Compecon - Competition & Regulatory E-Zine.

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In this issue:

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

In this issue the emphasis is very much on the operations of the UK Competition Commission (CC) as we focus on two recent reports by them and also report on an economic study of the CC's decisions in abuse of monopoly cases.

In our February e-zine, we reported on the EU Commission's decision to block Ryanair's latest attempt to acquire control of Aer Lingus. The first article in this issue addresses the latest episode in this long-running saga, the CC's provisional finding that Ryanair's 29.82% shareholding in Aer Lingus is anti-competitive. This could lead to a decision requiring Ryanair to dispose of its shareholding or to substantially reduce it at the very least.

Our second article is also transport related as it analyses a CC merger decision announced on 6th June which prohibits Eurotunnel from operating ferry services to and from Dover.

Our final article reports on an economic study of CC decisions which found that the more a person served as Chairman of an investigation panel, the more likely it was that an undertaking would be found to have abused a monopoly (dominant) position.

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Director

Ryanair May Have to Reduce Aer Lingus Shareholding.

1: Introduction.

On 30th May the UK Competition Commission published the provisional findings of its investigation into Ryanair's minority (29%) shareholding in Aer Lingus. The CC also issued a separate document setting out possible remedies which it may impose if it ultimately decides that the shareholding has or would result in a substantial lessening of competition (SLC). The remedies proposed include requiring Ryanair to divest all or most of its shareholding in Aer Lingus. The CC, in choosing appropriate remedial action, is required to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy an SLC and any adverse effects resulting from it. [1] The publication of these documents by the CC represents the latest step in what has become a long-running saga.

2: The Story So Far.

Aer Lingus had been a State-owned airline but it was privatised in 2006, although the Irish Government retained a 25% shareholding. Aer Lingus shares were admitted to the Irish and London stock exchanges on 2nd October 2006. By 5th October 2006 Ryanair had acquired a 19.1% shareholding in its main Irish rival. Ryanair then launched a formal public bid for the entire share capital of Aer Lingus. It notified the EU Commission of the proposed takeover, in accordance with the Merger Regulation.

On 27th June 2007, the Commission adopted a decision declaring that Ryanair's planned takeover of Aer Lingus was incompatible with the common market. Ryanair then appealed the Commission decision.

Aer Lingus requested the Commission to order Ryanair to divest all of its shares in Aer Lingus. In a decision dated 11th October 2007, the Commission refused to grant that request. That decision was appealed by Aer Lingus.

Both appeals were rejected by the EU General Court in judgments handed down on 6th July 2010.

Ryanair continued, however, to acquire shares in Aer Lingus and by 2nd July 2008 had increased its shareholding to its current level of 29.82%. According to the CC the cost to Ryanair of acquiring its 29.82% shareholding in Aer Lingus was €407m. Based on a share price range of €1.10 to €1.40, the current value of Ryanair's shareholding in Aer Lingus, according to the CC, is between €175–223m. Ryanair launched a second bid in December 2008 but abandoned it in January 2009 after the Irish Government indicated that it would not support the bid.

Ryanair launched a third bid for Aer Lingus in 2012 which was blocked by the EU Commission in a decision dated 27th February 2013. On 8th May 2013 Ryanair

[1] Enterprise Act, 2002, section 35(4).

appealed the Commission's prohibition decision to the General Court.

Meanwhile in a separate development, on 29th October 2010, the UK Office of Fair Trading (OFT) announced it had decided to conduct a preliminary investigation into Ryanair's minority shareholding in Aer Lingus. Commenting on this decision in our November 2010 e-zine we pointed out that the OFT's decision should not have come as a surprise. A March 2010 report prepared for the OFT concluded that a minority shareholding by a firm in a competitor was likely to be anticompetitive. At the time the issue of minority shareholdings in competitors was being considered by competition agencies in a number of jurisdictions and the issue was also addressed in the August 2010 version of the US Horizontal Merger Guidelines.

