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STANDARDS OF COMPETITION IN THE IRISH ECONOMY

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Abstract

This paper argues that the Irish economy is characterised by high levels of industrial concentration and weak competition. Competition rules introduced in 1991 and strengthened in 1996 have had a significant effect in many markets, but the most extremely anti-competitive markets have remained from these rules. In some instances, political lobbying has resulted in unjustified protection from competition. The paper recommends that further improvements to competition rules are required and, most importantly, that all sectors of the economy should be exposed to these rules in a way that is not susceptible to political interference.

1. INTRODUCTION

Competition policy in Ireland has undergone an extraordinary transformation in recent years. The 1991 Competition Act introduced new rules on the behaviour of firms, based on Articles 85 and 86 of the Treaty of Rome. This marked the introduction of a competition law based on prohibition of anti-competitive behaviour, in contrast with the previous approach of controlling such behaviour (which often acted to protect firms from competition). The 1991 Act established a Competition Authority to undertake investigations. The Act relied on private enforcement via the courts so that the Authority's function was largely to monitor rather than enforce standards. This changed with the 1996 Amendment which gave public enforcement powers to the Authority. The Amendment also introduced, uniquely in the European Union, criminal sanctions for breaches of the law.

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The driving force behind this transformation, apart from membership of the European Union, has been a changing appreciation of the benefits of competition. Economic theory suggests that monopoly or weak competition results in high prices, lower levels of output and employment, poor quality of service etc., reducing economic welfare (measured, for example, as GDP per capita) and preventing the economy from reaching its full potential. Although the magnitude of the gains from competition does not depend on whether they accrue to domestic consumers or whether they result in improved international competitiveness, it has been the latter that has driven recent changes in competition law in Ireland. The competition policy that has emerged continues to be biased towards the interests of producers, especially exporters. As a result, this competition policy is unlikely to deliver the full potential benefits to domestic consumers.

This paper examines several facets of competition policy in Ireland with a view to ascertaining the standards of competition that are being attained. Section 2 considers the political economy factors that underlie the development of competition policy in Ireland. Evidence of increased lobbying[1] behaviour by firms or sectors to exempt themselves from full exposure to the rules of competition and weak enforcement rules illustrate the relative importance of producer over consumer interests inherent in policy. The economic loss from weak competition is estimated to be at several percentage points of GDP.

Section 3 examines the system of competition policy in Ireland. The rules of competition are based on those in the EC Treaty with some variations, particularly with regard to mergers and the continuation of part of the "control of abuse" system that existed before in the form of the Groceries Order. The system of enforcement is now converging to one of public enforcement, although it remains to be seen whether the provisions of the 1996 Amendment will be appropriate to this task. The powers and resources of the Competition Authority are outlined, and it is argued that the body may be constrained by a lack of institutional and political independence and possibly also by its resources. The final element of this section examines the sanctions for breaches of the rules, focusing especially on whether the recent introduction of criminal sanctions represent a strenghtening of policy or not.

Section 4 reviews the outputs of competition policy since 1991, namely the decisions of the Competition Authority and court judgements. The decisions of the Authority, running at almost 1,000, tend to dwarf the handful of Court cases, highlighting the difficulty of private enforcement in this area. Many of the Authority's decisions concerned innocuous vertical agreements, but a significant number of agreements were found to be anti-competitive, a surprising fact given the voluntary nature of the notification procedure. The Authority also investigated several merger cases and an abuse of dominance case at the request of the Minister. These cases are analysed in detail and it is argued that the outcomes were less than satisfactory, illustrating problems of both process and substance.

Drawing on the review of the statues and the case law, Section 5 assesses the standards of competition that have resulted from the above rules. In general, decisions to date have been based on an examination of the relevant economic issues and have utilised standard methods of analysis in reasoning whether behaviour is anti-competitive or not. Consumer welfare is clearly discernible as the main criterion in those cases detailed, as is appropriate. Problems persist with mergers where a cumbersome dual notification procedure has emerged and the criteria for approval are oblique. Problems also exist with the politicisation of certain aspects of policy, namely mergers and abuse of dominance, resulting in different standards being applied across markets. More generally, the enforcement of competition policy has been particularly weak and the introduction of public enforcement in the 1996 Amendment will only partly address this problem as many markets continue to be exempt from competition rules.

The analysis suggests several distinct policy issues that need to be addressed if competition policy is to operate effectively and attain its full benefits. The first relates to mergers and acquisitions and, in particular, the procedures for considering notifications and the criteria for approving mergers and acquisitions, both of which are extremely unsatisfactory at present. The second is the question of entry barriers created by licences. There is at present no system for deciding whether licensing criteria are anti-competitive and there is evidence that sectors may increasingly turn to the regulatory authorities to seek licensing to protect them from competition rules (under the misleading guise of enhancing consumer welfare). Third, there is the issue of competition advocacy in the economy. Government will constantly be pressurised to restrict competition in the interests of producers (and to the detriment of consumers) and a tough policy response is required if such rent-seeking activity is to be prevented. Giving an independent agency the power to review new and existing legislation and either to comment publicly on it or to force changes in it is one form of competition advocacy that could achieve this objective. This could, in principle, also be a solution to the licensing problem. Finally there is the role of competition policy in the regulation of natural monopoly. Until these problems are addressed, weak competition in some sectors of the economy will continue to restrict employment, output and overall economic performance.

2. THE POLITICAL ECONOMY OF COMPETITION POLICY

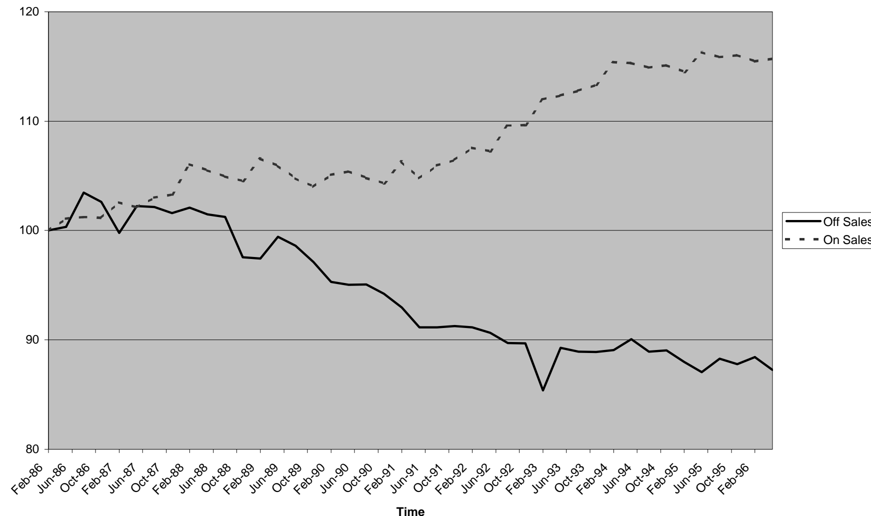
Competition policy is necessary in a market economy because private incentives do not always coincide with the public good. Monopolistic market structures or anti-competitive behaviour may not be eroded away by the market mechanism, typically because the latter is inhibited by barriers to entry or abuses of market power. Competition policy that sets out and enforces rules of competition can strengthen market mechanisms by preventing behaviour that restricts competition or abuses of market power, with consequent benefits for consumers and hence the economy. In Ireland, the combination of highly concentrated market structures, barriers to entry and weak price rivalry between firms in many markets suggests that an effective competition policy could deliver substantial benefits.

