

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

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### **Editorial.**

The latest issue of Compecon’s Competition and Regulatory Economics E-Zine marks our tenth year in business.

The first article in this issue looks at the interaction between competition law and sports based on rugby union’s switch to professionalism in 1995. There are numerous instances of sports leagues being permitted to engage in collective selling of broadcast rights and revenue sharing, although in other businesses such behaviour would be regarded as constituting a cartel. In addition, while the *Bosman* case established a single EU wide labour market for players, in soccer, unlike rugby, leagues are organised along strictly national lines, an arrangement which would normally be viewed as partitioning the Single Market.

The second article reviews key merger decisions taken by the Competition Authority over the period from 2003 to 2010.

Our final article looks back at the past 20 years of Irish competition law and suggests that the results to date have been somewhat mixed.

Patrick Massey  
Director

## Competition Law Lessons from Rugby's Late Conversion.

### 1: Introduction.

On 4<sup>th</sup> October, the European Court of Justice (ECJ) gave its judgment in a case referred by the High Court of England and Wales under Article 234EC regarding the live broadcast of football matches in the FA Premier League (FAPL). The judgment is likely to have far reaching implications for sports broadcasting and the revenues that sports organisations can generate from the sale of television rights. While sports organisations have often fallen foul of competition, they have also been allowed some latitude to operate in ways which would be considered illegal for most other businesses.

Firstly, sports leagues and their member teams have been permitted to sell broadcast rights collectively. Such arrangements would generally be regarded as constituting a cartel. The main justification for permitting such arrangements is that the sharing of revenues from TV broadcast rights leads to greater competitive balance within leagues which in turns makes matches more attractive to fans. Interestingly, while this justification has been advanced, decisions permitting such arrangements have not cited any empirical evidence to support the proposition that revenue sharing improves competitive balance.

Secondly, while the ECJ judgment in the *Bosman* case abolished restrictions which prevented the free movement of players throughout the EU, product market restrictions remain in place as soccer's rules require leagues to operate along national lines. Again such partitioning of the Single Market would

generally be considered a serious infringement of EU competition law.

A recent study which looked at the impact of the move to professionalism in rugby provides fresh evidence on the effects of revenue sharing on competitive balance in sports leagues.<sup>1</sup> In contrast to soccer, rugby's rules do not require leagues to operate along national lines. The paper also analyses the implications of this for inter-league competitive balance.

### 2: Competitive Balance.

It is widely recognised in the economics literature that sports leagues require a greater degree of cooperation among competitors than most other industries. In the extreme no team can produce a single unit of output (a match) on its own. Unlike other businesses there is nothing to be gained by putting rivals out of business. The organisation of a season long league competition, which is more attractive to supporters than a series of one-off ad-hoc matches, requires a considerable level of cooperation among all the member teams.

It has been argued that the successful operation of sports leagues requires teams to cooperate beyond the organisation of fixtures. Specifically, it has been suggested that uncertainty of outcome is what makes sports contests attractive to fans and that uncertainty of

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<sup>1</sup> V. Hogan, P. Massey and S. Massey, *Late Conversion: The Impact of Professionalism on European Rugby Union*, UCD Centre for Economic Research, Working Paper WP11/18. Click [here](#) to download a copy of this paper.

outcome requires that the teams in the league should be relatively equally balanced. Therefore, teams need to pool their revenues in order to give every team an equal opportunity to recruit the best players. Such arguments have been accepted as justifying collective selling of broadcast rights in both the EU and US.

Membership of US sports leagues is fixed, i.e. the same teams play every season. Competitive balance is thus important in US sports to maintain supporter interest over time. In contrast teams in European soccer leagues do not have the same mutual interest in ensuring competitive balance.

European soccer leagues operate a system of promotion and relegation with a hierarchical league structure. The bottom team(s) in each division at the end of the season change places with the top team(s) in the division below. The top teams in European soccer leagues qualify to play in European wide competitions such as the UEFA Champion's League and earn significant extra revenue from participating in such competitions. It is not in the top teams' interests that every team should have an equal opportunity to qualify for the Champion's League and/or to be relegated.

The US National Football League (NFL) shares income from the sale of broadcast rights equally among all the member teams. In contrast in the FAPL 50% of revenue is shared equally, 25% is allocated on the basis of team's final league placings and the other 25% is allocated on the basis of how frequently teams matches are televised. As the better teams' matches are likely to be broadcast more often, the share out favours the better teams. The NFL also shares revenues from other sources

equally among all its member teams so that overall, two thirds of total revenue is shared equally among the member teams compared with just 22.5% in the case of the FAPL. In the case of the Champions League 50% of broadcast revenue is paid to clubs on the basis of results while the other 50% is allocated according to the size of national broadcast markets which favours teams from the larger countries.

The view that revenue sharing and other arrangements, such as salary caps, could improve competitive balance has been questioned. It is suggested that if teams have different levels of support because of population differences, the larger teams will attract the better players and will tend to dominate.

