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Editorial.

Welcome to the latest issue of Compecon's Competition and Regulatory Economics EZine. In this issue we consider the EU Commission's recently published proposals for reform of EU State Aid rules in respect of services of general economic interest (SGEI). Our second article summarises a recent joint report by the UK Office of Fair Trading and Competition Commission on a number of investigations into mergers in the retail sector. Ireland's agreement with the EU/IMF requires the Government to implement the outstanding recommendations from the Competition Authority's 2006 report on the legal professions including the establishment of an independent legal regulator. Our third article looks at recent reforms introduced by the Northern Ireland Bar Council and highlights differences between a number of the Authority's key recommendations and those included in a similar report into the professions in Northern Ireland which was conducted at around the same time.

In our last issue we noted that the UK Appeal Court had upheld the Competition Commission's decision requiring the British Airports Authority (BAA) to dispose of its interest in Gatwick, Stansted and either Edinburgh or Glasgow Airports. The UK Supreme Court subsequently refused the BAA leave to appeal the judgment.

Patrick Massey
Director

Proposed Reform of State Aid Rules for Services of General Economic Interest.

1. Introduction.

On 23rd March the EU Commission published proposals for the reform of State Aid rules for services of general economic interest (SGEI)[1] together with a Commission Staff Working Paper reviewing the application of the current rules which have been in place since 2005.[2] The Commission has indicated that it is proposing that reforms would be designed to provide greater clarification on the rules, to simplify the rules in respect of aid that is unlikely to have any significant distorting effects and to promote greater efficiency and improve the quality of SGEIs. The current SGEI Framework is due to expire in November.

2. Background.

In many cases SGEIs cannot be provided without Government financial support. Such financial support is subject to the TFEU State Aid rules. Article 107(1) TFEU states:

> *"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

This prohibition applies to aid paid in respect of SGEI, to the extent that they involve the performance of economic activities by an undertaking.

Article 106(2) TFEU, however, provides for a specific, limited exception for SGEI aid. Article 106(2) states:

> *"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."*

The Court of Justice in *Altmark* stated that compensation in respect of SGEI is not State aid if it simply offsets the net costs of carrying out public service obligations. The Court, however, imposed strict conditions which had to

[1] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Reform of the EU State Aid Rules on Services of General Economic Interest*, Com (2011) 146 Final, 23.3.2001.

[2] Commission Staff Working Paper, *The Application of EU State Aid Rules on Services of General Economic Interest Since 2005 and the Outcome of the Public Consultation*, 23.3.2011.

be satisfied before such aid would not be regarded as constituting state aid. In particular such aid must satisfy the following four conditions before it can be regarded as not constituting state aid:

1. The recipient undertaking must actually have public service obligations to discharge, and the PSO must be clearly defined;
2. The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
3. Compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of PSOs, taking into account the relevant receipts and a reasonable profit for discharging those obligations.
4. Where the undertaking which is to discharge PSOs is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the necessary means, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

3: Current Framework.

The Commission adopted a set of legal instruments in 2005, known as the SGEI Package ("the Package") which clarifies the circumstances in which State aid granted for the financing of SGEI is compatible with the Treaty. The Commission subsequently adopted a number of decisions in specific cases.

The Package comprises three instruments:

1. The SGEI Decision sets out certain rules, which if satisfied, mean that aid does not need to be notified to the Commission where the amounts involved fall below certain thresholds. Articles 4, 5, and 6 of the Decision impose conditions which correspond with the first three requirements established by the ECJ in *Altmark*. The SGEI Decision does, however, contain any condition equivalent to the fourth *Altmark* requirement requiring the SGEI provider to be chosen on the basis of a competitive tender or for its costs to be benchmarked against those of a well run undertaking.
2. The SGEI Framework sets out the conditions under which State Aid in respect of SGEI notified to the Commission can be considered compatible with the internal market. The conditions in the Framework are the same as those in Articles 4, 5 and 6 of the Decision.
3. The Transparency Directive provides that separate accounts are required for all SGEI services for which a financial compensation is paid by some public authority, whether or not that compensation constitutes State aid.