Domestic competition policy is necessary, even in a small open economy. The opening of markets to foreign trade does not expose most domestic markets to international competition. This mechanism is at best sluggish, and may be non-existent if competition is weak in intermediate markets or there are other policy responses (state aids, devaluation, etc.). In addition, many non-traded products (typically services such as transport, retailing etc.) are directly consumed so trade will have little effect on competition. Barriers to trade continue to persist even in the most integrated of free trade areas (for example, professional services within the EU).

Within the Irish economy, levels of market concentration are extremely high and many barriers to entry exist.[2] In the main, concentrated market structures, especially at the upstream level (firms selling to other firms), can hide behind a veil of secrecy, as there are no officially published data on concentration.[3] Examples of high concentration that have come to light following Competition Authority decisions and investigations include the distribution of tea, petrol and magazines, the manufacture of whiskey and the publication of newspapers. Regulatory and other barriers to entry exist in retailing (especially of alcohol), transport, the professions, broadcasting, retail banking and in service provision over networks. In contrast, the experience of increased competition in some markets (for example, on the Dublin-London air route) has been that prices have fallen, quality and variety of service have improved, all while output, measured by passenger numbers, increased.

Licences to supply goods or services may constitute barriers to entry that restrict competition in many markets in Ireland. An example is the licensing of public houses for the sale of alcohol, especially in restricting competition in the sale of draught beer and spirits. New licences are rarely issued[4] and existing licences may not generally be moved from one location to another.[5] Irish consumers are severely restricted in their choices, not being able to purchase such products on equal terms in restaurants or cafes, as is the norm in other countries. Quality of service may also be affected by weak competition. It is likely, in addition, that Irish consumers pay considerably over the odds for the privilege of the Irish licensing regime. Between 1986 and 1996, the price of stout sold in public house (on sales) increased in real terms by 16 per cent whereas the price of stout sold in off-licences decreased in real term by 13 per cent (see Figure 1), a divergence of over 25 per cent. This divergence in prices can be explained neither by changes in the relative production costs over the period nor by the different quantities of the products sold.[6] The most plausible explanation appears to be that there is little competition in the retail of the on-sales product whereas there is considerable increase in competition in the retail of the off-sales product, especially since the Single European Act in 1987 which enabled importation of canned and bottled beer for private consumption. Approximately 5 per cent of GDP is spent on beer (2.5 per cent on stout), and given that the monopoly mark-up may be as high as 25 per cent of the price, it is possible that the annual monopoly profits in the beer market could account for 1 per cent of GDP.[7]

Figure 1 Real price of draught (on-sales) and packaged (off-sales) stout, 1986-1996



Another acute example of a regulatory licensing regime erecting a barrier to entry is the taxi market in Dublin. Here the effect of restricted competition is not manifest in high prices, as these are regulated, but rather in lack of supply. Economic efficiency is seriously impaired as consumers who wish to purchase a service and producers who wish to supply it are prevented from trading because the latter are refused permission to supply. This quantitative restriction on the number of taxis does not have any compensating positive effect on aspects of the quality of the service such as the comfort of the car or the knowledge of the driver. Given that there are currently 1,974 licences in Dublin, and that licences trade at about £80,000, the value of the total (not annual) monopoly rent is in the region of £160m.

Worryingly, such regulatory barriers to entry are not simply an historical anomaly. New regulations were introduced in May 1996 restricting entry to the market for pharmacist services.[8] There was no evidence of market failure and no justification for the new regulation was given. It appears to have resulted from an increased supply of qualified pharmacists, itself a result of EC measures to increase labour mobility. Lobbying by existing pharmacists occurred.[9] The most obvious effect of such licensing is to prevent the market from determining the equilibrium number of suppliers. An equally important effect is the prevention of the market from selecting the most efficient suppliers, even if the equilibrium number prevails.

This is not the only recent measure that illustrates a weak commitment to promoting competition in the economy. A system of independent regulation of natural monopoly has yet to be put in place. The retention of the Groceries Order provides continued protection from competition law in that sector.[10] The solicitors' monopoly on conveyancing was not eased in the Solicitors' Amendment Act, as had been

originally intended. Perhaps the most disturbing indication of a weak commitment to competition is that the government itself lobbied the European Commission on behalf of a large company (Telecom Eireann) to be allowed to retain control of a major potential competitor (Cablelink), restricting competition in the markets for local telephony and cable television.

Economic theory indicates that the lack of competition has welfare costs. If competition is weak in upstream markets (those producing inputs), the welfare loss is manifest in downstream markets (e.g. those selling to consumers), in terms of either higher prices for consumers or weaker competitiveness on international markets. However, the magnitude of the welfare loss is independent of how or where it is manifest.[11] For this reason, competition policy should have the maximisation of welfare as its sole objective. Such an objective will ultimately generate higher output and employment, with the added bonus that it is non-inflationary.

The OECD (1993) noted the obvious link between the lack of competition policy and a poor record of employment creation in Ireland:

> *"the absence of an effective competition policy applying to the sheltered sectors of the economy could well have exacerbated the problem of slow employment creation, both directly, by impeding the natural development of these sectors, and indirectly by adding to the costs of sectors exposed to foreign competition."*

The *Survey* further pointed to a major problem in the area of public ownership, where the employment and other social objectives of publicly-owned companies has led to over-staffed, inflexible and inefficient organisations. It concluded that:

> *"impediments to domestic competition have distorted a wide range of relative prices in Ireland, at a heavy cost to Irish consumers."*

Economic policy in Ireland has traditionally been relatively mercantilist, putting most weight on growth through exports, and little or none on consumer welfare *per se*. Although this approach is no longer dominant in industrial policy, it still persists: a recent official report recommended extending the low corporation profit tax rate to *internationally traded* services but placed little emphasis on the growth potential of the non-traded services sector or the benefits (for consumers) of competition.[12]

More recently, however, a form of reconstructed mercantilism has developed. This recognises that the non-traded sector supplies inputs to the traded sector and that greater competition in the non-traded sector can improve competitiveness.[13] Although still naive in that all the weight in the social welfare function[14] is still on exports, the reconstructed approach necessitates a domestic competition policy, albeit directed at producers of certain inputs. As it is not possible in practice to separate out markets that supply to consumers directly and those that supply to

exporters, a policy that reflects the preferences of a reconstructed mercantilist will put some positive weight on consumer welfare.

In effect, competition policy still does not reflect consumer interests as it should. Some markets are exempt from competition rules. In markets where the competition rules apply, enforcement has been weak. There has been a lack of progress in exposing some markets to competition policy (taxis, public houses, groceries, cable television) and regress in other areas (newspapers and pharmacists). Moreover, these are generally markets where the products are consumed directly rather than supplied as inputs to exporters.[15] In contrast, progress has been made in some markets (air transport) where exporters are the customers. The bottom line would appear to be that when it is a case of producer against consumer, the producer still stands a good chance of having its preferences reflected in the social welfare function whereas when it is an upstream producer versus a downstream producer, increasingly we may expect the downstream producers to win out if they are exporters (or perhaps import-competing producers).