Empirical studies have come to different conclusions as to whether revenue sharing actually increases competitive balance. It has also been suggested that if teams operate as profit maximising businesses, revenue sharing will not improve competitive balance. If, however, teams operate as "win maximisers" then revenue sharing appears to improve competitive balance.<sup>2</sup>

Rugby provides an interesting case study because of differences between countries. The English Premiership operates a system of revenue sharing and salary caps. This is designed mainly to ensure the financial viability of all of the member clubs rather than maintain competitive balance.<sup>3</sup> In contrast the French Top 14 does not operate a system

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<sup>2</sup> A team is described as a "win maximiser" if it spends money recruiting players etc. to win more games even though such a strategy results in lower profits.

<sup>3</sup> A reduction in the number of league teams from 12 to 10 reduces the total number of games from 132 to 90 a reduction of one third which has obvious implications for the financial viability of the league.

of revenue sharing and only introduced a salary cap in 2010/11 in response to a number of clubs getting into financial difficulties.<sup>4</sup>

The results suggest that the English Premiership displayed greater competitive balance both in the short-run and in the long-run than the FAPL and the Top 14, which is in line with expectations. Interestingly the study suggests that prior to the introduction of professionalism the then English league was becoming increasingly imbalanced.<sup>5</sup>

The HHI, which is regularly used in analysing mergers, provides a useful measure of how a championship is shared around. In this case each team's market share can be defined as the number of times it has won the championship over a given time period. The HHI for various leagues are shown in the table.

| League HHIs              |         |       |
|--------------------------|---------|-------|
| League                   | Seasons | HHI   |
| Magner's League          | 10      | 2,400 |
| Premiership (England)    | 14      | 2,857 |
| French Top 14            | 14      | 3,265 |
| FAPL                     | 14      | 4,184 |
| Courage League (England) | 10      | 4,400 |

The Magner's League (since re-named the Pro-12) was the most evenly balanced league on this measure. The FAPL and the former Courage League which operated in England before the

<sup>4</sup> The salary cap for French clubs is much higher than for Premiership teams.

<sup>5</sup> The Rabo Pro 12 post dates the introduction of professionalism and the Top 14 did not operate on a league basis prior to 2005/6 so it is not possible to make comparisons between the amateur and professional eras.

professional era were the most imbalanced.<sup>6</sup>

The Pro-12 does not have revenue sharing or salary caps. It is unusual in that the teams are vertically integrated to varying degrees with the sports governing body in the respective countries.<sup>7</sup> This constitutes a rather unusual arrangement in sports terms as common ownership or control of teams normally raises questions about the integrity of the competition.

### 3: Inter-League Competition.

As pointed out, in soccer there is an EU labour market for players, but the rules require leagues to operate along national lines. Teams in smaller countries cannot join a larger country league, e.g., the attempt to relocate Wimbledon to Dublin when they were in the FAPL. Similarly, mergers between smaller country leagues have been prevented.<sup>8</sup>

Post-*Bosman* this has led to a situation where the leagues in the four or five largest countries have attracted all

<sup>6</sup> The maximum possible HHI in each case is 10,000 which would occur if the same team won the league each year. The minimum possible value of the HHI is 1.000 for the Magner's and Courage Leagues and 714 for the other three leagues, i.e. 10,000/number of seasons, which would arise if no team won more than one championship.

<sup>7</sup> All of the leading Irish players are contracted centrally to the IRFU which provides the bulk of the funding for the four professional teams so that the relationship is effectively a parent-subsidiary one. The WRU provides financial support to its four regional teams but not to the same extent as the IRFU while the relationship between the WRU and the regional teams is governed by contractual arrangements.

<sup>8</sup> For example, proposals for a merger of the Dutch and Belgian leagues along with earlier proposals for a league involving teams from these two countries along with Scandinavian teams and Scotland's Celtic and Rangers have been prevented.

of the best players as teams in smaller countries do not have the financial resources to compete. This has resulted in a growing imbalance in national leagues and at European level with the teams from the largest countries dominating the Champions' League.

This is in contrast to the situation which pertains in rugby. The smaller countries (Ireland, Scotland and France) do not have a sufficient fan base to support national professional leagues, or at least national leagues that could pay salaries in line with those on offer in the English and French leagues. By combining the smaller countries have been able to establish a league which is able to compete with those in the two larger countries. This is clearly illustrated by performances in the Heineken Cup, which is to some extent rugby's equivalent of the Champions League. In 16 seasons there have been six English, five French and five Irish winners of the competition.

It might have expected that the lack of revenue sharing and salary cap arrangements in the French league should have given French teams an advantage over their English (and Irish) rivals.

#### **4: Conclusion.**

EU competition law allows professional sports to operate what are effectively cartels which engage in the joint selling of broadcast rights. The justification for this is that it improves competitive balance and thus makes sports more attractive to the public. The evidence from rugby in the professional era lends some support to this view in so far as the English Premiership which operates revenue sharing and salary cap arrangements displays a greater level of competitive balance than other leagues which do not operate such arrangements.

