoly prices"* does not reflect any serious empirical economic research. Its application to the particular case has also been questioned given that the defendant owed its local monopoly position(s) *"to a combination of natural monopoly characteristics, public franchises and long-run investment supported by rate-based government regulation."* Consequently, it is argued that it did not need to enjoy monopoly prices for even a short period to induce it to take risks *"in the local landline telephone markets that it and its corporate predecessor AT&T have monopolised for almost a century."*[18]

[16] R. Joliet, (1970), *Monopolization and Abuse of Dominant Position*, Martinu Nijhoff, p.252. Of course, under Regulation 1/2003 (and the Competition Act, 2002) there is a possibility of breaking up a dominant position.

[17] *Verizon Communs, Inc v Law Offices of Curtis v Trinko,* 540 US 398 (2004) (Trinko) at 410.

[18] D.I. Baker, (22009), An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolies, *European Competition Journal,* 5(1) 146-99.

Over the past 20 years US courts and enforcement agencies have adopted a strict Chicago based economics approach despite an extensive economic literature which indicates that many of the assumptions underlying the Chicago approach are flawed. The strict Chicago view does not regard highly concentrated market power as posing any problems from a competition perspective. According to this approach markets are largely self-correcting and market power will be swiftly eroded if it has any adverse effects. The exception is where market power is due to regulatory intervention in which cases it is those interventions which should be addressed. Based on such views it has been argued that merger enforcement and dominance cases produced no consumer benefits and that enforcement action should be limited to only the most egregious price fixing cases.[19] Such views have been strongly criticised for relying on evidence from quite old merger and dominance cases.[20] Nevertheless, this is pretty much now the *de facto* position in the US.

The Department of Justice has not succeeded in challenging a merger before the Supreme Court in over 35 years. The past 20 years have seen the gradual scaling back of the scope of section 2 of the Sherman Act as the courts have become increasingly hostile to allegations of monopolisation. It is very difficult, if not impossible, for plaintiffs to succeed in predatory pricing case due to court scepticism.

> *"The courts adhere to a static nonstrategic view of predatory pricing, believing it to be an economic consensus. But it is an economic consensus most economists no longer accept."*[21]

The Supreme Court's 5-4 decision on price squeezing in *Pacific Bell* is another example of its sceptical approach to Section 2 cases. Chief Justice Roberts' opinion for the majority concluded:

> *"[I]f AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market".*[22]

It is difficult to see the European Courts adopting such an approach under Article 102.

The then Chairman of the Federal Trade Commission has expressed the view that the US system of treble damages has also contributed to US courts steady rolling back the scope of section 2 of the Sherman Act.

> *"Had the US private rights of action been more constrained (for example, by making treble damages*

[19] R.W. Crandall & C. Winston, (2003), Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence, *Journal of Economic Perspectives,* 17(4), 3-26.

[20] See, For example, Baker (2003) above; J.E. Kwoka, (2003), The Attack on Antitrust Policy and Consumer Welfare: A Response to Crandall and Winston, *mimeo.*; G. J. Werden, (2004), *The Effects of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook*, AEI Brookings Joint-Centre for Regulatory Studies.

[21] P. Bolton, J. Bradley & M. Riordan, Predatory Pricing, Strategic Theory and Legal Policy, p.3.

[22] *Pacific Bell Telephone Co v LinkLine Communications Inc.* The DoJ filed an amicus brief in favour of the appellant Pacific Bell while the FTC by a 3-0 vote publicly refused to support the brief and issued a public statement explaining its dissenting position.

discretionary rather than mandatory), my prediction is that US doctrine for abuse of dominance would more closely resemble existing EU standards."[23]

Under the Bush administration, the Justice Department *"took a narrower view of the scope of Section 2 liability and remedies than any of its predecessors".*[24]

The US position is in contrast with the EU where the Commission and Member States (apart from Ireland) have been quite active in pursuing Article 102 cases. While the US Courts approach reflects Chicago, the EU approach is post-Chicago relying more on game theory and less willing to assume that ambiguous conduct is likely to be efficient and that markets are self to be much closer to Boston (or rather Chicago) than Berlin. This approach has come about largely without any public debate. Perhaps it is time to have such a debate.

National Transport Authority Faces Key Test.

1: Introduction.

The National Transport Authority (NTA) was established by the Public Transport Regulation Act, 2009. The Act essentially protected Dublin Bus and Bus Eireann against competition by private bus operators by requiring that the NTA enter into direct award contracts with the two State owned bus companies in respect of all of their existing routes for a period of five years.[25] These contracts are set to expire at the end of December 2014. The NTA has stated that it is currently considering *"whether it should enter into new direct award contracts with the current contracted parties or whether it should undertake competitive tenders in relation to some or all of the services".*

As part of this process the NTA initiated a *"Non-Statutory Public Consultation on 2014 Bus Public Service Contracts."* The consultation period ran from 14th June to 11th July. In September, the NTA published a report on the public consultation submissions.[26]

2: The Consultation.