On 15th June 2012 the OFT decided to refer Ryanair's acquisition of a 29.82% shareholding in Aer Lingus to the CC. Ryanair unsuccessfully challenged the CC's ability to investigate its shareholding before the UK Competition Appeals Tribunal (CAT). It subsequently sought leave to appeal the CAT decision, but this was refused by the UK Supreme Court on 26th April 2013.

3. CC Provisional Findings.

According to the CC, Ryanair said that it bought shares in Aer Lingus because it wanted to, and still wants to, acquire Aer Lingus. It said that it did not acquire its shareholding in order to influence Aer Lingus. Aer Lingus, however, claimed that Ryanair used its shareholding to undermine and weaken its principal competitor.

The CC provisionally concluded that Ryanair's shareholding gave it the ability to exercise material influence over Aer Lingus's commercial policy and strategy. This view was based on a number of factors, in particular, Ryanair's ability to block special resolutions and the disposal of Heathrow slots under the Articles of Association which are relevant to Aer Lingus's ability to pursue an independent commercial policy and strategy. The CC therefore provisionally concluded that the acquisition by Ryanair of a 29.82% stake in Aer Lingus had resulted in the creation of a relevant merger situation.

The CC's provisional findings defined the relevant product market as that for the supply of air passenger services. It identified six corridors connecting airports in Britain and the Republic where services operated by Ryanair and Aer Lingus overlapped and a further five corridors where Ryanair's services overlapped with routes operated by Aer Arann under the Aer Lingus Regional brand. The CC also identified some overlap between Ryanair and Aer Lingus on routes between London and Northern Ireland and Northern Ireland and Faro.

The provisional CC findings concluded that Ryanair and Aer Lingus imposed a strong competitive constraint on each other on overlap routes between Great Britain and Ireland, and were also likely to impose a competitive constraint—albeit less significant—on each other through the threat of entry on routes between Great Britain and Ireland on which the two airlines were not currently both active. According to the CC's provisional findings, Ryanair and Aer Lingus did not face a competitive constraint from any other airlines on

many of the routes between Ireland and Britain although it noted that there was some competitive constraint from other airlines on the London to Dublin and Bristol to Dublin corridors and, more substantially, on overlap routes between London and Northern Ireland, and Northern Ireland and Faro.

The CC considered whether the intensity of competition between Ryanair and Aer Lingus had changed compared with the level which existed in 2006. It provisionally concluded that competition between Ryanair and Aer Lingus had remained intense since 2006, and that the extent of overlap between the operations of the two airlines had increased, largely as a result of Aer Lingus's Regional franchise agreement with Aer Arann.

The CC rejected Ryanair's submission that it was bound to conclude, on the basis of the European Commission's assessment of the competition between Ryanair and Aer Lingus, that the acquisition of the minority shareholding had not and would not result in a substantial lessening of competition (SLC). The CC reasoned that, absent Ryanair's shareholding, competition during the period since 2006 or in the future might have developed differently and might have been stronger. The provisional findings note that the CC was required to consider not only whether the transaction had, to date, led to an SLC, but also whether an SLC might be expected in the future.

The CC provisionally concluded that the appropriate counterfactual was that Aer Lingus, absent Ryanair's shareholding, would pursue a broadly similar commercial strategy on routes between Britain and Ireland, either as an independent company or in combination with another airline.

The CC identified three possible competitive effects arising from the acquisition of Ryanair's minority shareholding that might have resulted, or might be expected to result, in a reduction in Aer Lingus's, Ryanair's or both companies' effectiveness as competitors on routes between Britain and Ireland because:

a. the shareholding had or might be expected to reduce Aer Lingus's effectiveness as a competitor because of the influence that it gives Ryanair over its rival, or by affecting the commercial strategies that are available to Aer Lingus;
b. the change in financial incentives associated with the shareholding had or might be expected to reduce Ryanair's effectiveness as a competitor by giving it the incentive to compete less fiercely with Aer Lingus; and
c. Ryanair's minority shareholding had or might be expected to increase the effectiveness of any existing coordination between Ryanair and Aer Lingus, or increase the likelihood of coordination between them in the future.

