

**Compecon - Competition & Regulatory Economics E-Zine.**

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**Editorial.**

Welcome to the latest issue of Compecon’s Competition and Regulatory Economics EZine. The E-Zine provides regular updates on economic aspects of competition and regulation. In this issue we consider the EU General Court’s judgments of 6<sup>th</sup> July upholding the Commission prohibition of Ryanair’s attempted acquisition of Aer Lingus and rejecting the Aer Lingus claim that the Commission should order Ryanair to dispose of its shareholding in Aer Lingus. Our second article analyses the proposals by the Minister for Communications, Marine and Natural Resources to designate Ireland’s matches in the Six Nations Rugby Championship and all games involving Irish teams in the Heineken Cup for live broadcast on free-to-air television. The proposals raise some important public policy issues regarding broadcasting, sports and the relationship between the State and sporting organisations. We suggest that they could have serious negative effects for Irish rugby. Our third article looks at the Competition Authority’s report on the General Medical Services (GMS) scheme arrangements for general practitioner (GP) services. The report could be overtaken by proposals on health service reform contained in an expert report launched by the Minister for Health and Children on 9<sup>th</sup> July.

Patrick Massey

Director

Compecon – Competition Economics

## Court Upholds Commission Prohibition of Ryanair/Aer Lingus Merger.

### 1. Introduction.

In a judgment dated 6<sup>th</sup> July 2010, the EU General Court (formerly the Court of First Instance) rejected an appeal by Ryanair against a decision by the EU Commission prohibiting its proposed acquisition of Aer Lingus. The Court also rejected a counter-claim by Aer Lingus seeking to overturn a related Commission decision that it could not compel Ryanair to dispose of a minority shareholding in Aer Lingus

### 2. Background to the Case.

Following the privatisation of Aer Lingus in 2006, Ryanair acquired a 19.16% shareholding in its main Irish rival. Ryanair then launched a formal public bid for the entire share capital of Aer Lingus. It notified the Commission of the proposed takeover, in accordance with the Merger Regulation. On 27<sup>th</sup> 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.

During the Commission procedure Aer Lingus requested the Commission to order Ryanair to divest all of its shares in Aer Lingus. In a decision dated 11<sup>th</sup> October 2007, the Commission refused to grant that request, stating that it was not in its power under the Merger Regulation to order Ryanair to divest its shareholding since the planned takeover had not been implemented and Ryanair only held a minority shareholding which

did not enable it to exercise control over Aer Lingus. By this stage Ryanair had increased its shareholding to 29.3%. That decision was appealed by Aer Lingus.

### 3. The Commission Merger Decision.

A considerable part of the Commission decision was taken up with the issue of market definition. In airline merger cases each individual route is normally regarded as constituting a relevant market. The obvious question that arises is whether a route should be defined in terms of flights between two specific airports ("airport pairs") or between specific cities ("city pairs"). The Commission found that the relevant routes comprised city pairs.

The Commission stated that the case differed from a number of previous airline mergers which it had considered because it "*concerns the two main airlines in Ireland with a significant base at the same airport, namely Dublin Airport.*" It found that the merger raised concerns on a significant number of overlap routes, all with a common point of origin, from or to Ireland.

According to the Decision Ryanair and Aer Lingus accounted for the largest share of passenger traffic at Dublin, Shannon and Cork. Routes where the merging parties' activities overlapped included 8 out of the 10 most important routes to/from Dublin (one of the remaining two most important routes was the long-haul route to New York).

The Commission found that the two airlines overlapped on 35 routes. Ryanair

and Aer Lingus were the only operators on 22 of these routes. The Commission found that the merger would create a monopoly on those routes. In the case of the remaining 13 routes, Aer Lingus and Ryanair had a combined market share in excess of 60%.

Ryanair had argued strongly that it did not compete with Aer Lingus. The Commission noted that both Aer Lingus and Ryanair monitored each other's fares and reacted regularly to changes in fares. It referred to the fact that both airlines used specific software to adjust their capacities and prices on a daily basis in response to competitive actions by the other. It also found that the advertising strategy pursued by the two airlines indicated that each considered the other to be its closest competitor noting that they both routinely published advertisements in which they compared fares and services offered by the other. Both carefully monitored and sought to react to each other's promotional fares.