4: Summary of Commission Proposals.

The Commission has stated that its consultation with Member States and various stakeholders showed that there was scope for improvement on the current Framework. In particular, according to the Commission, there is a need for clearer, simpler, more proportionate and more effective instruments to ensure an easier application of the rules and to promote more efficient delivery of SGEI.

The Commission proposals state that it is examining the possibility of providing additional clarity on a number of key issues, including the scope of the State Aid rules and the conditions for the approval of SGEI aid by the Commission.

The current Package applies in a more or less uniform way to a very wide range of economic sectors and actors. The Commission has indicated that it is exploring ways to offer a more diversified and proportionate response to different types of SGEI. In the upcoming reform the Commission proposes to distinguish more clearly between different types of services depending on the extent to which State aid poses a serious risk of creating distortions of competition in the internal market. It thus proposes simplifying the process for aid to SGEI which have little impact on competition within the internal market. It has also stated, however, that "it will also seek to ensure high quality public services and efficient allocation of State resources, thus avoiding distortions of competition in the internal market as effectively as possible, as one of the key objective of the reform of the Package."

The Commission proposals note that many public services organised by local communities are of a relatively limited scale and thus only have a minor impact on trade between Member States, while certain types of social services present a series of particularities as regards their financing and objectives. It suggests that one option could be to simplify the application of the State aid rules for such services. It also suggests that the administrative burden put on the public authorities concerned should be proportionate to the impact that the measure has on competition in the internal market. The Commission has stated that it would therefore assess:

- Under what conditions and circumstances certain aid could be regarded as *de minimis*;
- for which types of services and under what conditions an individual State aid notification would be required; and
- whether the thresholds in the current SGEI Decision should be modified.

The Commission proposals state that the risk of distortions of competition in the internal market is particularly high in sectors characterised by large scale commercial activity with a clear EUwide dimension where operators are entrusted with PSOs. It notes that under the current Package, compensation granted for the provision of SGEI can cover the costs incurred by the provider along with a reasonable profit margin. There is no provision for taking into account how the costs incurred by the SGEI provider compare to those of a well-run undertaking. In other words, there is no obligation to ensure that SGEI are efficiently provided.

According to the Commission:

> *"Such a situation tends to distort the functioning of markets and may ultimately harm service quality and efficient delivery. In addition, it is misaligned with the general public policy objective of efficiency in public*

spending and correct resource allocation."

The Commission has therefore indicated that it is considering to what extent greater account should be taken of both efficiency and quality when deciding on the approval of State aid measures in relation to SGEI. Such consideration could also include measures aimed at achieving appropriate transparency in relation to public expenditure for SGEI or to the identification and definition of SGEI obligations, as well as measures aimed at taking into account efficiency over the duration for which an undertaking is assigned responsibility for providing SGEI.

4: Comment.

The basic principles set out in the Commission proposals are welcome. The Commission has provided significant clarification in respect of how the State Aid rules apply to SGEI payments. Nevertheless, further clarification would be welcome.

Similarly, the Commission's proposals to simplify the rules and reduce the administrative burden on public bodies and undertakings in minor cases also represent a welcome step. The absence of any requirement in cases where State Aid is given for SGEI that such services should be provided efficiently and to ensure quality represents an obvious shortcoming. Where public funding is being provided to support the provision of SGEI, taxpayers are entitled to expect that services should be provided efficiently and be of the highest quality. The Commission's proposals to address these issues in its upcoming reform of the SGEI Framework are therefore very welcome. It will be very interesting to see how the Commission proposes to address these key issues.

Analysis of UK Retail Merger Cases.

1: Introduction.

The Office of Fair Trading (OFT) and the Competition Commission (CC) have published a review of merger cases in the retail sector.[3] The review focuses on three aspects of such cases:

1. The definition of catchment areas in retail mergers;
2. How the agencies decide whether merging retailers compete locally or at national level; and
3. Quantitative techniques that can be used to assess how mergers might affect prices.