Having considered various means by which Ryanair, as a minority shareholding, might exert influence over a competitor, the CC reached the following provisional conclusions:

a. Ryanair's shareholding would be likely to be a significant impediment to Aer Lingus's ability to be acquired by, merge with or acquire another airline and could make it more difficult for Aer Lingus to attract a

strategic minority shareholding. The CC provisional view was that it was likely that, absent Ryanair's shareholding, either in the period since 2006 or in the foreseeable future, Aer Lingus would have been involved or would be involved in an acquisition, merger or joint venture. This, according to the CC, would be likely to lead to synergies, over and above those which could arise from looser forms of cooperation between Aer Lingus and other airlines, making Aer Lingus a more effective competitor with Ryanair than it would otherwise have been.

b. Ryanair's ability to block a special resolution gives it influence over Aer Lingus's ability to issue shares and might hamper Aer Lingus's ability to raise capital. Given Aer Lingus's existing balance sheet strength and forecast financial performance, under circumstances of stable trading, no new debt issuance or structure, Ryanair's ability to restrict it from doing so could cause Aer Lingus to become a less effective competitor than it would otherwise have been.
c. Ryanair would be able to influence Aer Lingus's ability to dispose of some of its Heathrow slots in order to optimize its slot portfolio. The CC found it likely that, absent Ryanair's minority shareholding, either in the period since 2006 or in the foreseeable future, Aer Lingus would have wanted to manage its portfolio of Heathrow slots in the context of optimizing its network and that this would have involved the sale or lease of slots. Ryanair's ability to prevent Aer Lingus from disposing of its slots could, according to the CC, reduce its effectiveness as a competitor by limiting its strategic options. Although the scale of any impact would depend on the specific transaction being considered, this could increase Aer Lingus's costs and restrict its flexibility with regard to its network, causing it to be a less effective competitor than it would otherwise have been.
d. Ryanair could influence Aer Lingus's commercial strategy by exercising the deciding vote in the context of an ordinary resolution. The CC felt it was relatively unlikely that Ryanair alone would be able to achieve a majority in a shareholder vote, given the Irish Government's stated position. However, the CC believed that there were circumstances in which Ryanair could achieve a majority with the support of other shareholders apart from the Government. If Ryanair were to achieve a majority the CC considered that it could have very significant implications for Aer Lingus because of the importance of company decisions put to a shareholder vote.
e. The CC noted that Ryanair's minority shareholding was not required for it to lobby against Aer Lingus's decisions. It did not expect Ryanair's requesting of information as a minority shareholder to affect Aer Lingus's effectiveness as a competitor. Nor did the CC expect its ability to call EGMs or propose resolutions at an AGM materially to affect Aer Lingus's effectiveness. Ryanair's minority shareholding increased the likelihood of it mounting a full bid for Aer Lingus. Any such bid could

significantly disrupt Aer Lingus's commercial policy and strategy.

f. The CC believed that it was unlikely that Aer Lingus would compete less fiercely with Ryanair in order to avoid antagonizing its largest shareholder either now or in the future.

According to the CC, it was informed by Ryanair that when it had opposed Aer Lingus's management, it had done so only to protect the value of its shareholding, and that it would, for example, support Aer Lingus in raising capital and would be willing to sell its shareholding to another airline (albeit for a significant premium over market price). However, given the closeness of competition between Ryanair and Aer Lingus, the CC provisionally found that Ryanair would have an incentive to use its influence to weaken Aer Lingus's effectiveness. This incentive would not exist for a shareholder which was not in competition with Aer Lingus.

The CC felt that it was unlikely that Ryanair would compete less strongly with Aer Lingus because of its financial interest in Aer Lingus. In reaching this conclusion, the CC took into account that the acquisition of its minority shareholding in Aer Lingus was part of Ryanair's overall strategy of acquiring the entirety of Aer Lingus. It therefore provisionally found it unlikely that Ryanair's minority shareholding in Aer Lingus would lead to coordinated effects.