The Commission Decision found that any anti-competitive effects of the merger on air routes to and from Ireland were unlikely to be offset by new entry or expansion by other existing operators.

The Decision noted that there had been numerous unsuccessful attempts at entry on routes, and numerous examples of other airlines pulling out of routes, in and out of Ireland. It also highlighted the fact that there was no example of entry by a third carrier on a Dublin route where Ryanair already operated. The Commission pointed out:

*“In contrast to other competitors, Aer Lingus has “survived” on a number of routes against Ryanair.”*<sup>1</sup>

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<sup>1</sup> Para 512.

The Commission's conclusions regarding the impact of the proposed merger on competition were summarised in para 491.

*“...Aer Lingus and Ryanair are in competition with each other and constrain each other when it comes to determining fares for flights on the overlap routes. The proposed merger would eliminate this actual competition between the Merging Parties, giving the merged entity significantly increased market power with the likely consequence of increased fares and/or a reduction of the number flights for passengers wishing to travel to or from Ireland. Indeed, post-merger, as predicted by standard ‘non-coordinated effects’ analysis...both carriers would internalise the effects of setting higher fares on each other. In particular, the merged entity would have the incentive to set higher fares for Aer Lingus since most of the customers lost would be captured by Ryanair.”*

The Commission also found that the merger was likely to lead:

- to lower quality service;
- less consumer choice; and
- would reduce potential competition with less pressure on the merged entity to establish new routes.

#### **4. The Court Judgment.**

##### **(a) The Merger Case.**

Ryanair advanced five main arguments in its appeal against the decision claiming that the Commission had made manifest errors of assessment regarding:

1. The competitive relationship between Ryanair and Aer Lingus;
2. Barriers to entry;
3. Route-by-route analysis;
4. Efficiencies; and
5. Commitments offered by Ryanair to offset any competition concerns.

The Court dismissed all of Ryanair's arguments.

Ryanair claimed that the Commission had operated on a false premise that Ryanair and Aer Lingus were "like for like" in concluding that the two airlines were each other's closest competitors. It argued that the parties were not competitors due to differences in their costs and fares,<sup>2</sup> differences in service levels and the fact that Ryanair operated to secondary airports while Aer Lingus used primary airports. The Court rejected these arguments.

The Court also rejected Ryanair's claims that the Commission had erred in finding that new entry would constrain any price increase post-merger, due to barriers to entry. Although Ryanair had cited a number of examples of entry, the Court noted that many of those entrants were no longer present one year later.

In its decision rejecting Ryanair's efficiency arguments, the Commission stated that "[t]here appear[ed] not to exist business documents, dated premerger, which objectively and independently assess the scope for efficiency gains from acquiring Aer Lingus". It also described such documents were "critical" to show that Ryanair's business model was different, to that of Aer Lingus and that its cost

structure could be successfully replicated in Aer Lingus post-merger. The Court observed, however, that "*the Commission was not entitled to require a particular type of document, such as documents, dated pre-merger, which objectively and independently assess the scope for efficiency gains generated by the acquisition, to dispute the relevance of information deriving from another type of document which might be provided.*"<sup>3</sup>

#### **(b) Minority Shareholding Case.**

In its decision of 20<sup>th</sup> December 2006 to conduct a detailed investigation of the proposed merger the Commission stated that the acquisition of shares before and during the public bid period as well as the announcement of the public bid itself constituted a single concentration within the meaning of Article 3 of the merger regulation.

During the course of the Commission procedure, Aer Lingus wrote to the Commission on several occasions asking it to order Ryanair to dispose of its shareholding in Aer Lingus. On 27<sup>th</sup> June 2007, the day it adopted its decision prohibiting the merger, the Commission wrote to Aer Lingus stating:

*"that the Commission's services did not have the power to order Ryanair to divest its minority shareholding, or to take other measures to restore the situation prevailing before the concentration was implemented, under Article 8(4) and (5) of the merger regulation."*

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<sup>2</sup>The Competition Authority advanced a similar argument in *Kerry/Breeo* arguing that price

differentials indicated that own label products were not a close substitute to branded products.

<sup>3</sup>Para 409.