Quantifying the economic loss due to monopoly rent is difficult. Economic studies of monopoly estimate the pure welfare loss (Harberger triangle) as being between 0.1 and 10 per cent of output. The figure would be several times greater if the monopoly rent were to be included, as would be appropriate for example if substantial resources are expended on rent-seeking, if there is wasteful dissipation of monopoly profits (X-inefficiency) or if profits are paid to foreign shareholders, all factors which may be important in Ireland. For such markets, a figure of up to 15 per cent of the turnover might be considered to be social waste. Clearly, with such magnitudes applied across large sectors of the economy, the welfare loss from monopoly power may run to several percentage points of GDP. The estimation of the welfare loss in individual markets, even if crude, suggests priorities for competition policy, namely to tackle those markets where turnover is large (e.g. telephones, taxis, alcohol) and those markets where monopoly profit is likely to be dissipated in rent-seeking, lobbying or other inefficient activities. However, it may also be worthwhile to tackle a problem in a small market, either because it is representative of many others or because the issues and analysis have an exemplary effect.

3. COMPETITION POLICY IN IRELAND

This section of the paper outlines briefly the current system of competition policy in Ireland.[16]

Competition Rules

The principal competition rules are set out in three pieces of legislation.[17]

1. The Mergers, Take-overs and Monopolies (Control) Act, 1978.
2. The Competition Act, 1991.
3. The Competition (Amendment) Act, 1996.

Section 4 of the 1991 Act deals with agreements between firms. It sets out a list of practices[18] that could offend against competition (identical to that in Article 85 of the EC Treaty) and enables the Competition Authority to certify inoffensive agreements. Where an agreement is anti-competitive, the Authority may issue a licence if there are countervailing benefits (increasing efficiency and passing the gain onto consumers). Otherwise the agreement is refused a licence or certificate.

Section 5 of the 1991 Act covers abuse of dominance (by one or more firms), with a non-exhaustive list of abuses that is identical to that in Article 86 of the EC Treaty. The Competition Authority had no role unless requested to investigate by the Minister.

Mergers and acquisitions are covered in the 1978 Act (as amended by the 1991 and 1996 Acts). Turnover thresholds apply, above which notification to the relevant Minister is required.[19] The Minister makes the decision but if he wishes to prevent the merger or acquisition must refer it to the Competition Authority for an investigation and report.[20] The Competition Authority is required to report *inter alia* on industrial policy criteria such as the effects on the level of employment and regional development. The legislation makes no comment as to whether any or all of these should be considered in defence of a merger or acquisition (i.e. countervailing benefits), nor does it indicate what factors the Minister should take into consideration in deciding on whether to approve a merger or acquisition. Thus the actual rules governing mergers and acquisitions are obscure.

An early decision of the Competition Authority recognised that a merger or acquisition may take the form of an agreement between undertakings that affects competition. In such cases, Section 4 of the 1991 Act would apply.[21] This introduced a second procedure whereby an agreement could be notified to the Authority for a certificate or licence. Clearly the criteria are not the same under each procedure.[22] In practice, the main problem might be that smaller mergers or acquisitions are treated according to the Section 4 criteria and larger ones according to some other less observable criteria that may not coincide with consumer interests.

Enforcement

The 1991 Act was implicitly posited on a principle of private enforcement through the courts. This is best illustrated by the fact that the Competition Authority was established as a body to monitor and comment on standards of competition rather than to enforce them.[23] Several features illustrate this.

1. All agreements with potentially anti-competitive terms were eligible to be submitted to the Authority for licensing, but there was no penalty for not submitting them.
2. The Authority had no power to enforce its decisions. Thus the only penalty for non-compliance with a decision was the risk of private action by a party to the agreement (to have it declared void), action by the Minister or action by a third party to seek damages.
3. The Authority had no role in abuse of dominance cases unless requested by the Minister to undertake an investigation.
4. It was not intended that the Authority should have any role in approving mergers and acquisitions unless requested by the Minister to undertake an investigation.
5. The Authority had no powers to investigate an agreement not submitted to it. This severely restricted public enforcement against cartels.
6. The Authority had no powers to impose fines or other sanctions.
7. Orders of the Minister under the merger legislation are enforced by the Director of Consumer Affairs rather than by the Competition Authority.

The procedures differ according to whether a matter is decided by the Competition Authority, the High Court or the Minister. In all three cases, there is a right of hearing, but only in court cases is there a right of cross-examination. A time limit applies only in respect of mergers and acquisitions notified to the Minister.[24] Decisions of the courts and the Competition Authority contain written reasoning, but those of the Minister do not. In the case of mergers not investigated by the Competition Authority, there is no clear procedure for publicising the notification, inviting third party submissions, issuing questionnaires to competitors and customers or publishing favourable decisions.

The 1996 Act tightened up the enforcement side of the legislation in two specific regards. First, it introduced penalties for breaches of competition rules and for non-compliance with orders of the Minister and decisions of the Competition Authority (described in Table 3 below). The most interesting feature of this change is the introduction of criminal sanctions for the breach of competition policy, with possibilities of imprisonment for offenders. Culpability extends to all members of a company that consented to a decision.

Second, it facilitates (but does not require) the appointment of one member of the Authority as a Director of Enforcement. The Director is enabled to carry out investigations arising from his or her initiative or arising from a complaint and to make recommendations to the Authority for relief and penalties. It is the Authority, however, that decides whether to initiate proceedings.

The Competition Authority

The powers and functions of the Competition Authority have been considerably enhanced by the 1996 Act (see Table 1). In particular, the Authority is now free to

conduct investigations of its own accord, undertake studies, prosecute cases and seek fines.

Table 1 Functions of the Competition Authority and how they changed with the 1996 Amendment

Function	1991 Act	1996 Act
Consider notified agreements	Yes	Yes
License/Certify agreements	Yes	Yes
Investigate restrictive agreements	No	Yes
Consider mergers and acquisitions	If Minister requests or Section 4 or 5	If Minister requests or Section 4 or 5
Decide merger cases	No	No
Investigate abuse	If Minister requests	If Minister requests
Determine abuse	No	Yes
Seek penalties for breach of rules	No	Yes
Seek penalties for non-compliance	No	Yes, of Competition Authority decisions
Undertake studies	If Minister requests	On own initiative
Publish an Annual Report	Yes, via Minister	Yes, via Minister

The ability of the Authority to enforce the law is determined by its resources. At present, it is funded directly from the budget of the Department of Enterprise and Employment and its total cost is not separated out but was estimated to be in the region of £800,000 in 1995. The absence of a separate item in the Book of Estimates means (a) that the Competition Authority lacks institutional and political independence and (b) that it has an inefficient administrative procedure for approving expenditures because it must seek approval for each item of expenditure (which in practice occupies considerable Authority time).