The CC provisionally concluded that substantial entry on routes between Britain and the Republic of Ireland was unlikely due to several factors. These included early morning capacity constraints at Dublin Airport and some UK airports, the need to establish a well-known brand and base in Ireland, the relative unattractiveness of the Irish market, the potential for an aggressive response by existing operators and the level of taxes and airport charges. The CC therefore concluded that entry or expansion by other airlines would be unlikely to offset any SLC that might otherwise arise. The EU Commission also found that entry was unlikely to offset any diminution of competition resulting from a full merger of the two airlines.

The CC stated:

> *"We considered that, in exercising influence over Aer Lingus's commercial policy and strategy, Ryanair's minority shareholding would affect Aer Lingus's overall effectiveness as a competitor, albeit without giving Ryanair direct influence over the company's competitive offering on a day-to-day basis. Given the closeness of competition between Ryanair and Aer Lingus, we provisionally found that Ryanair would have an incentive to use its influence to weaken Aer Lingus's effectiveness that would not exist for a shareholder which was not in competition with Aer Lingus."*

The CC provisional findings noted that the importance of scale to airlines was clear from its discussions with Ryanair. This highlighted Aer Lingus's small scale as an impediment to its survival according to the CC. The CC identified a number of significant synergies that would be likely to arise from a combination between Aer Lingus and another airline, over and above those that might arise via looser forms of cooperation. The CC also indicated that it would expect the pressure on Aer Lingus's cost base—and the need for

additional scale to remain competitive—to become stronger over time. Additional bids by Ryanair for the outstanding shares in Aer Lingus could significantly disrupt Aer Lingus's commercial strategy.

The CC provisionally concluded that these constraints on Aer Lingus's ability to implement its own commercial policy and strategy were likely to make Aer Lingus a less effective competitor than it would otherwise have been across its network generally, and specifically as a rival to Ryanair on routes between Britain and Ireland.

Accordingly the CC provisionally concluded that Ryanair's acquisition of a 29.82% shareholding in Aer Lingus had led or might be expected to lead to an SLC in the markets for air passenger services between Britain and the Republic of Ireland.

4: Possible Remedies.

The remedies document invited views on whether divestiture of all or part of its shareholding in Aer Lingus by Ryanair would be effective in addressing the SLC which it had provisionally identified. The options being considered by the CC are as follows:

a. Divestiture of the whole of Ryanair's shareholding in Aer Lingus (full divestiture). This would remove any ownership link between Ryanair and Aer Lingus. According to the CC this option is likely to be an effective remedy to all aspects of the SLC which it has provisionally identified.
b. Divestiture of part of Ryanair's shareholding in Aer Lingus (partial divestiture).
c. Behavioural remedies to accompany a partial divestiture remedy.

The CC stated that it was not, at this stage, proposing behavioural remedies on their own for discussion as none appeared to be effective in addressing the SLC. However, "the CC remains willing to consider any practical alternative remedies that the main parties or other persons would like to propose which they consider would remedy the SLC identified."

The CC sought views from interested parties on the various remedial options that it has proposed. Interested parties had to submit their views by 11th June. The CC is expected to issue its final decision by mid-July.

5. Comment.

The CC's Provisional Findings and proposed Remedies represent another step in, what has undoubtedly been a long running saga. The case involves very important issues regarding the competitive effect of undertakings holding minority shareholdings in their competitors. It remains to be seen whether Ryanair can persuade it to change its views regarding the competitive effects of its minority shareholding in Aer Lingus and/or that a less drastic remedy is capable of customers. The findings are set out in a report by the CC which was published on 6th June and are in line with the CC's provisional findings in the case which were published in February.

Eurotunnel Cannot Operate Ferry Business from Dover.

1: Introduction.

Eurotunnel will be stopped from operating ferry services at the port of Dover, after the UK CC decided that its acquisition of three ferries and other assets from the former ferry operator, SeaFrance, could mean higher prices for cross-Channel passengers and freight customers. The findings are set out in a report by the CC which was published on 6th June and are in line with the CC's provisional findings in the case which were published in February.

