Compecon - Competition & Regulatory E-Zine.

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Editorial.

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

Our last issue included an article reviewing 20 years of Irish competition policy which was an abbreviated version of a presentation which I gave to the Dublin Economic Workshop Annual Economic Policy Conference in Kenmare. The presentation argued that there was a need for greater enforcement of competition law, while noting that there may be a valid case for increasing the Competition Authority's resources to enable it to take more enforcement actions. It also pointed out that whereas in the past when settling cases, the Authority had required parties to give legally binding undertakings before the courts, more recently it had accepted written undertakings from parties which are not legally binding. The presentation also suggested that more needed to be done to promote competition in the energy and transport sectors and suggested that the Troika should turn its attention to these areas. At the time media attention focused on another presentation given to the conference by a Mr. Chopra from the IMF.

The first article in this issue reports that the latest version of the MOU agreed with the Troika on 12th February coincidentally requires the Government to review the Competition Authority's resources and if necessary to provide any additional resources that the review finds are required to allow adequate enforcement of the legislation. The MOU also provides that the Government will seek to introduce an amendment to the Bill to make undertakings furnished to the Authority legally binding, subject to such a provision being consistent with the Constitution. Our second article reviews the agreement reached with the Troika on asset sales and notes that this addresses some of the competition concerns raised in the Kenmare speech. The final article in this issue analyses the Authority's recent enforcement decision in respect of television.

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Troika's New Year Gifts for Competition Authority.

1: Introduction.

The Government decision not to include provision for civil fines for competition offences in the Competition (Amendment) Bill, 2011, was seen in some quarters as representing a setback for the Competition Authority. The latest MOU between the Government and the Troika dated 12th February, however, contains some better news for the agency. It includes proposals to provide some additional enforcement powers and to ensure that it has adequate resources to do the job.

2: The MOU Commitments. The MOU includes the following provisions with respect to the Competition Authority among its list of actions to be completed by the Government by the end of 2012 q1:

> *"Following the introduction of amendments to the Competition (Amendment) Bill at Committee Stage, the authorities will seek to introduce an amendment allowing commitments by an undertaking to the Competition Authority to be made a rule of court having due regard to Ireland's constitutional framework; and*
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> *The Authorities will undertake a review of the resourcing of the Competition Authority and report on whether it is sufficient to allow adequate enforcement capacity of the legislative framework."*

The MOU goes on to state that by the end of Q2-2012:

> *"The authorities will ensure that resourcing of the Competition Authority is sufficient to ensure adequate enforcement capacity of the legislative framework on the basis of the review undertaken in Q1 2012."*

This latter obligation would seem designed to ensure that the proposed review will be acted upon.

3: Comment.

The first of these proposals is interesting. In the past the Authority had required undertakings to be given in court when settling cases. This had the effect of making them legally binding and the Authority was able to bring contempt of court proceedings against the LVA on foot of undertakings which had been furnished earlier. Recently the Authority has tended to settle cases on foot of written undertakings furnished by parties. The problem with such commitments is that they are not legally binding. The proposal contained in the MOU would seem to be designed to address this issue.

The commitment by the Government to provide extra resources by mid-2012 if these are found to be necessary to ensure effective enforcement of competition law will undoubtedly be welcome by the Competition Authority.

The MOU also requires the Government to prepare a report by year end which will form the basis for reviewing whether sufficient progress has been made toward strengthening the enforcement of competition law by ensuring the availability of effectiveness sanctions for breaches of national and EU competition law. This review is to be undertaken in consultation with the members of the Troika. It is difficult to know what this review might encompass given that the Competition (Amendment) Bill has yet to be passed. The end of the

year would appear relatively soon to seek to draw any conclusions as to whether or not it has been effective.

Government Proposals on State Asset Sales.

1: Introduction.

On 22nd February, Minister for Public Expenditure and Reform, Brendan Howlin TD, announced that the Government had agreed the shape and scale of the asset disposal programme to be pursued as a commitment under the EU/IMF Programme, with the ECB/EU/IMF Troika. According to the Statement the State would seek to raise €3bn in total from the disposal of State assets. The statement emphasised the fact that the Troika had agreed that, if the revenue target was achieved, up to one third of the proceeds could be invested in job creation projects instead of being used to pay down debt. However, some of the details contained in the announcement have significant implications for competition policy.

2: Key Points.