The *Bosman* judgment means that there is an EU wide labour market for soccer (and rugby players). Soccer's rules require leagues to operate along national lines, thus effectively partitioning the market. This has led to a growing competitive imbalance both within national leagues and in the Champions League which is dominated by larger country teams. Rugby's experience indicates that the abolition of such anti-competitive restrictions can promote greater competitive balance within leagues and at European level.

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## **Review of Irish Merger Cases.**

### **1: Introduction.**

A new Compecon report analyses the Competition Authority's merger decisions over the period from July 2003, when the Authority assumed responsibility for merger control, up to

December 2010.<sup>9</sup> The report, which runs to 156 pages, provides a detailed insight into the Competition Authority's economic analysis of merger cases. This

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<sup>9</sup> Compecon, *Key Irish Merger Cases*, November 2011.

article provides a brief overview of some key aspects of the report.

The report contains a detailed analysis of 31 individual cases. The cases analysed include all 21 cases which were subject to a Phase 2 investigation as well as those Phase 1 cases that were cleared on foot of undertakings given by the merging parties. In addition a small number of other cases which were cleared at Phase 1 but raised some interesting issues from

a competition perspective are analysed in the report. The report also includes an economic analysis of the EU Commission decision and General Court judgment in *Ryanair/Aer Lingus*.

## 2: Merger Notifications.

Details of mergers notified to the Competition Authority between July 2003 and December 2010 are summarised in the following table.

| Mergers Notified to Competition Authority 2003-2010 |            |            |           |                           |                          |            |
|---|------------|------------|-----------|---------------------------|--------------------------|------------|
| Year  | Notified   | Phase 1    | Phase 2   | Withdrawn /Referred to EU | Undertakings/ Conditions | Prohibited |
| 2003  | 47         | 42         | 2         | 2                         | 1                        | 0          |
| 2004  | 81         | 78         | 3         | 0                         | 1                        | 1          |
| 2005  | 84         | 82         | 3         | 1                         | 6                        | 0          |
| 2006  | 98         | 93         | 4         | 1                         | 2                        | 1          |
| 2007  | 72         | 67         | 3         | 2                         | 1                        | 0          |
| 2008  | 38         | 36         | 2         | 0                         | 0                        | 1          |
| 2009  | 27         | 25         | 2         | 0                         | 1                        | 0          |
| 2010  | 46         | 44         | 2         | 0                         | 1                        | 0          |
| <b>Total</b>  | <b>493</b> | <b>467</b> | <b>21</b> | <b>6</b>                  | <b>13</b>                | <b>3</b>   |

Note the 13 cases cleared on the basis of undertakings/conditions include *Statoil/Topaz*.  
Source: Competition Authority *Annual Reports*, various years.

493 mergers were notified to the Authority during the relevant period. 467 were cleared during the initial (Phase 1) investigation, although seven of these were cleared on foot of undertakings given by the notifying parties. This includes the *Statoil/Topaz* case which was cleared by default after the Authority failed to make a decision to conduct a more detailed (Phase 2) investigation within the statutory timeframe.<sup>10</sup>

<sup>10</sup> The parties had offered undertakings during Phase 1 and subsequently agreed to adhere to these.

21 cases were subject to a Phase 2 investigation. Combining these with the cases cleared on foot of undertakings at Phase 1 gives a total of 28 cases which, in the Authority's view, raised possible competition concerns.

Of the 21 Phase 2 cases, 12 were cleared without conditions, six were cleared subject to conditions while just three mergers have been prohibited, although in one of these cases the prohibition was overturned on appeal.

Details of the cases which are analysed in the report are contained in the following table.