2: Background.

The OFT referred completed acquisition by Groupe Eurotunnel S.A. (GET) of certain assets of former SeaFrance S.A (SeaFrance) to the CC on 29th October 2012.

Eurotunnel operates the Channel Tunnel between Coquelles (in the Pasde-Calais in France) and Folkestone (in Kent, England) under a concession which will not expire until 2086.

SeaFrance was a wholly owned subsidiary of Groupe SNCF which operated ferry services between Calais and Dover prior to November 2011. Following a period of heavy losses, SeaFrance was placed in liquidation on 16th November 2011 and its ferry services ceased operating.

In early 2012, DFDS A/S (DFDS) launched a new service between Calais and Dover, using two chartered ships, taking advantage of the freeing of berthing slots in the port of Calais following the liquidation of SeaFrance. DFDS had previously operated short-sea ferry services only between Dover and Dunkirk, using three vessels.[1]

DFDS's Channel operations were subsequently transferred into a joint venture (DFDS/LD) with the ferry operations of Louis Dreyfus Armateurs (LDA).

Three of the four vessels operated by SeaFrance at the time it was placed in liquidation (the Vessels) and other assets were sold in a sealed bid process. The Commercial Court of Paris (the Court) received bids from GET, P&O Ferries (P&O), Stena RoRo (AB (Stena RoRo) and DFDS/LD.

In order to secure the Vessels, GET acted together with a workers cooperative formed by former SeaFrance employees (a Société cooperative et participative, referred to as the SCOP) and on 11th June 2012, the Court decided in favour of GET's bid. The acquisition of the three vessels and other assets was completed on 2nd July 2012.

Having acquired berthing slots at the ports of Calais and Dover, GET launched ferry services between Calais and Dover on 20th August 2012 under the MyFerryLink brand. Its newlycreated subsidiary, MyFerryLink SAS (MFL), assumed the commercial risk for the operation, while the SCOP operated the

[1] Together, routes via the tunnel, between Calais and Dover, between Dunkirk and Dover and certain other routes across the English Channel are referred to as the short sea.

ships and acted as a sales and marketing agent for MFL.

The CC had to consider whether the transaction was a 'relevant merger' situation within the meaning of the Enterprise Act 2002. This involved an assessment of whether the transaction, as structured, meant that an 'enterprise' had been acquired. The CC concluded that the transaction involved the acquisition of an enterprise in light of:

- the ease and speed with which the vessels were put back into operation;
- the fact that GET and the SCOP acted together to secure control of the vessels and other assets and/or that GET had material influence over the SCOP;
- the fact that a large proportion of the staff provided by the SCOP to run the MFL service were previously employed by SeaFrance; and
- the fact that GET's bid had assigned some value to the brand and goodwill. The CC concluded that, in the context of the particular industry concerned, these elements met the statutory definition of an enterprise and constituted the activities, or part of the activities, of a business. It also found that the transaction met the share of supply test contained in the Enterprise Act and concluded that a *"relevant merger"* situation had been created.

3: Competition Analysis.

A key issue in the CC's assessment of the merger concerned what would have happened absent the transaction, i.e. the relevant counterfactual. As Sea France had been placed into liquidation a continuation of the pre-merger situation was not possible. According to the CC "the most likely outcome absent the merger would have been one in which DFDS/LD acquired one, two or three of the Vessels and continued to operate five vessels across the short sea, having replaced one or more of its existing vessels with the acquired vessels.

The CC concluded that GET's decision to acquire the former SeaFrance assets had been primarily driven by its concern that DFDS/LD would acquire the Vessels at a low cost and drive down prices on short sea routes.

Using a combination of travel statistics, evidence received from freight customers and its own analysis of prices and events that had taken place on the short sea over the previous five years, the CC concluded that the relevant markets in which to consider the competitive effects of the merger were:

a. transport services to passengers on the short sea (the passenger market); and
b. transport services to freight customers on the short sea (the freight market).