The first two issues are particularly important in the context of retail mergers, while the third is of more general application. The publication of a report such as this is particularly helpful

[3] Competition Commission/Office of Fair Trading, *Commentary on Retail Mergers*, March 2011.

to business and practitioners as it provides additional information on the approach adopted by competition agencies.

The substantive test applied by the UK competition agencies in merger cases is the substantial lessening of competition (SLC), which is also contained in Ireland's Competition Act, 2002. The two UK agencies perform different tasks under the UK legislation. The OFT is responsible for Phase 1 investigations. Where it concludes that a Phase 2 investigation is required, it refers a merger to the CC. This means that the two agencies apply a different threshold when evaluating a merger. The OFT applies a "realistic prospect" threshold whereas the CC applies a "balance of probabilities" threshold. The Competition Authority does not apply a "realistic prospect" threshold when deciding to undertake a full (Phase 2) investigation. In many cases it has simply stated that it was unable to conclude that a merger would not result in an SLC when deciding to institute a Phase 2 investigation.

2: Catchment Areas.

In the case of traditional retailers, the starting point for the UK agencies is to consider the extent to which there is an overlap between the merging parties' stores. This has commonly involved identifying the geographic area within which individual stores derive a large proportion of their business which is referred to as the "catchment area".

The agencies have frequently used distance or drive-times to identify catchment areas, although they have applied varying distance and times depending on the kind of retail outlet and whether outlets are in an urban or rural area. In other words, the UK agencies have concluded that different stores types may have different catchment areas.

Different sized stores may have different catchment areas if they have differentiated customer offerings (for example, differences in the amount of choice or product categories available in different sized stores or differences in prices between store types). Thus, a large supermarket may have a larger catchment area than a convenience store. For example, the CC identified different catchment areas for different sized stores in *Safeway*.[4] (See below). Similarly, the OFT noted that catchment areas for larger out of town carpet stores were larger than for some independent outlets.[5]

The report also notes that the agencies have generally concluded that retail

[4] Competition Commission, *Safeway plc and Asda Group Limited (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets PLC; J Sainsbury plc; and Tesco plc (groceries)*, September 2003.

[5] OFT, *Completed acquisition by Carpetright plc of four Allied Carpet stores, Case ME/4570/10*, 13 September 2010.

outlets located in rural or remote areas generally have different catchment areas to shops in urban areas. Thus, in *Safeway* the CC found that in the case of large supermarkets with a floor area of 1,400m^2 or more, the catchment area was limited to a 10-minute drive-time in urban areas and a 15-minute drive-time in rural areas. Smaller shops were found to have a catchment area of a 5-minute drive-time in urban areas and 10-minute drive-time in rural areas.

In a number of cases the catchment area was designed so as to capture around 80% of an individual store's business. A variety of evidence was used to identify the origin of sales in such cases such as loyalty card data, home delivery records, customer contact details, customer surveys and company documents.

The impact of store openings on other retailers in a particular locality has also been used by the agencies to determine catchment areas in a number of cases. The OFT has used documentary evidence which reviewed the effect of store openings. In a number of cases the CC has used econometric analysis of the impact of store openings on the merging parties' stores to help identify the appropriate catchment area

3: Local and National Competition.

In the case of mergers between retail chains, the issue of whether the parties compete at a local or a national level can be important.

Retail chains may operate a national pricing policy, while other key aspects of their retail offer may also be set nationally. The report notes that in a number of retail mergers the parties have argued that:

- The merger would not have an impact on prices and services to customers at a local level because many of the important aspects of their offer to consumers are determined at a national level and they would not change their national policy to a local one as a result of the merger, and
- where the merger involved a firm with a national policy acquiring a small number of stores, there would be no increase in national prices or deterioration of other aspects of their retail offer. When considering such arguments, the agencies have analysed:
- whether the merging parties competed locally;
- whether they competed nationally on some or all aspects of their retail offer; and
- whether the merged firm's competitive strategy would be changed as a result of the merger.