| Summary Details of Cases Analysed. |   |  |
|------------------------------------|---|--|
| Case No.                           | Name  | Outcome                                    |
| M/03/029                           | <i>Dawn Meats/Galtee Meats</i>                | Phase 2 Clearance                          |
| M/03/033                           | <i>Scottish Radio Holdings/FM104</i>          | Phase 2 Conditional Clearance              |
| M/04/016                           | <i>Stena/P&amp;O</i>                          | Phase 1 Clearance subject to undertakings. |
| M/04/020                           | <i>Uniphar/Whelehan</i>                       | Phase 2 Clearance                          |
| M/04/032                           | <i>IBM/Schlumberger</i>                       | Prohibited                                 |
| M/05/06                            | <i>Glanbia/Dairygold</i>                      | Phase 1 Clearance.                         |
| M/05/024                           | <i>UGC(Chorus)/NTL</i>                        | Phase 2 Clearance subject to undertakings. |
| M/05/025                           | <i>Scottish Radio Holdings/Highland Radio</i> | Phase 1 Clearance subject to undertakings. |
| M/05/027                           | <i>M&amp;J Gleeson/United Beverages</i>       | Phase 2 Conditional Clearance              |
| M/05/028                           | <i>Alphyra/Eason Electronic</i>               | Phase 1 Clearance subject to undertakings. |
| M/05/033                           | <i>Heinz/HP</i>                               | Phase 1 Clearance.                         |
| M/05/050                           | <i>Eircom/Meteor</i>                          | Phase 1 Clearance subject to undertakings. |
| M/05/051                           | <i>Grafton/Heiton</i>                         | Phase 2 Conditional Clearance              |
| M/06/027                           | <i>Tetra Laval/Carlisle</i>                   | Phase 2 Clearance                          |
| M/06/039                           | <i>Kingspan/Xtratherm</i>                     | Prohibited                                 |
| M/06/051                           | <i>Tayto/Largo</i>                            | Phase 1 Clearance                          |
| M/06/057                           | <i>Coillte/Weyerhaeuser</i>                   | Phase 2 Clearance                          |
| M/06/087                           | <i>Applied Materials Inc./Brooks Software</i> | Phase 2 Clearance                          |
| M/06/098                           | <i>Premier Foods/RHM</i>                      | Phase 1 Clearance subject to undertakings. |
| M/07/027                           | <i>Britvic/C&amp;C</i>                        | Phase 1 Clearance                          |
| M/07/030                           | <i>CDG/AEPL</i>                               | Phase 2 Clearance                          |
| M/07/031                           | <i>Galco/Sperrin</i>                          | Phase 2 Clearance                          |
| M/07/040                           | <i>Communicorp/Scottish Radio Holdings</i>    | Phase 2 Conditional Clearance              |
| M/07/047                           | <i>Origin/Odlum</i>                           | Phase 1 Clearance.                         |
| M/08/09                            | <i>Kerry/Breeo</i>                            | Prohibited (Overturned on appeal)          |
| M/08/11                            | <i>Heineken/Scottish &amp; Newcastle</i>      | Phase 2 Clearance                          |
| M/09/013                           | <i>Metro/Herald AM</i>                        | Phase 2 Clearance subject to Undertakings. |
| M/09/024                           | <i>Greenstar/Veolia (Ireland)</i>             | Phase 2 Clearance                          |
| M/10/026                           | <i>ESB/NIE</i>                                | Phase 1 Clearance subject to Undertakings. |
| M/10/038                           | <i>Barnett/Origin/Hall</i>                    | Phase 2 Clearance                          |
| M/10/046                           | <i>Stena/DFDS</i>                             | Phase 2 Clearance                          |

The report analyses 26 of the 28 cases in which the Authority identified potential competition concerns.<sup>11</sup> It also

analyses five other cases which were cleared unconditionally at Phase 1 but which arguably raised some interesting issues from a competition perspective.<sup>12</sup>

<sup>11</sup> In *Kingspan/Century Homes* (M/05/009) undertakings were offered at Phase 1. The case is not discussed in the report as the Authority's concerns related to certain ancillary restraints. The *Statoil/Topaz* case is not analysed in the

report as there was no Authority decision in that case.

<sup>12</sup> The cases concerned are:

- M/05/06 – *Glanbia/Dairygold*;

Of the 28 cases identified by the Competition Authority as raising potential competition concerns, 25 involved horizontal mergers while the other three were vertical mergers.<sup>13</sup> This is consistent with the economic literature which indicates that competition problems are more likely to arise in horizontal merger cases.

The low number of cases which raised competition concerns was due, in part, to the legislation being overly broad in scope.<sup>14</sup>

### **3: Merger Control Objectives.**

Merger controls recognise that it may be preferable, on occasion, to prevent the acquisition of market power because it can frequently prove difficult to control the exercise of such power once it has been acquired.

Two types of errors may arise in merger cases. The merger control agency might wrongly find that a harmless merger was anti-competitive, a “false positive”, or it might fail to identify a merger that was anti-competitive a “false negative”.

The low number of prohibition decisions limits the potential number of

false positives. A low refusal rate might suggest a problem with false negatives. However, this need not necessarily be the case. One must also take account of the number of cases which were cleared subject to undertakings or conditions, which presumably would otherwise have been refused. Similarly, if parties recognise that anti-competitive mergers are unlikely to be approved such transactions may be discouraged. There is no way of measuring the number of such cases.

There is no right of appeal for third parties where a merger is cleared by the Authority. The merging parties have a right of appeal against decisions by the Authority prohibiting a merger or imposing conditions. There is a right to appeal false positives but there is no right to appeal false negatives. Thus the appeal provisions may bias the process toward false negatives.

### **4: The Authority’s Approach.**

The Authority’s analysis in merger cases has generally tended to follow a number of distinct steps.

1. Define the relevant market.
2. Analyse the impact of the transaction on market structure.
3. Identify possible theories of competitive harm.
4. Assess the potential for entry.
5. Establish whether there is countervailing buyer power.
6. Analyse possible efficiency gains.