The NTA's consultation document ran to just three pages and contained just seven questions.

1. How can the new public service contracts best ensure a good quality of service is provided to passengers?
2. How can the new public bus contracts best ensure the integration of the public bus services and the integration

[23] W.E Kovacic, Competition Policy in the European Union and the United States Convergence or Divergence?", speech, 2 June 2008 available at http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf

[24] Baker, (2009), p178.

[25] This requirement did not apply in respect of Bus Eireann's *Expressway* inter-city routes.

[26] NTA, Non Statutory Public Consultation on 2014 Bus Public Service Contracts Public Consultation Submissions Report, available at http://www.nationaltransport.ie/wpcontent/uploads/2011/12/Report-on-Public-Consultation-on-2014-Bus-Public-ServiceContracts.pdf

of these services with the wider public transport network?
3. How can the new contracts best ensure value for taxpayer money?
4. Are there benefits in introducing separate contracts for different bus market segments within the Dublin area? If so, how should such market segments be defined?
5. Are there benefits in introducing separate contracts for different bus market segments outside the Dublin area? If so, how should such market segments be defined?
6. What are the potential benefits or otherwise of competitively tendering for the award of new bus service contracts, compared to directly awarding contracts to Dublin Bus or Bus Éireann?
7. Are there any other considerations you wish to identify or comment on, that are relevant to the new contracts for bus passenger services?

The questions posed were quite broad in nature and the document provided no guidance or background information. For example, it is difficult for individuals to respond to a question simply asking if there are benefits in introducing separate contracts for different bus market segments without putting the question into some sort of context.

More importantly there is extensive international evidence on the benefits of introducing competition for bus services, particularly by means of competitive tendering. It might have been more useful if the NTA had carried out a review of the extensive literature on competitive tendering and used this as a starting point for its consultation.

The NTA received a total of 62 submissions in response to the consultation. In its report on the consultation the NTA categorised 27 of the responses as being from *"stakeholders"* while a further 27 were described as *"submissions from individuals"*. Presumably such individuals are passengers or at least potential passengers, but they are not classed as *"stakeholders"*. Eight submissions were described as being from a Dublin City Council Workshop on 2014 Bus Public Service Contracts.

The responses were somewhat mixed. Some submissions dealt with individual bus routes.

Responses on the key issues of whether the existing direct award contracts with Dublin Bus and Bus Eireann should be renewed or whether they should be put out to competitive tender divided along largely predictable lines.

"Commercial bus operators and their industry group (CTTC) supported tendering, as did the Competition Authority."

On the other hand, not surprisingly:

"The incumbent operator companies (CIE, Dublin Bus and Bus Éireann) did not support tendering and felt continuation of directly awarded contracts would be appropriate, as did trades unions' submissions from ICTU, SIPTU and NBRU."

At the time that it announced the public consultation, the NTA stated that it would undertake a parallel consultation, with Irish and international bus operators. It indicated that this consultation would *"explore issues such as the appetite to enter the Irish market, the size, duration and nature of potential contracts, timeframes for possible tendering and issues regarding mobilisation, depot facilities and integration requirements."*

We were unable to find any further information regarding this consultation on the NTA website. Hopefully in the interests of informed debate the NTA will publish the results of this consultation in due course.

If the NTA proposes to enter into a further direct award contract or contracts for bus services it is obliged to carry out a statutory consultation, under section 52 (6)(b) of the Dublin Transport Authority Act.

3: Comment.

The decision by the NTA to carry out a public consultation on future bus public service contracts is welcome. Unfortunately, the lack of any background information, the limited number of questions and the fact that the consultation did not provide any context limited the usefulness of the exercise. Had the NTA reviewed international experience of introducing competition and competitive tendering prior to undertaking the consultation it might have made for a more informed public debate on the issues.

Most of the questions yielded a diverse range of responses and little The NTA faces a clear choice at the end of the day between favouring competition by introducing competitive tendering to replace the existing direct award contracts which are due to expire in December 2014 or it can choose to ignore the large volume of international evidence and continue to protect the incumbent State monopolies. Watch this space closely.

OFT Refers Cross-Channel Transport Merger to Competition Commission.

1: Introduction.

On 29th October 2012, the UK Office of Fair Trading (OFT) announced that it was referring the completed acquisition by Groupe Eurotunnel S.A. (Eurotunnel) of certain assets of former ferry operator, SeaFrance S.A. (SeaFrance) to the Competition Commission (CC) for further investigation. Effectively the CC investigation is the equivalent of what is known as a Phase 2 investigation in Ireland. SeaFrance had gone into liquidation in January 2012 and some of its assets including three ships were subsequently acquired by Eurotunnel. The OFT stated that it was referring the transaction to the CC *"due to concerns the merger could substantially reduce competition in the provision of cross channel transport services."*

2: The Relevant Legislation.