Ideally, the state should allocate resources to a policy to the point where the marginal benefit of the policy equals the marginal cost of public funds (including the dis-incentive costs of taxation).[25] As noted in the previous section, the benefits of competition policy in Ireland may run to several hundreds of millions of pounds, suggesting a low level of current funding (especially if compared with industrial policy). Although the high output of the Competition Authority to date[26] (Table 4) might suggest that competition policy is relatively inexpensive to provide, given staff levels (Table 2), there are several reasons why this is not the case. First, many of the decisions of the Authority were routine or repetitive in the sense that they apply a formula established in a previous case.[27] Second, the Authority has considered a large number of reasonably clear-cut cases, especially involving vertical restraints. Third, there have been very few complex cases requiring the collection of evidence etc. The length of competition cases in the High Court (often 30 days or more of court time) indicates the complexity of abuse of dominance cases. Cartel cases and merger investigations may impose similar costs. As the

Authority begins to enforce the law under the 1996 amendment, its costs will rise both because it has more functions to perform and because the new functions will be more costly than the previous ones. It is not clear that the allocation of 6 or 7 additional professional staff will be adequate to undertake these functions.[28]

Table 2 Staff of the Competition Authority, 1993-1996 and Expected for 1997

Type	1993-1996	1997
Members	3	4
Legal professionals	1	2
Economics professionals	0	5
Administration	5	5
Clerical	6/7	6/7
Total	15/16	22/23

Quality of output also affects costs. Bad decisions in competition law can do enormous damage. Safeguarding against poor quality output may increase the cost of policy both directly and indirectly. Examples of direct costs include the appeals procedure, the cost of adequate staffing by qualified individuals and so on. Indirect costs refer to the costs on consumers if an incorrect decision prevents efficient transactions or activities or allows inefficient ones. The discussion below reveals that where the Authority was required to consider complex issues in a short period of time (as with Ministerial referrals), resources may have constrained the quality of decisions. High quality output also requires that the individuals within the competition office take decisions that reflect the public interest, rather than any private interests. Although the Authority is not a judicial body, there may be reasons why revolving doors (whereby officials return to the private sector) may not be appropriate.[29] Given that the agency enforces rules against the private sector, incentives could be affected by subsequent private sector career opportunities. Moreover, competition decisions may sometimes be highly political. At present, it is not clear that the appointment procedures give adequate long-term protection in this regard.[30]

The low staffing of the Competition Authority has not, hitherto, permitted a distinction between investigation and decision-making, nor is there any reference to this distinction in the legislation. To some extent, this is achieved by the possibility of appeal to the courts. The new legislation does not confer powers to issue injunctions.

Sanctions

The 1996 Amendment had the effect of making breaches of competition law a criminal offence. The introduction of penalties of any kind, both for the breach of the rules of competition and for non-compliance with competition decisions, is welcome. Table 3 indicates the levels that now apply. The company limits are

expressed as a percentage of turnover but are capped by a nominal figure.[31] It is not clear that these can be exemplary (i.e. permit fines greater than the level of the damage). A limit of 10 per cent of turnover does not discourage large-scale abuses, that is, those for which the monopoly profits exceed the largest possible fine. This means that, perversely, a cap on fines penalises small abuses more severely than large abuses. Individuals in management positions (or those who purport to be) are treated in the same way as the company itself and can face personal fines or imprisonment.

Table 3 Sanctions for breach of Competition Law

Type	Company	Individual
Summary conviction	£1,500	£1,500 and or 6 months
Conviction on Indictment	Max (£3m or 10% of turnover)	Max (£3m or 10% of turnover) and/or 2 years prison
Continuation after conviction	£1,500 per day	£1,500 per day

Personal fines are not so different from company fines as the individual can be compensated by the shareholders if he or she was acting in their interest. Thus personal fines may only assist with preventing anti-competitive actions where there is a failure of corporate governance. On the other hand, shareholders may not easily compensate the managers for a period spent in prison so that managers will be less likely to take decisions that may be anti-competitive, regardless of shareholder instructions. It might also be argued that imprisonment, in being a personal penalty, has a greater disincentive effect than the imposition of a fine.[32] It will thus be interesting to see whether the courts rely more on fines or imprisonment where convictions are obtained.

In any event, the effect of the fines on corporate behaviour will depend to a large extent on the success of prosecutions. The criminalisation may have the effect of making it more difficult to convict, as it increases the burden of proof from "on the balance of probabilities" to "beyond reasonable doubt". This is potentially a serious problem in the context of competition law where the evidence may be difficult to obtain and may permit considerable ambiguities in interpretation. An additional problem relates to presenting technical and possibly complex economic arguments before a jury. The option of taking civil action is also open and this would involve obtaining an injunction, thereby opening the possibility of private action. However, this means that exemplary fines could not occur.

The task of enforcement of fines is to be undertaken by the Authority. Although the revenues accrue to the Authority, their use is at the discretion of the Minister for Finance so that fines are *de facto* returned to the Exchequer. It is frequently argued

that the Irish Constitution prevents administrative fines so that the Competition Authority may not itself impose fines but must instead seek them from the courts.

4. CASE LAW

We use the term 'case law' loosely to include the output of the Competition Authority (decisions and reports which are more like opinions than binding legal decisions) and judgements of the courts. It is not possible here to undertake a systematic review of the case law. Instead, we outline the scale and nature of the output from all these sources, concentrating particularly on cases in the last 5 years, and examine in detail a small number of cases that illustrate how the system works and what standard of competition is being determined.[33]

The bulk of output since the 1991 Act has been produced by the Competition Authority, both as a result of notifications received by it and investigations requested by the Minister (see Table 4). In addition, a number of High Court judgements have been made and there have been many hundreds of notifications of mergers and acquisitions to the Minister. A number of European Commission decisions and European Court of Justice (ECJ) judgements have concerned markets in Ireland.

Table 4 Output of Competition Authority since its creation in 1991

Year	1991/2	1992	1993	1994	1995	Total
Notifications received	14	1,159	67	34	38	1,312
Notifications dealt with before end 1995	14	844	49	18	19	984
Notifications on hand at end 1995		275	18	16	191	328
Investigations for Minister					1	1

Given the system of enforcement outlined above, it is not surprising that there were no cartel cases in the courts.[34] In addition, only a handful of private actions were taken in the courts on abuse of dominance, and none by or on behalf of consumers. The main work of the Competition Authority to date has been with vertical agreements, codifying them by category, and licensing and certifying them either individually or by use of category licences. The initial surge of notifications was caused by a deadline of October 1992 specified in the 1991 Act, after which notifications fell off considerably.[35] The fall in notifications may have been augmented by an increasing realisation that the Authority had no enforcement powers (especially as some were withdrawn). Although there was little incentive to notify a seriously anti-competitive agreement, the Competition Authority found a relatively high proportion offended under Section 4 (see Massey and O'Hare (1995)), mostly involving resale price maintenance. A number of horizontal agreements were also notified.

Agreements Between Undertakings

The Competition Authority's approach may be summarised as follows.