A merger might also be permitted if one of the parties might otherwise be forced to exit the market (failing firm). It might also be necessary to consider possible remedies which would address any competition concerns.

### **5: Market Definition and Structure.**

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- M/05/033 – *Heinz/HP*;
  - M/06/051 – *Tayto/Largo*;
  - M/07/027 – *Britvic/C&C*; and
  - M/07/047 – *Origin/Odlum*.

<sup>13</sup> Arguably *Eircom/Meteor* did not constitute a vertical merger strictly speaking. The competition concerns raised by the Authority, however, revolved around vertical links between the parties.

<sup>14</sup> Many notified mergers involved transactions between overseas firms, one of which had an Irish subsidiary which brought the transaction within the scope of the Irish legislation. The Authority revised its interpretation of the “carrying on business” provision in the legislation and has sought changes to the legislation to reduce if not eliminate such notifications.

Although the analysis generally begins by identifying the relevant market, in many of the cases analysed in the report the Authority concluded that it was not necessary to come to a precise conclusion on market definition. This was because:

- (a) The transaction would not result in an SLC on the basis of any possible market definitions; or
- (b) The transaction would not result in an SLC on the basis of the narrowest possible market definition.

Market structure generally focuses on the level of market concentration as measured by the Herfindahl-Hirschman Index (HHI). The Authority's Merger Guidelines state that mergers in markets where the HHI is above 1,800 and increases by more than 100 as a result of the merger are generally likely to raise significant competition concerns. Many cases have been cleared unconditionally despite HHIs that are well above this threshold. This confirms that market structure serves only as an initial screening mechanism and that there is no presumption that high levels of market concentration mean that a merger will lead to an SLC.

Two cases went to a Phase 2 investigation despite the fact that the markets were quite fragmented with HHIs below 1,000 in one case.

In one of these cases it appears that the Authority was unable to reach a conclusion on market definition at the end of its Phase 1 investigation.<sup>15</sup> It would appear that, had the Authority been satisfied that a wider market definition was justified during the course of the Phase 1 investigation, the case would not have gone to Phase 2. This

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<sup>15</sup> M/07/030 *CDG/AEPL*

illustrates the importance of providing adequate evidence on market definition.

In the other case there was no obvious explanation for the decision to conduct a Phase 2 investigation in circumstances where the relevant markets all had low levels of concentration.<sup>16</sup>

In a number of cases the Authority relied on customer responses to questionnaires when applying the SSNIP market definition test. In several cases the Authority indicated that many or a majority of customers would have to switch in the event of a small but significant price increase in order to render such a price increase unprofitable. This view is incorrect. In most cases it only requires a minority of customers to switch to render such a hypothetical price increase unprofitable. Markets in some cases may therefore have been defined too narrowly.

## **6: Competition Analysis.**

The Authority's merger decisions have tended to rely on qualitative rather than quantitative evidence. In many of the cases reviewed the determination did not identify a specific theory of competitive harm. This was particularly true in some of its earlier decisions.

More recently its decisions have focused on a unilateral effects theory based on the closeness of competition between the merging parties. This theory is relevant in the case of differentiated products. Somewhat confusingly the Authority has applied this model in cases where it had concluded that the products involved were homogenous.

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<sup>16</sup> M/09/024 *Greenstar/Veolia (Ireland)*. Evidence provided by the parties which was not disputed in the Determination indicated that the HHI was below 1,000 in all three relevant markets.

While closeness of competition between merging brands increases the likelihood of a post-merger price rise, whether such a price increase will occur will depend on the response of rivals, buyers and final consumers. For example, the remaining non-merging firms may re-position their products to make them closer substitutes to the merging brands thus reducing the scope for the merging parties to raise prices unilaterally. The Authority has generally

not considered this in many of its decisions.

The report also highlights questions about the Authority’s analysis of countervailing buyer power, entry and efficiencies in specific cases.

### 7: Remedies.

The following table gives some information on the remedies involved in the 13 cases that were cleared subject to conditions or on the basis of undertakings offered by the parties.