The report points out that a centrally set policy need not be the same as a national policy. In some cases, the OFT found that retailers had a centrally set strategy which set out specific arrangements for local actions and responses such as targeted discounts, margin support, or order of store refurbishments. Thus, even though retail chains might operate a centrally-set strategy across all of their stores, there could be important variations in the degree of competition in local markets.

In a number of cases the OFT has identified both national and local elements of competitive strategy. In *Somerfield/ Morrison*, the CC found that although prices were set nationally Somerfield had a tiered pricing strategy, leading to variation in prices at local level.[6]

The report notes that the agencies analyse a variety of evidence in order to identify whether the parties competed locally or nationally. The kind of evidence used in such cases included evidence on the extent to which:

- The parties determined some or all of their retail offer by reference to national or local competitive conditions and the circumstances in which the retail offer might be flexed (at the national, regional and local level);
- The merger might create an incentive to change the merging parties' existing national policy in response to local competition; and
- The extent to which the merger created an incentive to change prices, or other aspects of service, on a national level, but reflecting local interaction.

Evidence used in cases when looking at the pricing aspects of the offer included:

- Internal strategy documents setting out how prices were set;
- internal documents outlining local management's responsibilities;
- internal documents outlining responses to local entry; and
- evidence on how retailers responded to underperformance by one or more local stores.

Prices are not the only variable which the agencies have considered. Even when the merging parties operated a national pricing policy, they have analysed whether other variables are affected by local competition including:

- Promotions, vouchers, offers;
- local advertising;
- quality of management and staff training;
- product range, availability and quality;
- the level of pre and after sales service;
- store aspect: layout, size, maintenance, decisions to refurbish and facilities; and
- store opening hours.

The report notes that during Phase 2 investigations, the CC has often conducted an empirical analysis in order

6 Competition Commission, *A report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc*, September 2005.

to explore whether prices or other aspects of the retail offer are related to the degree of local competition based on price (or margin) concentration analysis or entry analysis. Such analysis asks whether prices or margins were higher in areas where local competition was less intense. For example, in areas where the merging parties' outlets face only one other competitor, they might charge higher prices and provide lower quality service compared with areas where they face greater competition. Even where retailers apply uniform national pricing policies, reducing other aspects of the retail offer, e.g. staffing or service levels, where competition is less intense would tend to lower a given store's costs and therefore increase its profit margins.

In *Somerfield/Morrisons* although both parties had national pricing policies, Somerfield's policy involved tiered pricing which resulted in local price variations. The CC's margin concentration analysis showed that there was a statistically significant relationship between Somerfield's margins and the degree of market concentration in rural areas.

The CC conducted a local price (margin) concentration analysis in *Sports Direct/JJB* due to concerns that, although Sports Direct operated a national pricing policy, other aspects of its retail offer such as store staffing levels, stock deliveries, store opening hours, store maintenance and refurbishment, and stock shortages might vary on a local basis.[7] The analysis did not indicate the existence of any relationship between the degree of competition and local variation of the retail offer.

Entry analysis relies on the fact that if a competing store opens near an incumbent store at least some of the incumbent's custom will be diverted to the new store for a sustained period.

Analysing whether a merger would provide retailers with an incentive to move from a national policy to a local retail offer policy, depends on whether it alters the incentives facing the merged firm and the costs and benefits to it of changing policy. For example, a more local policy might involve additional IT or reputation costs which exceed the likely benefits. The report states that the UK agencies therefore often seek evidence from merging parties as to why they would not have an incentive to change their policy post-merger.

4: Upward Price Pressure Indices. In differentiated product markets, the likelihood of a post-merger price increase depends on the extent to which sales lost by one of the merging parties as a result of a price increase (or a reduction in other aspects of its offer) will be captured by the other merging party. Whether such captured sales will be sufficient to render a price increase profitable depends on the margins and the diversion ratio, i.e. the percentage of sales lost by one of the merging firms that is captured by the other. The report points out that diversion ratios between merging parties may not be symmetric.