1. It has prohibited vertical agreements if they impose resale price maintenance (RPM). In the Net Book Agreement decision (Competition Authority Decision No. 336, 1994), the Authority noted that RPM may contribute to horizontal co-ordination. Justifications offered in favour of the Net Book Agreement were that the cross-subsidisation involved was socially desirable and that it kept small book-sellers viable. These were not accepted on the basis that cross-subsidisation distorts relative prices and that arguments about viability of producers were about protecting competitors rather than competition. In the Musgrave decision (Competition Authority Decision No. 354, 1994), the agreement specified a form of maximum resale price maintenance that the Authority considered to be anti-competitive in that it restricted the freedom of re-sellers to set the prices freely. On the other hand, the Authority has not objected to agreements that recommend resale prices where it is absolutely clear that these are non-binding and the re-seller can set prices as he or she chooses.
2. It refused to license horizontal agreements that involve price fixing in any form. Therefore it refused to license the agreement fixing commissions for brokers of Irish Government Securities (Competition Authority Decision No. 335, 1994) and an agreement amongst booksellers to use the same conversion tables for converting UK prices to Irish prices (Competition Authority Decision No. 348, 1994). Of particular interest was the Easons/Newspread agreement (No. CA/1080/92E). Easons and Newspread are duopolist importers of UK newspapers and magazines and distributors of both UK and Irish products within Ireland. They wished to get approval for an agreement to buy currency forward at the same day and exchange rate and to coordinate on price-mark-ups. The latter took the effect of a ready-reckoner, supplied to retailers, enabling them to convert the UK to the Irish price. It was not obligatory for the retailer to use this, but the Competition Authority considered that the horizontal nature of the agreement was anti-competitive. In a legal manoeuvre, the agreement was withdrawn before the Competition Authority made its decision.[36] Subsequently, the Government attempted to impose price regulation in regard to the importation of such material, but its implementation was prevented by the High Court. The example highlights the problems that can arise when enforcement of competition law is inadequate, and indicates that the official response is still to impose price controls as a damage limitation exercise instead of putting in place proper systems to tackle the potential problem at a general level.
3. With regard to associations of undertakings (typically competitors), the Authority has taken the view that an association of undertakings is itself an undertaking so that any agreements signed by the association come under the 1991 Act. Consequently both an agreement forming an association and an agreement between an association and other parties may come under Section 4.[37] The Authority has permitted agreements forming such associations if the purpose is to promote members' interests, provided that these interests do not

extend to restricting competition. In the case of the association of electrical contractors (RECI, CA/836/92), restrictions on fees charged or advertising were considered to be unacceptable.[38] In the Optometrists' case (Competition Authority Decision No. 16, 1993), it was noted that restrictions on the premises and any coordinated restriction of the numbers to be trained in the profession based on perceptions of satisfying demand would be unacceptable barriers to entry. Agreements among the clearing banks concerning the management of cheque cards, eurocheques and other clearing systems were considered anti-competitive but were licensed because they did not exclude entry to the agreement nor prevent an alternative association and they had efficiency benefits that justified the restriction in competition.

4. Many of the Authority's decisions relate to the applicability of the Act, and particularly important are those affecting market definition and the question of an undertaking. Agreements between a firm and consumers (Competition Authority/92/92E) do not come under the Act as the latter are not considered to be undertakings. An agent that is considered to be an integral part of a principal is similarly exempt. The fact that an employee cannot be an undertaking has led to an anomaly: non-compete clauses come under the Act if the party set up as a new undertaking but not if the party joins an existing undertaking as an employee, although the economic effect is possibly the same in both cases.
5. With regard to market definition, the Authority has steered a systematically clear and pragmatic course, examining demand substitutability in detail and showing a willingness to choose both narrow and broad market definitions in different cases. The Nallen/O'Toole decision (Competition Authority Decision No. 1, 1992) made clear that the relevant geographic market for large electrical appliances might be larger than the 20 mile radius in the agreement, particularly given the large once-off nature of the consumer's expenditure. It also argued that there were few barriers to entry in this retail business so that potential competition was strong. In general, the Authority has not examined the cross-elasticity of supply to the same extent as cross-elasticity of demand.[39] Instead, it has tended to define the relevant market based on demand substitutability and considered barriers to entry and potential competition only in the context of the analysis of competition on that market.[40]
6. In addition to the above, the Authority licensed a large number of vertical agreements involving exclusivity or selectivity of some kind. Many of these were done using category licences, identical in style to the EC Block Exemptions[41].

The output of the Competition Authority in dealing with Section 4 notifications has been nothing short of remarkable, given the small numbers of staff and the large flood of notifications in 1992. It would generally be regrettable, if not downright inefficient, to occupy the resources of a competition agency solely in the analysis and determination of vertical agreements at the expense of potentially more harmful horizontal agreements and abuses of dominance (particularly when these vertical agreements are submitted voluntarily). However, given the evidence of high concentration in retailing and wholesaling in Ireland (see footnote 2), this regret

must be tempered. The evidence is that the Competition Authority has performed a useful and extremely worthwhile task in codifying what vertical restraints should be allowed. In particular, it has sent a clear signal on resale price maintenance, and adopted a generally permissive attitude to exclusivity arrangements unless there is a danger of it facilitating horizontal coordination. The Authority has endeavoured to avoid taking any decisions on vertical contractual arrangements that might be considered to be tantamount to them facilitating a bargain between two parties (i.e. fair competition).[42]

It might be argued that the Authority has sometimes been too lenient and has not prohibited vertical agreements that clearly have adverse effects on third parties such as imposing barriers to entry, perhaps in an effort to avoid dealing with issues of fairness.[43] An example is provided by the LPG category licences (Competition Authority Decision No. 364, 1994, amended in Decision No. 402) where the two firms which supplied over 90 per cent of the market requested 5 year contracts but an entrant (Blugas) argued that there was no necessity for any exclusive purchasing in the market.[44] The Authority response was to restrict the contracts to exclusive purchasing for up to two years, which suggests either a mediated solution (fair competition) or a formulaic approach (applied incorrectly here). Where a third party (here a competing upstream firm) is adversely affected by vertical contracts and incumbents are dominant, the presumption should be that the restraint constitutes a barrier to entry unless it can be shown otherwise.

Abuse of Dominance

All decisions on abuse of dominance have been judgements of the High Court or the Supreme Court under Sections 4 and 5 of the 1991 Act or the European Commission and the European Court of Justice (ECJ) under Articles 85 and 86 of the Treaty of Rome. The sole exception is the investigation of the Competition Authority into the newspaper market(s) in Ireland.

A number of important legal precedents have been set in the High Court:

1. The holding of a dominant position is not equivalent to abuse (Keane, J. in Masterfoods/HB, 1992).[45] An earlier judgment in this case had the effect of permitting the dominant firm to continue its existing market practices pending the outcome of the main hearing. In the particular market (for impulse ice cream products), the dominant firm (HB) was found to have a market share of over 70 per cent, with a C_4 of 100.[46] It supplied freezers to retail outlets free of charge and charged the same prices for ice-cream to all retailers, regardless of whether they owned their own freezer or not. As part of the agreement, it insisted that rivals' products not be stocked in the freezers. It also operated non-linear pricing by the use of quantity discounts. The judge held that HB was dominant but accepted that these practices had an efficiency rather than anti-competitive rationale and thus concluded that there was no abuse of dominance.