In order to assess the competitive effects of the merger, the CC first analysed how the supply of ferry services in the two markets might evolve in the short to medium term and in particular whether one of the current ferry operators could be expected to withdraw from the Dover–Calais route and/or the short sea. It concluded that in the context of excess capacity and continuing competition from MFL, as an effect of the merger DFDS/LD would be likely to cease operating services between Dover and Calais in the short term. It did not form an expectation that DFDS/LD would exit from the Dover– Dunkirk route in the short to medium term.

Were DFDS/LD to exit the Dover–Calais route and MFL to achieve its target market share, GET's share of passengers

and freight transported on the short sea would increase substantially from its pre-merger share of over 40 per cent in each market.

The CC found that the merger was likely to result in an increase in prices for passengers and freight customers by GET relative to the counterfactual. This was because a proportion of the sales that would previously have been lost by GET to ferry operators following a price rise would go to MFL; and this would result in the weakening of competition between ferry operators.

The CC concluded that future entry or expansion in the relevant markets by ferry operators other than MFL or P&O was unlikely and that the extent of buyer power in the relevant markets was unlikely to be sufficient to protect the majority of customers from the adverse affects of a diminution of competition.

The CC therefore concluded that the transaction could be expected to result in a substantial lessening of competition (SLC) in the freight and passenger markets compared with the counterfactual situation. This could be expected to lead to an increase in the prices charged both by GET and ferry operators in the two relevant markets.

At the time it published its preliminary findings the CC issued a Notice of Possible Remedies (the Remedies Notice). The Notice set out the CC's provisional view that the divestiture of the MFL business or the assets employed in the business, including the Vessels (namely the Rodin, the Berlioz and the Nord Pas de Calais) was likely to be an effective remedy. However, the CC discovered that the French Court had prohibited the sale of the Vessels for a period of five years and that this prohibition could only be lifted by the Court through a process involving consultation with relevant French government ministers. Because of the uncertainty this process would cause for the timing and outcome of divestiture, the CC was not satisfied that such a remedy would be effective. Given these circumstances and the nature of the SLC, the CC concluded that an effective and proportionate remedy would be to prohibit GET from operating ferry services at the port of Dover. The CC considered that prior to the prohibition coming into effect, GET should be permitted to divest the Berlioz and the Rodin to a purchaser (or purchasers) satisfactory to the CC, as a means of remedying the SLC; and that a period of six months should be given to enable GET to pursue this divestment; to effect an orderly exit from Dover; and to make arrangements to operate on other routes, should it wish to do so. This divestiture would be subject to a ten year prohibition on reacquiring the Berlioz and the Rodin.

The SCOP proposed an alternative Remedy, which consisted essentially of the transfer of MFL's responsibilities to the SCOP. The CC concluded that this proposal was unlikely to be effective, as it would not address either the internalisation effect or the competition weakening effect resulting from the transaction, as the SCOP would not be independent of GET.

According to the CC, GET proposed a remedy that would have resulted in the gradual transfer to the SCOP of a proportion of the capacity available on the Vessels, at a late stage in the investigation. This would have resulted in the SCOP taking on the commercial risks and rewards of managing this

capacity independently from GET. The CC concluded that this proposal was unlikely to be effective: it would not address the internalisation effect either fully or in a timely fashion; and it would not remedy the weakening of competition between ferry operators since the SCOP would not be independent of GET. In addition, GET had not discussed its proposal with the SCOP.

The CC concluded that a prohibition on GET (and on any connected body corporate of GET) directly, or indirectly through arrangements with any associated person or other body over which it had control, operating ferry services at the port of Dover which commenced six months from the date the CC Order came into effect (a) with any vessel for a period of two years and (b) with the Berlioz and the Rodin for a period of ten years represented as comprehensive a solution to the SLC as was reasonable and practicable.