It added that this “*was without prejudice to the Member States’ powers to apply, if necessary, their national legislation on competition to Ryanair’s acquisition of a minority shareholding in Aer Lingus.*”<sup>4</sup> Following further correspondence the Commission wrote to Aer Lingus on 11<sup>th</sup> October 2007 stating that it had no power to compel Ryanair to dispose of its shareholding. On 19<sup>th</sup> November 2007, Aer Lingus lodged an application under Article 230 EC requesting that the Court annul the Commission decision of 11<sup>th</sup> October.

The Court rejected the Aer Lingus claim. It held that Ryanair’s minority shareholding did not enable it to exercise decisive control over Aer Lingus. Like the Commission it took the view that even though the Ryanair shareholding was sufficient to block certain resolutions, this did not give it control. It concluded that there was not a concentration within the definition of the Merger Regulation because the merger had been prohibited by the Commission and the Commission did not therefore have the power to order Ryanair to dispose of its shareholding. This was despite the fact that the Commission had ruled that the acquisition of shares by Ryanair before and during the public bid constituted a “single concentration”. It seems strange that if it was part of a single concentration it can remain in place after the concentration has been prohibited.

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<sup>4</sup>Para 19.

<sup>5</sup>See, for example, Case C-413/06 *Bertelsmann AG v Independent Music Publishers & Labels Association (Impala)* [2008] ECR I-4951. The EU

The Court also rejected a claim by Aer Lingus that the acquisition of a minority shareholding in a competitor undertaking in a duopoly inherently distorts competition because the company with such a shareholding has less incentive to compete with a company in whose profitability it is interested. The Court observed that this claim is disproved by the fact that after acquiring its shareholding in Aer Lingus, Ryanair entered four routes previously served only by Aer Lingus and

increased its frequencies on six other routes where it competes with Aer Lingus. This view contrasts with other judgments in which both the General Court and Court of Justice have held that the existence of certain structural characteristics known to facilitate tacit collusion is sufficient to establish joint dominance.<sup>5</sup>

## **5: Conclusions.**

Following the judgment, Ryanair has indicated that it could make a fresh bid for Aer Lingus at some future date. It would appear that any such bid would have to overcome considerable hurdles as the Court judgment held:

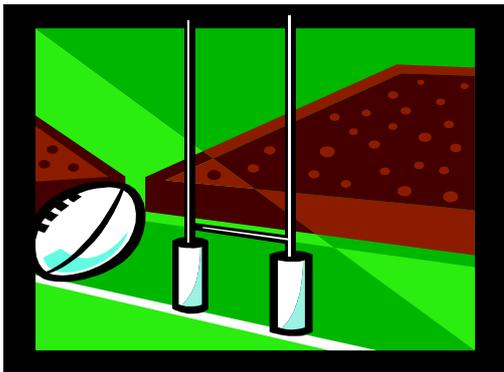
*“If Aer Lingus did not exist, the temptation would be great for Ryanair to maximise its profits to take account of the lack of competitive pressure resulting from the acquisition of its main actual or potential competitor on the relevant markets. Ryanair’s intentions in*

analysis of joint dominance is analysed in detail in P. Massey and M. McDowell, Joint Dominance and Tacit Collusion: Some Implications for Competition and Regulatory Policy, *European Competition Journal* 2010.

*relation to the use of Aer Lingus or its former pricing practices do not affect the credibility of that structural risk, which is apparent from the analysis of*

*the anti-competitive effects connected with the elimination of competition between the parties to the concentration.”<sup>6</sup>*

## Broadcast Proposal Could Harm Irish Rugby.



### 1. Introduction.

The Minister for Communications, Energy and Natural Resources has proposed designating Ireland's games in the Six Nations Rugby Championship ("the Six Nations") and all matches in the European Rugby Cup (ERC, also known as the Heineken Cup) involving Irish teams for live broadcast on free-to-air television channels within the State. The Minister's proposals raise some very important public policy issues regarding broadcasting, the organisation of professional sports and the relationship between sport and government.

### 2. Economics of Professional Team Sports.

There is an extensive literature on the economic characteristics of professional sports leagues which is particularly

relevant to understanding the potential implications of the Minister's proposals. This literature recognises that professional sports leagues have certain unique characteristics which distinguish them from other kinds of business.