The main features of the Minister's statement were:

1. The Government has agreed with the Troika sale of state assets up to a value of €3 billion.
2. Sales to be based on the guiding principles that there will be no fire sales; integral transmission and distribution systems will be retained in State ownership and full value will be derived for the State.
3. The Government has decided not to proceed with a sale of a minority stake in ESB as previously signalled.
4. The Government will instead pursue alternative asset disposal options, to include the sale of:
   - BGE's Energy business excluding the gas transmission and distribution systems and the two gas interconnectors, which will remain in State ownership;
   - Some of ESB's non-strategic power generation capacity;
5. Consideration will be given to the sale of some assets of Coillte (excluding the sale of land) and the sale of the State's remaining shareholding in Aer Lingus when market conditions are favourable and at an acceptable price to the Government.

3: Comment.

The main areas of interest from a competition policy perspective are the commitments in respect of BGE, the ESB and Aer Lingus.

The ESB is to be retained as a vertically integrated utility in State ownership, although some of its non-strategic power generation capacity is to be sold. The decision to dispose of the State's shareholding in BGE but to retain the transmission and distribution networks along with the UK interconnectors in State ownership is

consistent with the recommendations contained in the McCarthy report. BGE and ESB compete with one another to supply gas and electricity to households and businesses. There is no obvious reason for the State to own both. Similarly, it makes sense to retain the gas network in State ownership. The network is a natural monopoly and will require ongoing regulation. The fact that it will be completely separated from the supply business should make regulation a little easier.

The decision to drop the proposal to sell a minority shareholding in ESB and instead to dispose of some of the ESB's generating plants is also in keeping with the McCarthy recommendations. The devil in this case is likely to be in the detail, particularly with regard to which generating plants might be sold. While the ESB's overall share in the generation market has fallen, it still controls many of the peak price-setting plants. This proposal could potentially enhance competition in the wholesale electricity market.

While the Government has decided to retain the ESB as a vertically integrated business, the decision not to sell a minority stake in the overall business leaves open policy options in this area. Media speculation prior to the Minister's announcement had claimed that the Troika had objected to the proposed sale of a minority stake in ESB. The Minister's press releases states:

> *"Following detailed analysis which identified a range of complex regulatory and legislative issues the Government has decided not to proceed with a sale of a minority stake in ESB as previously signalled."*

The decision to dispose of the State's remaining shareholding in Aer Lingus raises the question of who might be potential buyers. Ryanair currently owns almost 30% of the company but the EU Commission has twice blocked its attempts to acquire control of Aer Lingus. The competition arguments against such a deal would not appear to have changed and the Commission's subsequent decision in the case of Olympic Airlines is in line with its approach in *Ryanair/Aer Lingus.*

In our previous edition we argued that the Troika needed to do more to promote greater competition in sectors such as energy and transport. The statement on asset sales is welcome in this regard.

Competition Authority's Enforcement Decision on TV Advertising.

1: Introduction.

On 17th January 2012, the Competition Authority issued an enforcement owned setting out is preliminary views regarding a scheme for the sale of television advertising by State owned broadcaster RTE. The Authority had launched an investigation into the operation of the scheme following a complaint from a rival TV broadcaster, TV3. Following the commencement of the investigation, RTE undertook to modify its TV advertising sales arrangements. The Authority concluded that the modified arrangements addressed its concerns and it therefore

decided that there was no need to investigate the matter further.

The Authority occasionally publishes enforcement decisions which outline its economic and legal thinking in respect of certain investigations which have been closed either because the Authority concluded that there was no breach of competition law or where it has settled the case. According to the Authority website it selects investigations for its enforcement decisions that:

- demonstrate the Authority's approach to a particular competition issue on which it has not previously opined;
- are of public interest (e.g., the investigation is in the public domain, the issue has been subject to considerable debate and discussion);
- and/or raise issues of interest or complexity.

The Authority's stated objective in publishing enforcement decisions is to provide greater legal certainty and reduce compliance costs for undertakings.

There is no reference to enforcement decisions in the legislation and only the Courts may decide whether or not a particular practice is in breach of the law. The Authority has concluded that Section 30(1)(g) of the Competition Act, 2002, enables it to publish enforcement decisions. Section 30(1)(g) states that the Authority's functions include *"carrying on such activities as it considers appropriate to inform the public about competition issues"*. In general, steps by the Authority to provide guidance on its views regarding competition law are welcome. The problem in a case such as this is that it is difficult to know how much weight to attach to what are stated to be preliminary views based on an incomplete investigation. The Decision, states that, at the point at which it decided to close the investigation:

> *"...the Authority had not reached a final view on the relevant market, the question of dominance or whether there had been an abuse of dominance by RTÉ."* (Para 1.4).