[7] Competition Commission, *A report on the acquisition by Sports Direct International plc of 31 stores from JJB Sports plc*, 16 March 2010.

The UK authorities have used surveys and event analysis to estimate diversion ratios. Retail margins may vary depending on the period over which the merging parties could change prices or other key competitive variables in response to change in competition. In *Asda/Netto*, for example, the OFT took the view that a supermarket could change a number of variables including its staffing levels for particular shifts, levels of stock and pricing decisions within one month.[8] If margins are high, unilateral effects are more likely to arise as a result of a merger as high margins imply that demand is relatively inelastic.

The UK authorities frequently use estimates of diversion ratios and margins to carry out simple quantitative analysis such as "illustrative price rises". Such analysis does not attempt to predict post-merger price rises but measures the extent of the upward price pressure.[9]

Such quantitative analysis does not take into account dynamic responses such as repositioning by non-merging parties, entry, and countervailing buyer power. Thus, while such quantitative analysis can provide useful insights into the likely impact of a merger, such results are not sufficient to establish that a merger would result in an SLC. Indeed, such static analysis will generally predict a post-merger price increase. Nevertheless, such analytical tools are widely used in many jurisdictions, although they have rarely featured in Competition Authority cases.[10]

5: Comment.

The report provides some useful insights into how the UK competition agencies have examined the impact of certain factors when analysing the likely impact on competition of retail mergers. This type of exercise can provide useful information to practitioners. While the question of catchment areas and whether retailers compete locally or nationally are particularly relevant to retail mergers, upward price pressure indices are a quantitative analytical tool which may be applied to mergers in various sectors. While upward price pressure indices are widely used in many jurisdictions, they have rarely featured in Competition Authority decisions.

[8] OFT, Anticipated *acquisition by Asda Stores Limited of Netto Foodstores Limited*.

[9] This may provide a measure of upward price movement, if an assumption is made about the degree to which this pressure is passed through to consumers.

[10] In the period from July 2003 to December 2009 around 24 mergers notified to the Competition Authority were either subject to a Phase 2 investigation or were cleared on foot of undertakings offered by the parties at Phase 1. The Authority calculated Diversion Ratios to estimate the possible impact on prices in only one of these cases - M/03/033 – *SRH/FM104*.

Legal Services Reform on Both Sides of the Border.

1: Introduction.

The OFT announced on 5th January 2011, that it welcomed steps taken by the Bar Council of Northern Ireland (BCNI) to encourage price competition among barristers and to improve choice for consumers. The agency, however, indicated that it had ongoing concerns about the regulation of legal services. In particular it stated that this appeared to lack the independence and accountability that had recently been introduced to the legal profession in England and Wales. The Competition Authority has expressed similar concerns regarding the profession in Ireland while the Government's agreement with the EU and IMF includes a commitment to establish an independent legal regulator and to implement any outstanding recommendations from the Competition Authority report on the legal profession.

2: Changes to BCNI Rules.

The OFT began discussions with the BCNI after receiving a number of complaints and conducting its own research into the market for legal services in Northern Ireland, which highlighted competition concerns. The BCNI agreed to amend its Code of Conduct enabling the OFT to resolve its concerns in an effective and efficient manner without having to resort to using its formal powers. The amendments are designed to make it clear that barristers operating in Northern Ireland are not prevented from competing freely on the level of fees charged to their clients. All members of the Bar of Northern Ireland have been sent copies of the new Code of Conduct and the changes have been highlighted on the BCNI's website. The BCNI also agreed to make it easier for barristers from outside Northern Ireland to practise there by publicising that an abridged, flexible procedure is available for obtaining a temporary practising certificate.

3: Outstanding Issues.

The OFT has indicated that it still has concerns about the regulation of the Northern Ireland bar. While welcoming the changes made by the BCNI, an OFT official stated:

> *"However, we believe that an independent regulatory body overseeing the Northern Ireland legal market, as recommended by the Bain report, remains necessary."*[11]

[11] This is a reference to the 2006 Report of the Legal Services Review Group on legal services in Northern Ireland. *Legal Services in Northern Ireland Complaints, Regulation, Competition*, Legal Services Review Group, 2006.