Professional sports teams seek to hire suitably talented players and coaches with the aim of maximising the likelihood of success on the field subject to a budget constraint. On-field success in turn is likely to generate increased revenues by raising attendances, increasing sales of team merchandise, and making the team more attractive to business sponsors.

Sports leagues require a greater degree of cooperation between member teams than is generally true of competitors in other industries. No individual team can produce a single unit of output, i.e. one match, on its own. Only by acting collectively can a league and its member clubs produce a full season of games resulting in a championship competition. Whereas in other industries firms seek to take business from their rivals and would gain if their rivals were forced out of business, this is not true of sports leagues, since a team that put its rivals out of business by taking customers

<sup>6</sup> Para 251.

away from them would have no teams left to play against.

Uncertainty of outcome is widely considered to be an essential feature of sports and a major attraction for fans. In the absence of any revenue sharing arrangements, teams from larger centres of population will tend to have a larger supporter base and earn higher revenues enabling them to hire better quality players and generally be more successful. Sharing of revenues from the collective selling of broadcasting rights evenly among all the teams in a league to promote competitive balance is a feature of US professional sports leagues.

Competitive balance is arguably less of an issue in European sports, especially football, because most leagues have a system of promotion and relegation, while the top teams qualify to play in lucrative European wide competitions such as the Champions League.<sup>7</sup> Thus, although broadcasting rights are sold collectively the revenues are not distributed evenly. There is evidence of a growing revenue and competitive imbalance in European football leagues.

The abolition of restrictions on player mobility, combined with rules which restrict teams to playing in their own national leagues has led to a situation where clubs in smaller countries lack the financial capacity to compete for the best players. This has resulted in teams from the four or five largest countries acquiring virtually all of the best players, with a consequent decline in the quality

of leagues in smaller countries and a growing domination of European wide competitions by teams from the five largest countries.

### **3. Sport and Broadcasting.**

The importance of sports to broadcasters is a relatively recent phenomenon. Changes in technology mean that broadcasting has moved from a situation where content competed for scarce distribution outlets to one where abundant spectrum has led to a proliferation of television channels competing for relatively scarce content. It has also facilitated the emergence of pay-TV channels which charge viewers directly. Major sports rights have migrated to these channels and the value of those rights has increased dramatically over the past ten years.

The value of sports rights to a broadcaster and thus the price that they are prepared to bid for such rights increases with exclusivity, scope and duration. A broadcaster will pay more for exclusive rights. Non-exclusivity not only reduces the price broadcasters are prepared to pay but also reduces the incentive for broadcasters to promote broadcasts of an event as such promotional activity is also likely to benefit its rival(s).

In 2009 the top 20 sports events in terms of viewer numbers in Ireland were all broadcast by RTE Two. Nine of these events are not currently designated for free-to-air broadcasting but the State

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<sup>7</sup> The US National Football League is generally regarded as having the most even distribution of revenues between teams and as having a very high degree of competitive balance. Its revenue sharing arrangements are also seen to have

enabled the *Green Bay Packers* to enjoy considerable success despite being located in a far smaller city than any of the other NFL teams. The English Rugby Premiership also operates a system of revenue sharing.

broadcaster, nevertheless won the right to broadcast them.

#### **4. Irish Rugby.**

Compared with association football or soccer, rugby has traditionally been played in a relatively limited number of countries throughout the world. For most of its history rugby operated as an amateur game and payments for playing have only been permitted since 1995.

Following the move to professionalism there has been a significant re-structuring of the sport. The two largest rugby playing countries in Europe, England and France, continue to have their own national leagues with a promotion and relegation system between the top division and lower divisions, while the top teams qualify to play in European competitions like the ERC. They are therefore similar to European football leagues.

Three of the smaller countries, Ireland, Scotland and Wales established a new joint league, known as the Magner's League, in 2000/1.<sup>8</sup> Thus, in contrast to the situation which pertains in football, the smaller countries were able to establish a league which has a sufficiently large support base to enable them to compete with clubs in the two larger countries for players, something which they would almost certainly be unable to do if they were confined to playing in national leagues. The small number of top-level rugby playing countries means that, unlike, football, the smaller countries also have a significant

representation in European competitions such as the ERC.

A further important factor is that international games generate the major share of the revenues, again unlike football, and this has enabled the national associations, particularly in the smaller countries to exert a greater degree of control over the organisation of the game. The Magner's League and ERC has given Irish teams the opportunity to compete in competitions at the highest level.