2. A dominant position may be held by a firm with market power in a market in which it purchases inputs (Shanley, J. in Blemmings/Monaghan, 1997). This case established the precedent that monopsony (buyer) power constitutes dominance in a manner analogous to monopoly (seller) power. As in the Ice Cream case, the judge found dominance but did not find evidence that dominance had been abused.
3. Non-profit organisations and bodies engaged in providing a public service (even if not for profit) are undertakings under the Act (VHI case) but ministers acting in a regulatory capacity (such as awarding licences) are not (Keane, J. in Carrigaline, 1995). The latter decision has the effect of protecting many markets from the rules in the 1991 Act. To the extent that this outcome was unintended, it is unfortunate. If it was the deliberate intention of the legislators, then it is very regrettable.

A number of decisions at EU level have also related to Irish markets and their number is significant in view of the fact that domestic enforcement has been relatively weak. In particular, the European Court of Justice found the Irish public broadcasting service had abused its dominant position by refusing to supply programme schedules to a magazine (the Magill case). Aer Lingus was similarly found to be in breach of Article 86.

The Competition Authority's investigation of newspapers deserves attention (a) because it is the only investigation of dominance by the Competition Authority under the 1991 Act and (b) because it illustrates the most serious shortcomings of the system, and its potential susceptibility to industry and political pressures.

Although the Authority was originally asked by the Minister to undertake a general study of competition in the newspaper market in October 1994, this request was subsequently modified by a request for a more urgent interim report on two aspects of the industry: trans-frontier competition and the question of whether Independent Newspapers's acquisition of 24.9 per cent of the shares of the Irish Press Group and the granting of a £2 million loan to the latter constituted an abuse of a dominant position.

The report of the Authority (Competition Authority (1995b)) was presented to the Minister in March 1995 and its basic findings were that Independent Newspapers had abused its dominant position and that the low price selling of British newspapers in Ireland did not constitute predatory pricing. We consider these in turn.

The Competition Authority considered that there were seven distinct markets[47] for newspapers in Ireland, having excluded magazines and regional newspapers, on the basis of substitutability in demand and statements in the annual reports of Independent Newspapers. In the different markets for newspapers in Ireland, the titles controlled by Independent Newspapers had market shares in the region of 60 to 80 per cent. Other factors indicating Independent Newspapers's dominance were its vertical integration into printing and distribution and its financial strength.[48] The

Irish Press Group had titles in three of the markets, Irish quality daily, Sunday quality daily and evening. It was the only Irish competitor of Independent Newspapers to compete with it in several markets. In finding an abuse under Section 5, the Authority focused on the fact that the acquisition specifically excluded any rival of Independent Newspapers from acquiring control of the Irish Press, and emphasised that Independent Newspapers would be the main beneficiary of the demise of the Press in terms of sales and advertising revenue. It also concluded that the agreement offended against 4(1) of the 1991 Act. Although the Minister eventually stated publicly that he supported the Authority's findings, he took no positive action and the Irish Press newspapers ceased publication (in May 1995).

The Authority's findings appear both reasonable and well-argued.[49] It remains to be seen whether entry can and will occur to challenge the Independent's dominance of the market. It is possible to fault the Minister for failing to act in a decisive manner, for example, by bringing an action to prevent the continuation of the agreement.[50] The case highlights the fact that political decision-making in regard to competition issues may often be unsatisfactory.

On the second issue, the Authority noted that no UK published titles had a dominant position on a market in Ireland and consequently concluded that the low prices observed could not be predatory. They made the point that the UK group, News International, would not be the main beneficiary of the elimination of an Irish title, either in terms of newspaper or advertising sales. They did not examine, however, the issue of cross-ownership between the Irish and UK markets which could be relevant to competition on the Irish market. Nor, as mentioned above, did they address the extent of supply side substitutability (for example, the ability of a UK newspaper to produce an Irish title).

The question did not end here. The Authority, having published its *Interim Report*, was not asked to undertake the full investigation originally requested. Instead, the Minister appointed a Commission on the Newspaper Industry in September 1995 which *inter alia* was to report on "the competitiveness of the industry in Ireland which faces growing challenge from imports" and "fair competition both in the market for newspaper sales and in the advertising market" and "concentration of ownership in the media generally". The Commission was headed by a former Chief Justice and included representatives of various cultural and industry groups, plus some academics. The Commission reported in June 1996 (see Commission on the Newspaper Industry (1996)) and:

1. found the relevant market for their terms of reference was the entire market for the sale of newspapers in Ireland, as opposed to the Authority's seven distinct sub-markets, (reasoning not provided) and addressed competition between indigenous and imported national newspapers, among indigenous national newspapers, and among local newspapers;
2. found that UK newspapers were selling below cost in Ireland and recommended that the Government introduce specific legislation (along the lines

recommended by the National Newspapers of Ireland) outlawing the sale of newspapers below cost and banning the free lotteries as marketing devices;

3. admitted that Independent Newspapers occupied a powerful position but noted that there was no evidence of predatory or below cost selling or price war by it or any other newspaper and, apparently on this basis, concluded that "mere size cannot be taken to establish unfair competition";
4. avoided making any comment on the Independent's acquisition of shares in the Press other than a general platitude about the "desirability of maintaining as far as possible ease of access to the newspaper market".

Moreover, the fact that Independent Newspapers offered discounts of 15 to 25 per cent on advertisements placed in the five titles it controlled was considered to "represent strong and telling competition" and to be a logical development of the company's size in the market (whereas an economist might see it as extension of dominance). Finally, in their deliberations on concentration, the Commission confined itself to a discussion of the extent of cross-ownership and made no reference to concentration *per se* as an economist would know it.

The eventual outcome of the process is very disappointing and particular blame must be placed on the Minister (a) in not acting more resolutely on the Competition Authority's report (and in using a Section 11, rather than Section 14, procedure) and (b) in the poor terms of references given to the Newspaper Commission (e.g. the focus on fair competition). However, the findings of the Commission, even within the poor terms of reference, are equally disappointing. If there is no direct competition between indigenous and foreign titles (as the Competition Authority considers) there can be little effect on Irish producers. In either scenario, Irish consumers benefit from below cost selling, funded by UK newspaper readers. The whole process highlights the need for transparency and consistency in competition policy decisions.[51]

Competition policy in the media may need to reflect different interests than in other sectors for political or cultural reasons. This may not imply a conflict between policy goals, if the idea of consumer interest underlying competition policy can take account of such political or cultural arguments. However, if there are cultural or other reasons for protecting indigenous newspapers from foreign competition, this can be achieved more easily and transparently by other means. For example, foreign newspapers could be taxed or minority newspapers could be subsidised.[52] Instead, the introduction of legislation along the lines proposed by the Commission amounts to a charter for newspapers to protect themselves from competition. Such immunity from competition rules amounts to an implicit state aid to a sector, and should be seen as such.

Mergers and Acquisitions

As noted above, there are now two procedures for notifying a merger or acquisition, to the Competition Authority as an agreement under Section 4 and to the Minister

under the 1978 Act in the event that either of the thresholds is attained. We consider the outcome of both procedures.