4. Comment.

The decision in this case is interesting for several reasons. First the CC concluded that the transaction involved the acquisition of an enterprise and therefore constituted a merger as defined in the UK Enterprise Act. The transaction involved the acquisition of three vessels which had been owned by an undertaking which had been liquidated along with arrangements between GET and the SCOP for the future operation of those vessels. The finding that the transaction would give rise to a SLC was based on the view that if the merger went ahead a rival ferry operator would be likely to exit the market thereby enabling the merged entity to raise prices. It also illustrates that the fact that an undertaking may have failed does not prevent a finding that the subsequent acquisition of its business may be considered to result in a SLC.

In Competition Cases Decision-makers Matter.

1: Introduction.

An economic study of decisions by the UK Competition Commission competition (CC),[1] published in the latest edition of the *Economic Journal* found that the more the chairperson of the adjudicating panel had chaired panels previously, the more likely undertakings were to be found to have breached competition law.[2] If the panel chairperson had previously chaired a panel in 30 cases or more, the undertakings were always found to have broken the law. Such findings raise obvious questions about a regime where the same individuals are responsible both for the conduct of investigations and the final decision.

2: Background.

[1] Prior to April 1999, the CC was known as the Monopolies and Mergers Commission (MMC).

[2] L. Garside, P.A. Grout and A. Zalewska, Does Experience Make You 'Tougher'? Evidence from Competition Law, *Economic Journal,* 123, May 2013.

The study reviewed CC decisions under the Fair Trading Act, 1973 from 1970 to 2003. The study only considered abuse of monopoly cases.[1] There were 80 such cases over the course of the study period.

The membership of the CC comprised a full-time Chairman, up to three part-time Deputy Chairmen and up to 40 part-time members. Under the Fair Trading Act, the CC was responsible for investigating possible breaches of UK competition law referred to it by the Director General of Fair Trading (DGFT) who was the head of the Office of Fair Trading (OFT).

Following a referral, a panel would be selected, consisting of a panel chairman and four other members, and the panel were responsible for investigating and adjudicating on the case. In the vast majority of cases panels were chaired by the CC Chairman or one of the Deputy Chairmen. The CC was responsible for investigating various different categories of competition cases, but the study was confined to abuse of monopoly cases only, because if all types of cases had been included the data set would have been too diverse. Chairmen were selected so as to balance the workload of the CC Chairman and the Deputy Chairs.

The study found that abuse of monopoly cases accounted for more of the CC's time than any other category of cases and in terms of man-hours involved more of the CC's time than the aggregate of all other types of cases. This is probably due, in part at least, to the fact that dominance/monopoly types cases tend to be very complex. It is also in contrast with wider international experience where abuse of dominance cases generally tend to be far less frequent than other types of competition cases.

Perhaps the most significant finding of the study is the strong evidence that how often a panel chairman previously chaired a panel affected case outcomes. The more occasions a panel chairman had previously chaired a panel the more likely that the firms involved would be found to have abused a monopoly position. Replacing an inexperienced chairman with a more experienced one increased the likelihood of a finding of abuse by 30%. An individual who had chaired more than 30 panels was likely to find against the firm in almost all future cases. The way panel chairmen were appointed excluded the possibility of endogeneity in the results.

3: Comment.

It is important to analyse competition agencies' decisions. At EU level and in most member States, competition agencies are responsible for investigating and deciding on alleged infringements of competition law. Ireland is somewhat unique in an EU context in this regard. The Competition Authority's role is limited to carrying out investigations while it is for the Courts to decide if parties have broken the law.

The results of this study, while limited to specific types of cases raise questions about the effects of combining investigative and adjudicative roles. They suggest that the role of investigator and decision-maker should be separate in

[1]The Fair Trading Act, 1973 referred to an abuse of a monopoly position rather than a dominant position. The Competition Act, 1998 and the Enterprise Act, 2002 replaced the monopoly provisions of the 1973 Act, with a prohibition on the abuse of a dominant position in line with EU law. Investigations commenced under the provisions of the 1973 Act were completed under that legislation which is why the end date for the study was 2003.

competition cases. Surprisingly, the study suggests that increasing the likelihood of adverse findings might be welfare enhancing as it would increase deterrence. This ignores the fact that wrongful findings of anti-competitive behaviour also impose costs on society.