| <b>Details of Mergers Cleared Subject to Undertakings/Conditions.</b> |   |                        |  |
|---|---|------------------------|--|
|   |   | Type of Remedy         | Details of Remedy  |
| M/03/033  | <i>SRH/FM104</i>                        | Structural/Behavioural | Divestiture of <i>Newstalk 106</i> shareholding and termination of certain sales arrangements. |
| M/04/016  | <i>Stena/P&amp;O</i>                    | Behavioural            | Notify future mergers if below threshold.  |
| M/05/009  | <i>Kingspan/Century Homes</i>           | Behavioural            | Amendments to certain ancillary restraints.  |
| M/05/024  | <i>UGC(Chorus)/NTL</i>                  | Behavioural            | Address potential for coordination due to cross shareholding.                                  |
| M/05/025  | <i>SRH/Highland Radio</i>               | Structural/Behavioural | Divestiture of shareholding, cessation of board membership and participation in sales of IRS.  |
| M/05/027  | <i>M&amp;J Gleeson/United Beverages</i> | Behavioural            | Notify future mergers if below threshold.  |
| M/05/028  | <i>Alphyra/Eason Electronics</i>        | Behavioural            | Notify future mergers if below threshold.  |
| M/05/050  | <i>Eircom/Meteor</i>                    | Behavioural            | Reporting requirements to prevent possible foreclosure.  |
| M/05/051  | <i>Grafton/Heiton</i>                   | Behavioural            | Notify future mergers if below threshold.  |
| M/06/044  | <i>Statoil/Topaz</i>                    | Behavioural            |  |
| M/06/098  | <i>Premier/RHM</i>                      | Structural             | Divestiture of <i>Erin</i> brand.  |
| M/07/040  | <i>Communicorp/SRH</i>                  | Structural             | Divestiture of <i>FM104</i> .  |
| M/09/013  | <i>Metro/Herald AM</i>                  | Behavioural            | Address potential for coordination due to cross shareholding.                                  |
| M/10/026  | <i>ESB/NIE</i>                          | Behavioural            | Measures to prevent ESB acquiring market sensitive information from NIE.                       |

Nine cases involved behavioural remedies. Four of these cases involved a

requirement to notify possible future mergers that might fall below the

notification thresholds. In other words, the concern was about possible future acquisitions rather than the immediate case at hand. Another case involved amendments to ancillary restraints.

Two cases involved structural remedies with the Authority effectively requiring a divestiture of businesses. The two remaining cases both of which involved mergers of local radio stations involved a combination of structural and behavioural remedies.

It is important for merging parties to consider possible remedies in advance of making a notification to the Authority. Having an effective remedy available may, for example, avoid the need for a Phase 2 investigation, thus reducing cost and delay.

## **8: Conclusions.**

The decision to transfer responsibility for deciding on mergers to the Competition Authority represented a radical departure. The Authority has dealt with a large number of merger cases since July 2003. In general, the transfer of responsibility for mergers to the Authority has been successful. The report identifies some problems with the Authority's economic analysis in specific cases. The consultation on possible revisions of its Merger Guidelines announced by the Authority in November 2010 provides an opportunity to address these issues.

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## What Has 20 Years of Irish Competition Policy Achieved?

### **1: Introduction.**<sup>17</sup>

It is almost exactly 20 years since the introduction of the 1991 Competition Act which represented the first stuttering steps towards the introduction of a modern prohibition-based competition law regime in Ireland. The legislation has been amended three times in the intervening twenty years. The Minister has published a Bill to further amend the legislation to meet Ireland's obligations under the "bail-out" agreement. Further changes are believed to be in the pipeline.

### **2: Irish Competition Law.**

A form of competition law based on the control of abuse principle was originally introduced in Ireland in the Restrictive Trade Practices Act, 1953. Although the legislation was amended on several occasions, its basic features remained largely unchanged for almost 40 years.

The Competition Act, 1991, radically reformed Irish competition law by introducing a prohibition-based system modelled on what were then Articles 85 and 86 of the Treaty of Rome. The legislation provided that any party aggrieved by anti-competitive behaviour could bring legal proceedings seeking an injunction, declaration and/or damages including exemplary damages. The Minister was also given a right to bring proceedings seeking an injunction and/or

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<sup>17</sup> This article is an abbreviated version of a paper presented by Compecon Director, Patrick Massey, at the Dublin Economics Workshop, Annual Economics Policy Conference in Kenmare on 15<sup>th</sup> October 2011.

declaration, which has never been exercised.

A major shortcoming of the 1991 Act was the lack of an effective enforcement regime. The Competition (Amendment) Act 1996 gave the Competition Authority a right to seek injunctive and/or declaratory relief in civil proceedings. The 1996 Act also introduced criminal penalties with fines for undertakings found to have engaged in anti-competitive behaviour and for managers and directors of such firms. It also provided that such individuals could be imprisoned for up to two years. Thus Ireland became somewhat unique in criminalising all infringements of competition law.<sup>18</sup>

The Competition Act, 2002, distinguished between “hard-core” cartel activities such as price-fixing, market sharing and bid-rigging and other types of anti-competitive behaviour. The maximum penalty in the former case was increased from two to five years while prison sentences were abolished for non-cartel offences, although the Competition Authority lobbied for the retention of prison sentences of up to two years in such cases.

### **3: Has Criminalisation Worked?**

Following the passage of the 1996 Act, the Authority initially exercised its new enforcement powers by bringing a number of civil actions in cases involving alleged cartels. All of these cases were ultimately resolved by the parties concerned giving undertakings to

the Court not to engage in certain behaviour in the future.

Since 2000 some 50 prosecutions have been brought by the Competition Authority all involving alleged cartels. These prosecutions have resulted in 32 convictions to date, of which four were for summary offences and the remainder procured on indictment. Cartel cases by their nature involve multiple defendants. Thus, only four separate cartels were involved in the successful prosecutions. In two other cases the defendants were acquitted by the jury.