Such comments are interesting, not least because the Competition Authority has repeatedly called for the establishment of an independent regulator for the legal profession in the Republic citing the case of England and Wales. What makes this especially topical is the provision in the agreement between the Government and the EU/IMF to establish an independent regulator for the legal profession and implement any other outstanding recommendations contained in the Authority's 2006 report on the legal profession. The Bain Report on the legal professions in Northern Ireland, which was also published in 2006, reached very different conclusions to the Authority on a number of key issues including regulation, restrictions on business structures and conveyancing services. Its findings may, therefore, be relevant to the debate on reform in the Republic.

3: The Bain Report.

The report pointed out that the legal system in Northern Ireland differed from that in England and Wales and was similar to that in Scotland and the Republic. The legal services market in Northern Ireland is smaller than in the Republic with around 500 solicitors firms and 560 barristers in 2006. Solicitors firms were generally smaller than those South of the border. Solicitors in the North do not have automatic rights of audience in the higher courts but can undertake a specialist advocacy course in order to obtain such rights.

One of the key findings of the Competition Authority's report on the legal profession in the South was its criticism of self-regulation and call for the separation of representative and regulatory functions and for the establishment of an independent regulator.

The main economic argument that can be advanced for self-regulation is based on the fact that regulators often lack information, and it can be very costly for them to acquire sufficient information to enable them to make good decisions. This point was recognized by the Bain Report.

Independent regulation can frequently prove very costly, bad or both. State regulatory bodies are highly susceptible to capture by the undertakings that they regulate and just as likely to introduce anti-competitive regulations. Self-regulation may reduce the cost of acquiring information and make adjustments of regulations easier. Consequently, the efficiency gains due to self-regulation need to be compared to the potential costs of an alternative regulatory regime. The Authority's interim report stated:

> *"A Legal Services Commission would not necessarily be more costly than the present system."*

It went on to state, however:

> *"Even if there were higher costs, they would likely be associated with a higher degree of transparency and accountability, with attendant benefits."*[12]

The Final Report includes no assessment of the likely costs and benefits.

The Authority correctly pointed out that self-regulation by the legal profession gives rise to potential conflicts of interest. The Bain Report found:

[12] Para 3.53.

> *"In spite of these risks, the Law Society and the Bar Council have generally established an effective framework for regulating themselves."*

It noted that there were areas for concern with regard to complaints handling

> *"...but the professions have a good record on entry to the profession, professional rules, and codes of conduct. The Law Society for Northern Ireland, supported by many other consultees, stressed that, unlike in England and Wales, there has not been a history of regulatory failure in this jurisdiction. It is difficult to argue with that statement."* (Para 3.26)

It went on:

> *"Indeed, a number of examples support the view that the professions in Northern Ireland have performed their regulatory duties well."* (Para 3.28)

The Bain Report also noted that a review by the Scottish Parliament's Justice Committee of the legal system there had concluded that self-regulation was the best option for Scotland, although an independent legal complaints commission has since been introduced there. In other words, in contrast to the situation in England and Wales, self-regulation was found to have worked well in Scotland and Northern Ireland.

In contrast to the Competition Authority, the Bain Report concluded that separation of the regulatory and representative functions was unnecessary except in the case of complaints. Bain recommended that a Legal Services Oversight Commission (LSOC) should be established but with more limited powers than those proposed by the Authority for a Legal Services Commission (LSC). The main role of the LSOC would be to provide independent oversight of the complaints handling process, although Bain also proposed that it should be able to offer opinions and suggestions to the Bar Council and Law Society in respect of their other regulatory functions.