In the nine years of the Magner's League Irish teams have won the competition on five occasions. Welsh teams have won on four occasions while no Scottish team has yet won the competition. Irish teams have won the ERC four times in 15 years, compared with six wins for English teams and five by French teams. There have been no Italian, Scottish or Welsh winner. Thus Irish teams have arguably punched above their weight in both competitions. This view is supported by the overall playing record of Irish teams in both the Magner's League and ERC.

Table 1 gives details of ERC matches won by country since the competition's establishment in 1995/6.

The table shows that Irish teams have the best overall record in the ERC having won almost 60% of all games played (176 wins from 294 games). England and France come next winning 57% and 56% respectively of all games played. Italy has the poorest record with Italian teams winning an average of one game out of

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<sup>8</sup> In its first two seasons, teams in the competition were divided into two groups with the top four from each group qualifying for the knock-out stages but from 2003/4 it switched to a straight

league format. In 2009/10 a play-off involving the top four teams in the league was introduced. Two Italian teams are set to join the league from next season.

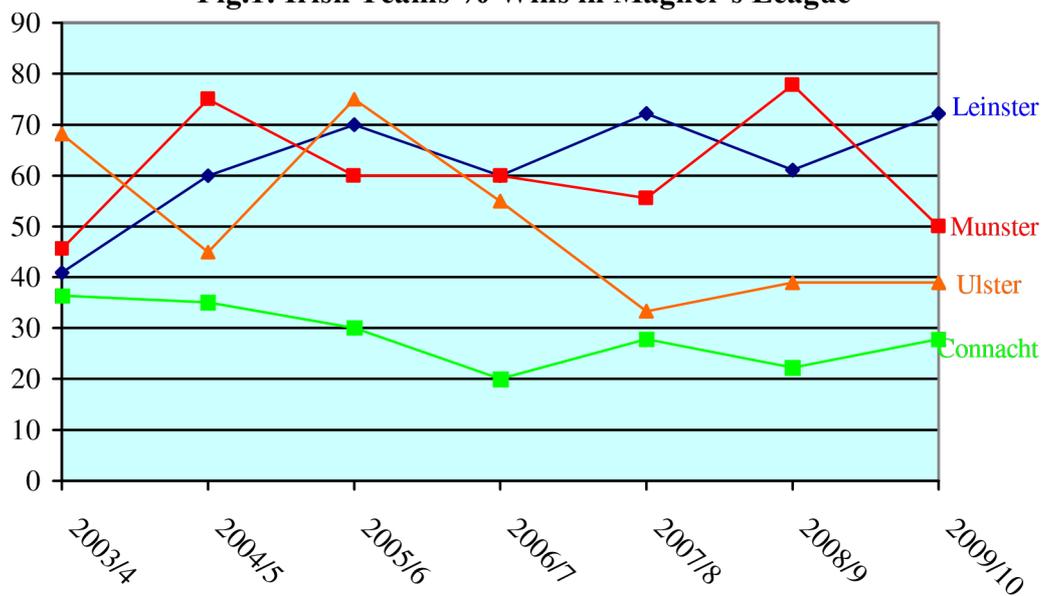
every eight. Scottish teams have won only 29% of their games.

Table 1: ERC % Wins By Country 1995/6-2009/10	
Ireland	59.9
England	57.8
France	56.8
Wales	44.3
Scotland	29.3
Italy	12.6

Fig 1 shows the percentage of games won by each of the four Irish teams in the Magner’s League since it went to a league format in 2003/4.

Leinster’s win ratio has not dropped below 60% since 2003/4. Munster have also been very successful. While Ulster’s performances in the early years of the league were in line with those of Leinster and Munster, its win ratio has dropped to around 40% in recent seasons. Connacht has the poorest record of the four Irish teams with a win ratio of around 30% or less in recent seasons.