There is literally no way of knowing whether or not the introduction of criminal penalties in 1996, and the strengthening of such penalties in 2002 had any major deterrent effect. This is because cartels by their nature are secretive. One cannot quantify the number of cartels that decided to shut up shop and how many were discouraged from getting off the ground in the first place by the introduction of criminal penalties. Nevertheless, the number of successful prosecutions suggests that the decision to criminalise cartels has been vindicated.

Deterrence depends not just on the level of penalties but on the likelihood of being caught, prosecuted and convicted. The Competition Authority has repeatedly stated that it is only capable of mounting one criminal cartel investigation per year. In fact it has recently indicated that it may be unable to achieve even this level of enforcement. This obviously greatly reduces the deterrent effect of criminal sanctions since it means that chance of being subject to such penalties is close to zero.

It is sometimes suggested that the Authority’s cartel cases have tended to target small firms and ignore larger ones.

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<sup>18</sup> In the case of other jurisdictions which have criminal penalties, such sanctions only apply in respect of “hard-core” cartels. The reason for criminalising all competition law breaches was the generally accepted view that under the Constitution penal fines can only be imposed for criminal offences, i.e. the Constitution precludes administrative or civil fines.

In this respect, the Authority should be afforded some latitude. Decisions to investigate and ultimately to prosecute cartels depend on the quality of evidence available in a particular case rather than the size of potential defendants. In terms of establishing credibility, it was important that the early prosecutions were successful. Nevertheless, the perception has emerged that the Authority is more likely to go after small firms than larger ones, which is unfortunate.

The recently published Competition (Amendment) Bill, 2011, proposes to increase the maximum prison sentence for those engaged in cartels from five to ten years. It also provides for increased fines and proposes that the Probation of Offenders Act, 1907, will not apply to individuals or companies convicted of competition law offences. The rationale for increasing the maximum prison sentence for those engaged in cartels from five to ten years is difficult to understand. The problem in cartel cases is too little enforcement not inadequate penalties.

#### **4: Non-Cartel Cases.**

If the experiment of criminalising cartels can be said to have worked reasonably well, subject to the caveat in respect of enforcement, the same cannot be said of non-cartel infringements. It is generally accepted that criminal sanctions are a non-runner in such cases by virtue of the fact that it would be virtually impossible to prove cases to a jury beyond a reasonable doubt because the distinction between what is pro- and anti-competitive is unclear.

The Competition Authority has long argued for the introduction of a system of civil fines in non-cartel cases. The 2011 Bill, however, makes no provision

for the introduction of civil fines. It is difficult to see how civil fines could successfully deter only anti-competitive behaviour when the distinction between pro- and anti-competitive behaviour is unclear. Sanctions which to some extent deter behaviour that is actually competitive would impose costs on consumers and the economy.

The lack of penalties in non-cartel cases does not appear to constitute a serious weakness in Irish competition law. In most cases where the Authority had concluded an infringement had occurred, the existing civil remedies (injunctions and/or declarations) or the threat of them “are sufficient to bring the infringement to an end.”<sup>19</sup>

Again, the real problem is not the lack of effective sanctions but a lack of enforcement. The Authority’s approach, in some instances, to vertical restraints comes close to a *per se* legal standard. Similarly, it has brought only one abuse of dominance case to a full hearing, which was ultimately unsuccessful. Lawyers have expressed concern that there is no point in making complaints to the Authority.

In a number of past cases where the Authority brought civil proceedings and the parties agreed to discontinue certain behaviour, the Authority required them to give undertakings to this effect before the courts. This had the effect of making such undertakings legally binding meaning that any subsequent breach would constitute a contempt of court. This enabled the Authority, for example, to successfully bring contempt proceedings against the LVA after it had advised its members to freeze their

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<sup>19</sup> G. Fitzgerald, G. and D. McFadden, (2011), *Filling a Gap in Irish Competition Law Enforcement: The Need for a Civil Fines Sanction*, Competition Authority, p.11.

prices in response to the downturn in economic activity in recent years. More recently the Authority has accepted written undertakings from parties to settle cases. Such undertakings, unlike those given to the court, are not legally binding. Arguably, therefore, the Authority has abandoned a potentially significant sanction in non-cartel cases.

### **6: Advocacy.**

The Competition Act, 2002, gave the Authority considerable powers to investigate and make recommendations for reform in a wide range of areas where regulation or other practices restrict competition.<sup>20</sup> The Authority has made extensive use of these powers most notably in the case of its extensive reviews of various professions. The Memorandum of Understanding between the Government and the Troika requires the Government to introduce legislation to give effect to any of the Authority's recommendations that have not been implemented to date.

It is generally recognised by economists that arrangements should be subject to an effects' based rather than a form based test.<sup>21</sup> The Authority report on the legal profession adopted a form based approach.