A key difference between UK and Irish merger control legislation is that in the former case there is no formal requirement to notify mergers. Parties may notify voluntarily while the OFT has the power to investigate mergers which have not been notified. However, the CC/OFT joint Guidelines state:

"It is not obligatory to seek approval before merging but it is strongly

recommended to advise the OFT before the merger occurs."[27]

Another significant difference between the two jurisdictions is that in the UK, the OFT is required to show that there is a *"realistic prospect"* that a merger will result in a substantial lessening of competition (SLC) before it can refer a merger to the CC for a Phase 2 investigations. There is no requirement under Irish legislation for the Competition Authority to establish that there is a realistic prospect of an SLC before it can embark on a Phase 2 investigation. Indeed, in many instances the Authority has stated that it had decided to carry out a Phase 2 investigation because it was not in a position to establish that a merger would not result in an SLC following its Phase 1 investigation.

The CC is normally required to complete a Phase 2 investigation within 24 weeks of a referral from the OFT. If the CC decides that a merger gives rise to an SLC, it can take steps to remedy the effects.

"For a completed merger, the CC will normally seek to divest all or part of the acquired business to a suitable purchaser who can provide effective competition. Undertakings as to future behaviour may be accepted in addition to, or occasionally instead of, divestiture."[28]

3: The Facts of the Case.

Eurotunnel provides rail transport to both passengers and freight customers across the narrowest of the English Channel via the Channel Tunnel. SeaFrance had been engaged in the provision of ferry services to both passengers and freight customers on same section of the English Channel between Dover and Calais.

SeaFrance went into liquidation in January 2012. Eurotunnel subsequently acquired a collection of SeaFrance's assets, including three vessels. In August 2012, Eurotunnel commenced operating a ferry service on the Dover to Calais route under a new brand called *"MyFerryLink"* using the three former SeaFrance vessels which it had acquired, the vessels being operated primarily by former SeaFrance employees.

4: Economic Analysis.

The OFT in its press statement announcing its decision to refer the transaction to the CC:

"The evidence gathered by the OFT indicates that, prior to SeaFrance's liquidation, it was a close competitor to Eurotunnel. Although some competitors remain after the merger, the evidence available to the OFT indicates that only P&O will provide strong competitive constraint to Eurotunnel for some customers."

The statement went on to say that the OFT was concerned that prices might increase for both passenger and freight customers as a result of the deal.

While the information available is limited, the transaction appears to involve a failing firm.

The exit from a market of a failing services firm results in a loss of output which, other things being equal, means that prices will increase. While a merger which is anti-competitive will result in some increase in price the increase is likely to be less than would result from the exit of the failing firm. There will be some reduction in output but the entire

[27]Competition Commission/Office of Fair Trading, *A Quick Guide to UK Merger Assessment*, March 2011, p.3.

[28] Competition Commission/Office of Fair Trading, *A Quick Guide to UK Merger Assessment*, March 2011, p.13.

output of the failing firm would not normally be lost. In those circumstances permitting an otherwise anti-competitive merger involving a failing firm to go ahead is less harmful to consumers than blocking the transaction and having the failing firm exit the market completely.

The European Court of Justice in *Kali und Salz* [29] agreed with the EU Commission's finding that the failing firm defence may be invoked to negate the prohibition in Article 2 of the EU Merger Regulation, if it could be demonstrated that there was no means of saving a failing undertaking, other than for it to be taken over by a stronger competitor, and where there were no less anti-competitive options. The failing firm defence has been accepted as justifying an otherwise anti-competitive merger under US law since the 1930s.

The Competition Authority Merger Guidelines state that it will consider *"failing firm"* arguments in merger cases. To date it has not addressed the failing firm issue in any of its merger decisions.

For a failing firm argument to succeed it is generally necessary to show that there was no less anti-competitive option available as laid down in the ECJ's *Kali und Salz* judgment.

The OFT press release stated that it recognised that the new service provided benefits to passengers by replacing capacity on the Dover to Calais route which was lost when SeaFrance went into liquidation. Significantly it went on to state:

> *"However, there is some evidence that an alternative buyer would have acquired the business, had Eurotunnel not done so, and the OFT was concerned about the loss of competition as compared with this plausible scenario."*

In effect the issue of whether or not there was a credible alternative buyer for the SeaFrance assets is likely to be a key factor in determining whether or not the failing firm conditions are met. Note it generally does not matter that such a buyer was only prepared to pay a lower price.

[29] *France v. Commission* Case C/68/94 [1998] ECR I-1375.