Specifically, Bain proposed that the LSOC, in consultation with the Lord Chief Justice, should have the ability to issue advice to the professional bodies on their rule-making powers in relation to, among other things, entry to the profession, education, and training. If such advice were ignored, Bain proposed that the LSOC should have the power to refer the matter to the government so that appropriate legislative or other action could be taken. In contrast the Authority recommended that the proposed LSC would be given explicit authority to make new regulations, would have the power to veto the rules of self-regulatory bodies and set guidelines for the assessment of costs in contentious matters.

While the Authority recommended that the Chairman of the LSC and a majority of its members should not be members of the profession, Bain, while advocating greater lay participation in the regulation of the professions in Northern Ireland specifically recommended against the appointment of lay chairpersons and a majority of lay members on committees responsible for drawing up professional rules and codes of conduct.

The Competition Authority was also critical of restrictions on the type of business structures under which lawyers could operate. It objected to the requirement that barristers must operate as sole traders and recommended that they should be permitted to set up partnerships with other barristers. The Authority also argued that there were undoubted benefits from a competition perspective to allowing solicitors and barristers to form partnerships, (legal disciplinary practices or LDPs), although it recognised that this would give rise to issues regarding access to justice and regulation which required further consideration. It also stated that there were benefits to enabling solicitors to form multi-disciplinary practices (MDPs) although again it recognised that this would also raise a number of noncompetition issues which would require further examination.

The Bain Report concluded that the sole trader requirement for barristers in Northern Ireland resulted in a market that was competitive *"in the economists' sense of that term: a large number of sellers (barristers) offer, without any collusion between them, a relatively homogenous product (advocacy services) to a large number of buyers (solicitors)."* (Para 6.39) It found that allowing barristers to form partnerships or groups would represent a move away from this competitive model. It warned that barristers specialising in certain aspects of law, in which there were only a limited number of suppliers in Northern Ireland, could group together to form a local monopoly.

> *"Hence we conclude that the current prohibition on association between barristers in Northern Ireland should be viewed as a pro- rather than an anticompetitive restriction."* (Para 6.40).

The Bain report also recommended against allowing LDPs or MDPs.

The Competition Authority recommended that solicitors' monopoly on conveyancing should be abolished and a new profession of licensed conveyancers should be introduced and that such individuals should be permitted to provide conveyancing services. Such measures were introduced in England and Wales in the late 1990s.

Again, the Bain Report recommended against such moves in Northern Ireland. It noted that while the introduction of licensed conveyancers initially reduced conveyancing costs in England and Wales, after a time the fees of solicitors and conveyancers had begun to converge. It also noted that, in contrast to England and Wales only 22 licensed conveyancers had established in Scotland so that the reform had not had its intended effect there. The Bain Report also noted that the residential conveyancing market was highly competitive with evidence that undercutting of prices for conveyancing was rife throughout Northern Ireland. Consequently, it concluded that it was doubtful that licensed conveyancers would have much impact on charges. It also noted that permitting licensed conveyancers to carry out conveyancing services would require the establishment of a regulatory regime to protect consumers which would be both costly and difficult, particularly in a small jurisdiction such as Northern Ireland. In this regard it cited difficulties that had been experienced in establishing a regulatory body for licensed conveyancers in Scotland.

The Competition Authority proposed that persons wishing to provide conveyancing services should be required to be registered as "conveyancers" by a Conveyancers' Council of Ireland which would be responsible for regulating the training, qualification and operation of conveyancers. Although this Council would have "day-to-day" responsibility for regulation of licensed conveyancers, this would be subject to oversight by the proposed LSC. Again, the Authority's report contains no estimate of the likely cost of such arrangements or whether they might outweigh the claimed benefits.

4: Conclusions.

The reform of the legal professions on both sides of the Border has resurfaced with its inclusion in the agreement between the Government and the EU/IMF combined with recent reforms introduced by the Northern Ireland Bar Council. The EU/IMF agreement requires the Government to implement any outstanding recommendations made by the Competition Authority in its 2006 report on the legal profession including the establishment of an independent legal regulator. Interestingly, a report on the legal professions in Northern Ireland carried out at roughly the same time reached somewhat different conclusions on a number of key issues including the need for an independent regulator.