That being said it should be acknowledged that the Authority is seeking to provide guidance as best it can within the constraints of the legislation.

2: The Authority's Enforcement Decisions.

Since the passage of the Competition Act, 2002, the Authority has published 14 enforcement decisions, which is slightly more than one per year. Significantly this was the Authority's first enforcement decision in almost two and a half years – the previous one dating back to 17th August 2009. Nine of these decisions concluded that, in the Authority's opinion, there had been no breach of competition law. In the remaining five cases, the parties concerned agreed to discontinue or at least to modify the particular behaviour involved and, as a result, the Authority took no further action.

3: The RTE Case.

The subject of the Authority's investigation in this case was RTE's arrangements for the sale of television advertising known as the *"Share Deal"*.

According to the Decision, under the Share Deal arrangements, the discounts granted to individual advertisers depended on, among other factors, the percentage (or share) of the advertiser's total television advertising budget committed to RTÉ.

> *"In simple terms, everything else being equal, the higher the share of total*

television advertising budget that an advertiser committed to RTÉ, the larger the discount RTÉ would typically offer to that advertiser." (Para 2.15).

According to the Decision, the Authority considered that the relevant market was likely to be the market for television advertising airtime in the State.

"The Authority did not reach a definitive view on the relevant market and notes that further investigation and analysis of RTÉ's competitive constraints would have been required in order to do so." (Para 5.4).

The Decision states that the Authority considered the possibility of a wider market definition *"but did not find sufficient evidence during the course of its investigation to support the existence of a wider market."* (Para 5.5) It is not clear whether much reliance can be placed on this conclusion given the Authority's admission that its investigation was incomplete.

A previous Authority merger decision relating to two local radio stations along with a number of cases in other jurisdictions are cited in the Decision in support of the Authority's conclusion on market definition. The fact that radio advertising may constitute a distinct product market does not mean that the same is true for television advertising. Questions arise in respect of the Authority's application of the SSNIP test in one of these radio cases.[1]

The Decision notes that RTE disputed the finding that television advertising constituted a distinct product market. Interestingly the Share Deal requirement linked the level of discounts to the share of an advertiser's total television advertising budget committed to RTE and did not apparently refer to its total advertising budget. The Authority's preliminary view was that RTE had a dominant position. This was based essentially on its allegedly high market share and what the
Authority described as its "unavoidable trading partner" status. RTE disputed these findings according to the Determination and also claimed that advertising agencies could exercise countervailing buyer power which prevented it acting independently of its customers, a key test of dominance. The Decision's discussion about the competitive effects of rebates is largely composed of quotations from various EU Commission and European Court judgments. There is relatively little economic analysis by the Authority. That is perhaps not surprising, given that the investigation was incomplete.

According to the Decision, the Authority did not accept RTE claims that there was an objective justification for such arrangements. Again it is not possible to read too much into this as the investigation was incomplete.

4: Conclusion.

The Authority's primary objective is to ensure that undertakings act within the law. This objective is achieved where undertakings agree to amend their behaviour following expressions of concern by the Authority. If this occurs

[1] The Authority concluded that radio advertising constituted a distinct product market because only a few advertisers would switch some of their advertising from radio in the event of a 5% price increase. Such a level of switching may, however, be sufficient to render the price increase unprofitable. M/07/040 – Communicorp/Scottish Radio Holdings.

before the Authority has carried out a full scale investigation, then this reduces the cost of enforcement.

It is inevitable when cases are settled in this way, that the Authority will be somewhat constrained in what it can say publicly. This obviously limits the usefulness of publishing such decisions. It is, nevertheless, preferable that the Authority should publish as much information as possible regarding the outcome of specific complaints. This is important in order to maintain public confidence and credibility both in the Authority and the legislation. This is particularly so in light of claims that have been made that the complaints process is not working. Arguably, therefore, the Authority needs to publish information on the outcome of its investigations more often.

The Authority's Enforcement Decision in this instance could arguably be summarised as follows:

> *"If RTE were dominant in the relevant market, namely the market for television advertising, then there are a number of EU precedents which would suggest that its Share Deal scheme might have amounted to an abuse of a dominant position."*

Arguably this is sufficient in terms of the stated objective of providing guidance, increasing legal certainty and reducing compliance costs.

The legislation does not permit the Authority to make a finding that an undertaking has infringed competition law nor to impose any form of sanction. Such decisions are reserved to the courts. The term *"Enforcement Decision"* would therefore appear to be something of a misnomer. It might be more accurate if such documents were headed *"Report of the Competition Authority's Investigation into a particular matter."*