Notifications to the Minister

In general the number of merger and acquisition notifications to the Minister has been running at between 100 and 120 per annum for the last 10 years, but only a very tiny percentage has been prohibited. (Information provided in the annual report on mergers is not particularly detailed.) As the Minister is not required to provide any reasoning for a decision, the only cases about which much can be said are those that have been referred to the Competition Authority for investigation. Three such investigations have been undertaken, all within a 30 day time limit. We consider the petrol and tea cases in detail.[53] In contrast with many other Authority decisions, each of these two cases exhibited some dissonance, either between the Authority's recommendation and the final outcome or within the Authority.

Petrol Retailing

In early 1996, the Minister referred to the Competition Authority a merger notification between two retailers of petrol and gas, Statoil with an 11 per cent market share and Conoco (trading under the Jet brand) with a 14 per cent share of the market (all figures on market shares and concentration measures are approximate). The facts noted by the Competition Authority were:[54]

- that the market structure was concentrated, with the C_4 increasing from about 70 to 85 and the Herfindahl index (see footnote 48) from about 1,500 to 1,800; and
- that Jet's prices were systematically below those of Statoil and tended to be the lowest in the market.

The Competition Authority used demand substitutability to distinguish retail from commercial sales, and motor fuels from other oil products. It was admitted that the relevant geographic market can be local rather than national. The Report did make reference to regional concentration, but did not examine the effect that the merger would have on competition on local markets. It did not devote adequate attention to supply substitutability in its definition of the relevant markets, and possibly underestimated the extent to which entry might occur.[55] As such, it would tend to bias upwards the measurement of market concentration.

The Competition Authority considered that the merger would restrict competition in the market for motor fuels.[56] This decision was based on the following considerations:

1. High barriers to entry in petrol retailing, resulting from sunk costs and long-term contracts between existing participants which prevented the possibility of hit-and-run entry; and
2. The fact that cost savings (efficiency gains from the merger) when translated into a petrol price reduction would be less than the existing differential between the participants.

The Competition Authority rejected *absolutely* the possibility of remedies, arguing that price controls were unsatisfactory and that structural conditions on the merger, such as an obligation to sell or release retail outlets, would amount to interference in the market and would be difficult to enforce. Within 30 days, the Minister published an Order prohibiting the merger.[57] Some months later, the Minister published an amending Order which in effect allowed the merger on condition that Statoil divest itself of certain owned and contracted retail stations, and some of these to be sold to a specific firm that was not a market leader.[58] The whole procedure took approximately 8 months. The amending Order highlights the difficulty of determining remedies within the current procedure.

Tea Distribution

In June 1996, the Minister referred another notification to the Authority. The leading tea distributor, Lyons, a firm with about 45 per cent of the market, was to be acquired by Unilever Ireland, the distributor of the Lipton tea brand which was a recent entrant to the market and had a market share of 3 to 5 per cent. The Authority was requested to report within one month. During this period, Unilever announced the withdrawal of the Lipton brand from the market. The Authority's Report (Competition Authority (1996c)) recommended refusal of the acquisition as initially notified. A supplement to the Report recommended, by a majority of 2 to 1, the acceptance of the acquisition given the information that the Lipton's brand was to be withdrawn. We consider the two decisions in turn.

The Authority defined the relevant market as the tea market in the State. The basis of the original Authority decision to recommend prohibition of the acquisition was that the market was highly concentrated (a C_4 of 84 to 90 and a Herfindahl close to 3,500[59]), profits were extremely high relative to all other firms in the food sector[60] and there were barriers to entry.[61] The report emphasises that the high profitability and barriers to entry were the crucial features. Given its decision in the Fexco case (discussed later in the paper), this suggests that structural parameters are not as important in determining the decision of the Authority as they might appear from the reading of the report.

The definition of the market was unsatisfactory. Common sense (which is what the characteristics test amounts to) suggests that there is a distinct demand for tea. Despite this, the Authority involved itself in considerable hyperbole that added little to the common sense result.[62] On the supply side, consideration was given to instant tea (which probably should be on the demand side). The most obvious sources of

supply substitutability are (a) distributors of tea in neighbouring jurisdictions[63], (b) distributors of coffee in the Republic and (c) distributors of other foodstuffs that could obtain easier access to the retail outlets (e.g. Unilever) or that had well-recognised brand names. These possibilities were not systematically analysed at the market definition stage with the result that the market may have been defined arbitrarily narrowly. Much is made in the report of the poor success of the Lipton brand, with the inference that high customer switching costs mean that barriers to entry are intrinsically high. No evidence is presented of a robust price-undercutting strategy by the entrant so that no such inference can be drawn.

On the other hand, there were several reasons to reject the merger that were not considered sufficiently clearly. The first is the possibility of tacit collusion amongst the existing firms in the market. A firm in a collusive market might choose to merge with an entrant to maintain the status quo.[64] The second is the extent of Unilever's involvement in two related markets, namely worldwide tea and foodstuffs in Ireland. Unilever's leading position in the distribution of tea worldwide could have effects in the Irish market, either by consolidating international dominance or by restricting potential entry. Unilever's strong position in the distribution of other foodstuffs in the Irish market might have justified concern about the acquisition of dominance in complementary goods (enabling full-line forcing or multi-market collusion, for example), especially in the presence of the Groceries Order. Each of these concerns applies *regardless* of whether Unilever already has a position in the Irish tea market. Their consideration in the main part of the original decision would have greatly helped the more contentious discussion of the merger in the context of the Lipton brand having been withdrawn.

On the withdrawal of the Lipton brand, the majority of the Authority concluded that the acquisition could have no effect on concentration in the Irish market and that the acquisition should be permitted. (This view was accepted by the Minister.) The minority argued that concentration was affected because Unilever was still a potential competitor, being a large player in the international tea market (with a subtle hint that Unilever's presence outside the market would restrain tacit collusion within it). It also noted that although the Lipton brand itself would be withdrawn, the production facilities would remain so that the failing firm argument was present to some extent. These arguments might have been more convincing if they had been made more systematically in the main part of the decision where they also applied. On balance, the outcome in this case may have facilitated a restriction of competition against the interests of consumers.

Competition Authority Notifications

The Competition Authority has considered a large number of agreements that constituted mergers or acquisitions.[65] A major case concerned an agreement whereby Irish Distillers (a firm with almost 100 per cent of the (Irish) Whiskey market, 76 per cent of the Whiskey + Whisky market and 46 per cent of the overall spirits market) would purchase the only other producer of Irish Whiskey, Cooley

Distillers (a tiny but growing producer). The Competition Authority refused to license this acquisition (Competition Authority Decision No. 285, 1994). It found that the relevant market was that for Irish Whiskey and that Irish Distillers was dominant. It also found that entry was difficult, with substantial sunk costs owing to the legal requirement to mature whiskey for several years. Finally they found that the acquisition was primarily aimed at eliminating competition and that it offended against Section 4 and could not be justified. The Authority did not accept the failing firm defence and cited the US Justice Department Guidelines in support of this.[66] An important aspect of the case was that it was the intent (rather than the effect) of IDG to restrict competition.