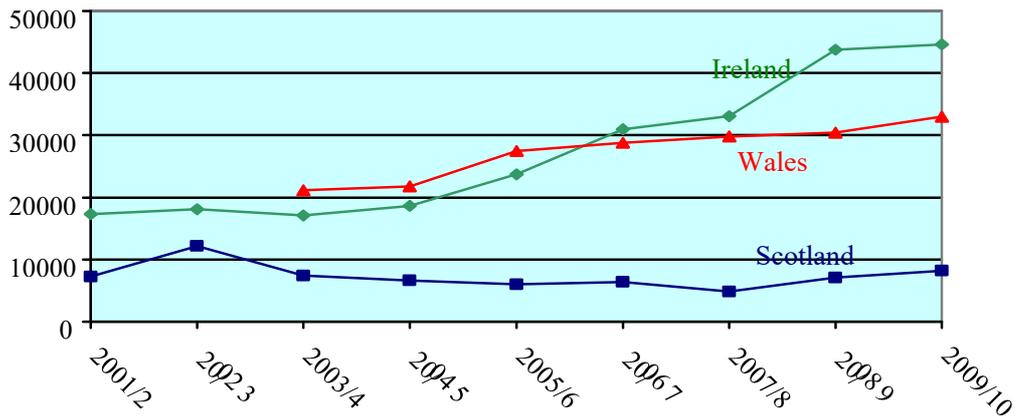
**Fig.1: Irish Teams % Wins in Magner's League**



The success of Irish teams, most notably Leinster and Munster in both competitions has been reflected in growing attendances in both

Competitions. Fig. 2 illustrates attendances by country at Magner’s League games.

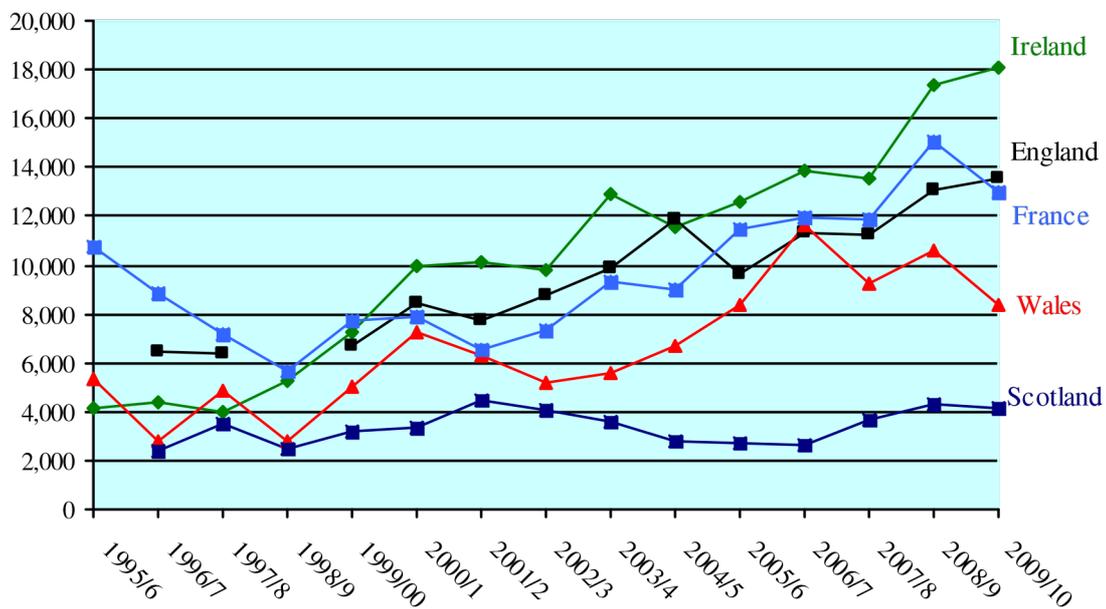
**Fig.2: Average Magners League Attendances by Country**



The chart shows that the combined average attendances of the four Irish clubs have not only increased significantly but for the past four years have exceeded those of the four Welsh teams, although rugby is normally regarded as the main sport in Wales. In 2009/10 the four Irish teams had a combined average aggregate attendance of 44,000 compared with an average

Fig. 3 shows average attendances per country for ERC group matches. The chart shows that the Irish teams have recorded a significant rise in attendances particularly over the past decade. Average attendances in Ireland have been higher than in the other participating countries for the past five seasons. In 2009/10 Irish teams had an average attendance of 18,000 at group

**Fig.3: Average Attendances at ERC Group Matches**



**5. Impact of the Minister’s Proposals.** aggregate attendance of 33,000 for the four Welsh teams. The two Scottish clubs had a combined average attendance of just over 8,000.

broadcast revenue this could be made up games, compared with English and French teams which drew average crowds of around 13,000, while Welsh and Scottish teams had average crowds of 8,000 and 4,000 respectively.