“The fundamental point is that if self-regulating professions are left to their own devices there is little incentive for them to encourage competition in the market.”<sup>22</sup>

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<sup>20</sup> Such arrangements would not normally come with the scope of the prohibitions contained in sections 4 and 5 of the Act.

<sup>21</sup> P. Gorecki, (2006), Form Versus Effects-Based Approaches to the Abuse of a Dominant Position: The Case of Ticketmaster Ireland, *Journal of Competition Law & Economics*, 2(3), 533.

<sup>22</sup> Competition Authority, (2006), *Competition in Professional Services Solicitors and Barristers*.

Thus in effect the Authority argued that self-regulation was inherently flawed. In contrast a review of the legal profession in Northern Ireland carried out at around the same time, while recognising the potential for self-regulation to be abused, concluded that such abuse had not occurred.

The economic justification for self-regulation recognises that independent regulators must incur very significant costs acquiring information in order to regulate an industry, while they are also prone to regulatory capture. Self-regulation means that society avoids the costs involved in acquiring information about the industry. Of course, vigilance is required to ensure that self-regulation is not used to promote the interests of the regulated.

The Report contains little if any evidence of the existence of monopoly rents. There is evidence of ease of entry and exit and it is not at all clear that the outstanding Authority proposals would actually reduce legal costs.

There are many other sectors of the economy, particularly where State undertakings are involved, where action is required to promote greater competition. Sadly these have received less attention from the troika.

It is generally recognised that complete separation of the transmission and generation businesses is required to foster effective competition in the electricity industry. Successive Governments have failed to grasp this nettle. The present Government has announced its intention to sell a minority shareholding in the ESB while allowing it to retain ownership of the transmission network. This is contrary to the recommendations of the McCarthy report and many previous studies. The sale of a minority shareholding, without

structural reform, would appear to permanently exclude the latter option.

The Public Transport Regulation Act, 2009, enshrined the existing Dublin Bus and Bus Eireann monopolies in the bus market by legally obliging the newly created regulatory body, the National Transport Authority (NTA) to grant the two companies licences in respect of all of their existing routes. The Minister for Transport, Leo Varadkar T.D. recently stated:

“The reduction in the subsidy to CIE over the next few years will be in the region of a 20 per cent cut so that will have to be met through a combination of fare increases, cost-cutting and cuts to services. Obviously I favour cost-cutting over higher fares or cutting services.”<sup>23</sup>

If the Minister was serious about cutting costs rather than services, scrapping the 2009 Act and introducing competition to the market would represent an obvious solution.

Thus, it is those areas that are not mentioned in the section of the MOU that talks about increasing competition which are most revealing. The Bertie Ahearn strategy of cosyng up to public sector unions and protecting State monopolies from competition would appear to be still in vogue in Government buildings.

### **7: Suggestions for Reform.**

Competition law has been beefed up considerably in Ireland over the past 20 years, but the results have been mixed at best. According to the *Global Competitiveness Report 2010-2011*, Ireland ranked 25<sup>th</sup> in terms of the effectiveness of competition policy out of 139 countries. This put Ireland below most EU Member States and OECD

countries. This suggests that there is still considerable room for improvement.

Criminalisation of cartels has worked reasonably well, despite many predictions that it would not. It appears to be widely accepted that criminal cases in non-cartel cases are a non-runner. The Government has accepted that civil fines are not possible in non-cartel cases.

The real problem in the case of both cartels and other infringements is the lack of enforcement. The Authority argues that it is unable to bring enforcement proceedings because of a lack of resources although its staffing levels are above their 2002 level when it was more active on the enforcement front. There may be a valid case for increasing its resources. More enforcement activity is likely to have a far greater deterrent effect than increasing penalties. Nevertheless, it is incumbent on an agency which constantly urges others to operate more efficiently to ensure that it uses its own resources efficiently. This requires effective external scrutiny of the Authority. The OFT in the UK is required to value the benefits accruing to consumers on foot of its various actions. The Authority should be obliged to show how its activities are benefiting consumers and the economy. Such quantitative evaluations should be conducted by an external body and not the Authority itself.

The 2011 Bill proposes that where cases have been successfully brought by the Authority, private parties suing for damages will be able to rely on the fact that the parties have already been found to have infringed the law by the Courts and will not be required to separately prove that an infringement has occurred. This is obviously designed to facilitate private follow-on actions for damages.

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<sup>23</sup> *Irish Times* 26 September 2011.

Of course, such a measure can only be successful if the Authority brings enforcement actions. If the Authority accepts out of court settlements in non-cartel cases, it will deny private litigants the opportunity of availing of this provision in the Bill.

Even with the proposed amendment, it is difficult to see many individual

consumers talking follow-on actions for damages in cartel cases because the harm suffered by each individual consumer is likely to be relatively small. If it were legally possible, however, allowing consumers to bring actions for damages in the Small Claims Court might arguably constitute an effective remedy.

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