Much of the rise in attendances is due to Leinster and Munster and almost certainly reflects the success of both teams in recent years. The downside is The IRFU claim that designating matches in the Six Nations and ERC as free-to-air could cost it up to €10-12m. The Minister has suggesting that while the IRFU might lose around €3m in from other sources.

Designating events free-to-air will almost certainly reduce the price that broadcasters will pay for such events. Non-exclusive rights are worth less to broadcasters. Competition for the rights would probably be reduced which would also reduce the price paid for the rights. There would be little incentive for the State broadcaster RTE to compete for exclusive rights when it could be reasonably confident of obtaining rights at a much lower cost by virtue of their designation for free-to-air. The Minister's proposals would weaken the IRFU's bargaining position vis-à-vis broadcasters and the other participating countries which would again be likely to lead to a loss of revenue for the IRFU. It is difficult to believe that any lost broadcast revenue could easily be made up from other sources as that presupposes the existence of hitherto untapped revenue sources.

The IRFU had total income in 2009/10 of approximately €59m. A loss of €3-5m would therefore represent a very serious drop in revenue. This figure is well below the level of losses which the IRFU claims it would suffer. The IRFU spends €38m on its professional teams and a further €11m on supporting the sport at club/domestic level. There is limited scope for savings in other areas such as interest and depreciation charges, which are largely outside the IRFU's control, while administration and overheads account for a small proportion of total expenditure, again leaving little

that many of these "new" supporters may drift away if the teams' performances decline.

room for savings in that area. Thus the bulk of any savings would have to come in reduced spending on professional teams and/or cuts in support to the club/domestic game. Either option would have a serious adverse effect on Irish rugby.

Irish teams, particularly Leinster and Munster have been quite successful in recent years, which is down to the fact that they retained their top Irish players and recruited top quality overseas players. A reduced budget for the professional teams will adversely affect their ability to recruit and retain the best players. As in football there is an international market for players as was clearly demonstrated by a major exodus of top English players to French clubs in recent years.

Any reduction in IRFU revenue is likely to have a detrimental impact on Irish teams' performances on the field. The strong upsurge in support for Irish teams in recent years could easily evaporate in those circumstances. Sponsorship revenue could also be hit as sponsors like to be associated with successful teams.

There are also potentially wider implications. A decline in Irish teams' performances in the ERC could ultimately lead to Ireland losing one of its ERC places.

The Magner's League has a fixed membership like US sports leagues and thus competitive balance, which has been a feature of the League up to now, is likely to be important. A decline in the performances of Irish teams in the



Magner's League could reduce the degree of competitive balance and make the League less attractive. With support levels in Scotland already quite low, any drop in Irish teams' Magner's League attendances would also raise questions about its long-term viability. Any threat to the Magner's League would have very profound implications for the future of Irish rugby.

### **Conclusions.**

The IRFU was a strong opponent of the move to professionalism at the time the International Rugby Board chose to go down that route. It has, however,

developed a successful business model which has yielded considerable on field success in recent seasons. Compared to teams in some of the larger countries its resources are fairly modest. Some of the largest English and French club sides have budgets of around €16m. The IRFU allocates €35m between its four provincial teams, although the teams would supplement this with revenue from other sources. Viewed in that light, the record of Irish teams in recent years is a most impressive one. Any loss of revenue could have quite a dramatic impact on Irish rugby.

## **Is There a Doctor in the House? Competition Authority GMS Report.**

### **Introduction.**

Last week the Competition Authority published another report on competition in the medical profession. The latest report deals with competition within the General Medical Services (GMS) system.<sup>9</sup> The report's main conclusions were that:

- Competition between GP practices is restricted by certain features of the GMS.
- The GMS favours existing GP practices and protects them from competition from newly qualified GPs.
- It reduces the number of GP practices available to patients, by creating unnecessary barriers to entry.

- Negotiations by the IMO in respect of fees are, in the Authority's opinion prohibited by section 4 of the Competition Act, 2002 and Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

The report claims that as a result:

- Both public and private patients have fewer GP practices to choose from; and
- There is less pressure on GP practices to compete on price for private patients and to be innovative in the service they provide.

### **Competition Among GPs**

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<sup>9</sup> Competition Authority, Competition in Professional Services General Medical

Practitioners Part III: Increasing Competition within the General Medical Services (GMS) System

The Authority argues that competition among GPs in Ireland is constrained by an overall shortage in the number of GPs at national level. It also states that GPs in Ireland are exposed more directly to competition than those in many other European countries. This is because in many EU states there is universal access to free GP services whereas in Ireland the majority of people (66%) pay for GP services. Irish GPs are free to charge private patients whatever they feel the market will bear and private patients are free to “shop around” if they are unhappy with the price charged. This seems a rather curious argument. Are Irish consumers better off by virtue of having to pay for GP services? Do they receive a better quality of service by virtue of having to pay directly?

Under the GMS, GP services are provided free of charge to 1.6m people and, according to the Authority, the vast majority of GP practices in the state participate in the scheme. GPs with a GMS contract are paid an annual capitation fee for every patient on their list irrespective of the number of visits made by the patient. They also receive certain other payments, but the capitation fee represents 69% of total payments to GPs participating in the GMS scheme.

In light of survey data on the average number of GP visits made by GMS patients, the Authority estimates that the average cost per visit per GMS payment is higher than that per private patient. In the past GPs received a payment per visit in respect of GMS payments but this was seen to give rise to perverse incentives and was replaced with a fee per patient. It is perhaps not surprising that the average fee per visit per GMS patient is

higher. A GP can charge a private patient for every visit. When a GP takes on a GMS patient s/he has no way of knowing how often that patient will choose to visit. The fee per patient system thus involves some risk for the GP and one might expect that this would be reflected in the price. Would a GP take on a private patient on the basis of a flat rate annual payment irrespective of the number of visits?

The Authority argues that the market for GMS contracts needs to be opened up and that all qualified GPs should be able to obtain a GMS contract. It notes that patients have a choice of doctor under the GMS and concedes that this allows an element of competition to develop between GPs at local level but argues:

*“In practice however, the scope for competition is curtailed because of patient inertia (which results in low switching rates) and because of restrictions inherent in the GMS system, which influence the number and location of GMS-contracted GPs throughout the State.”*

If patient inertia is a problem, then, simply increasing the number of GMS contracts may not make much difference. Faced with patient inertia, new GPs might be reluctant to branch out on their own in the hope of winning GMS patients from existing practices.

The Authority also claims that:

*“The GMS system encourages GPs to locate ‘where the lists are’ rather than where they see a business opportunity.”*

It seems likely that there will be a higher proportion of GMS patients in some areas rather than others. It is not clear, therefore, what benefit would arise

from the Authority's proposal that GMS contracts should be mobile. GPs would hardly locate where there are relatively few GMS patients.

In the case of collective agreements on fees the Authority argues:

*“The prohibition on collective negotiations is there to protect consumers and the State from concerted practices by independent businesses which could result in them (i.e. consumers and/or the State) paying higher prices than necessary for their purchases. In the current instance, its purpose is to protect the State from paying excess prices for GP services purchased by the HSE.”*

Following publication of the Authority report, an IMO representative was quoted in a newspaper as stating that the Department had agreed to amend the Competition Act to permit such collective negotiations. If that is the case, it would seem that the Authority has failed to convince its parent Department that such provisions protect the State.

The Authority recommends that the Minister for Health and Children should have power to set fees unilaterally. The Minister already has power under the Financial Emergency Measures in the Public Interest Act, 2009 to unilaterally reduce fees paid to various professionals. Indeed the Minister has recently announced that she is considering making Regulations under the Act to reduce the rate of fees and associated payments payable to certain health professionals including GPs contracted to the HSE and she has initiated a public consultation on that issue.

## Conclusions.

This Report is the latest in a series of reviews of professional services which was initiated by the Authority many years ago at this stage. It raises a number of interesting issues, although some of the proposals are difficult to understand. An expert group report on health services published on Friday 9<sup>th</sup> July recommended major changes regarding access to GP services and charges for such services which, if implemented, could render the Authority's GMS review obsolete.

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