In Fexco/BIG a merger was allowed to proceed in the market for providing VAT refunds to visitors from non-EU countries, although the market shares were 43 per cent and 1 per cent, on the basis the market is relatively easy to enter (Competition Authority Decision No. 405, 1995). This illustrates the ability of the Authority to permit an acquisition of a market leader where there are no barriers to entry (in contrast with the tea case where concentration levels were similar but barriers to entry were considered high).[67] In other cases (Eureko/Celtic International, Sedgwick/TSB, FBH/Harty, Azinger/Fispak), remedies have been imposed by the Authority. A particularly frequent remedy has been the modification of the terms of non-compete clauses that accompany the sale of a business. This demonstrates a consistent concern by the Authority that the lack of specific human capital might constitute a barrier to entry.

In general, the decisions of the Authority on mergers and acquisitions under Section 4 contrast sharply with those under the 1978 Act (Ministerial notification) in that they are less controversial and better reasoned. This may be attributable to greater complexity in the referred investigations, but is probably also due to the very short time interval available to the Authority to write a report. A change in procedure (perhaps two-stage as in the EC) might be effected that would give the Authority more time to consider such cases without increasing the overall time for a decision.

5. ASSESSMENT OF STANDARDS

Standards Determined in Case Law

The standards of competition are the *de facto* rules on the behaviour of and interaction between firms as they impinge on competition. Standards that are too lax would enable firms to engage in activities that impair competition and that do not have a (counter-balancing) positive effect on economic efficiency. On the other side, standards that are too strict might sometimes prevent firms from engaging in activities that improve overall efficiency. This review of the case law leads to the conclusion that a strict, coherent and clearly observable set of standards is developing for competition in the Irish economy. Subject to some qualifications, these standards would appear to accord with what economic theory suggests as appropriate.

The starting point for any analysis of competition is the relevant market and all the case law suggests that definition of the market has been undertaken rigorously both by the Authority and the Courts. In general, this has relied on best practice in the area with the exception that supply substitutability has been neglected in some cases where it might have mattered. This could make standards of competition overly strict (i.e. prevent efficient behaviour that does not impair competition).

With regard to abuse of dominance cases, dominance has been seen not just as a structural concept, but in the wider condition of other features of the market. In particular, the Authority has placed high emphasis on the question of barriers to entry. Where a firm is dominant, detailed attention is given to whether activities would constitute an abuse. In two cases where a dominant firm was engaged in vertical tying or exclusion, no abuse was found (implicitly in the case of the Authority). The Authority and the courts may have put emphasis on theory suggesting that many vertical agreements enhance efficiency more than they impair competition. However, in the light of the concentration in the distribution sector in Ireland, this may be too lax a standard to enforce.

The standard for mergers and acquisitions (considered by the Authority) is high, with firms being required to show that either the market shares are too low to warrant concern or, if they are high, that there are no barriers to entry in the market. It is not yet clear (despite the tea case) what standards apply to an acquisition by a firm that is not already in the relevant market but that has a strong position in some complementary market. More generally, the industrial policy criteria in the legislation and the involvement of a Minister in decisions in this area suggest that the same standards do not, in principle, apply to mergers and acquisitions. Thus a merger that clearly damages competition but that improves employment (a difficult concept theoretically) could be approved. The fact that the Minister, in reaching a decision, is not obliged to publish reasoning adds further to lack of clarity.

No standard has yet been set for cartel cases, as there have been none. The Authority has, however, taken a strict line against horizontal agreements that set prices or restrict entry.

Finally, the treatment of vertical restraints clearly reflects current theoretical thinking on the subject. A caveat here is the more strict treatment of resale price maintenance which in theoretical terms may be no more harmful than other types of vertical restraint. Although this was sometimes based on the possibility of it facilitating horizontal coordination, there may be some residual inconsistency in this regard. This may be particularly relevant in the case of the Net Book Agreement.

A welcome feature of the operation of the policy since 1991 is the high level of public awareness of competition issues that it has engendered.[68] The careful documentation produced and publicised by the Authority and the detailed reasoning

in the ice cream case from the High Court mean that the standards being determined are communicated to practitioners and firms.

Markets in which Standards Apply

The overall standard of competition rules in the country is not just the legal standard applied but also the set of markets in which it applies. In this regard, competition policy in Ireland is very weak indeed. There is much evidence that the strict and consistent standards outlined above do not translate into a strong overall standard, largely because they do not apply in many sectors of the economy. Although this may be set to improve considerably as a result of the enforcement powers granted to the Authority, standards are not likely to be applied consistently throughout the economy. Firms may shelter from competition policy either because the law excludes them or because enforcement is weak.

1. Many markets are relatively sheltered from competition policy by other laws. Until the 1996 amending legislation, this could have been said in a voluntary sense of almost all markets (barring private action), but it still applies to certain specific sectors, namely:

   a) Sectors with an element of natural monopoly (such as network industries like telephony and cable television);
   b) Markets where entry is restricted to licence holders (such as public houses, taxis and, more recently, pharmacists);
   c) The groceries sector where the 1987 Groceries Order permits price collusion; and
   d) possibly the newspaper market.

   This list is not exhaustive and it remains to be seen what will happen with self-regulated professions, retail banking and other areas.

2. Regardless of this legal umbrella, enforcement may be weak either because the Authority lacks powers or resources or because it is not efficiently operated. The overall resources of the Competition Authority will affect the extent to which competition standards are enforced consistently across all markets. The standard of behaviour that will prevail in the economy should reflect the magnitude of any deterrence effect, itself a function of fines and probability of detection. Even with its new powers, the probability of detection facing many firms will remain low. Moreover, exemplary fines are not really possible under the law and the imposition of fines is cumbersome. Permitting a greater range of fines would reduce the cost of the administration of policy while simultaneously increasing its effectiveness.[69] Within a given set of resources, the efficiency of the Authority is important. Requiring it by law to decide on many hundreds of largely harmless vertical agreements is one way to ensure that it does not have the resources to undertake investigations of serious abuses of competition law.[70]

6. TOWARDS MORE EFFECTIVE AND COHERENT COMPETITION POLICY?

The fact that the legal rules on competition in Ireland emphasise consumer welfare was not due to an explicit recognition that consumer welfare is the basis for such policy, but rather arose because the welfare of exporters is often coincident with that of domestic consumers and because of Ireland's EU membership. This study does not reveal any major problems with the legal rules themselves. Their interpretation in decision-making has created a set of competition rules that puts high weight on consumer welfare. Any problems in interpretation would appear to be questions of fine tuning in the direction of best practice. In particular, there is no evidence thus far of regulatory capture (i.e. where the Authority would reflect the interests of producers).

Unfortunately the divergence between the interests of consumers and those of exporters is most apparent in the enforcement of policy. Hitherto enforcement has been weak, relying on private action, and selective in that activities were exempt from the rules. The new powers allocated to the Competition Authority will strengthen the enforcement, but only to the extent that the new powers are effective and only in those sectors where the competition rules apply. At present there is a very real danger of applying strict standards in some areas of the economy, while letting other areas escape either the competition rules or their enforcement, thus creating incentives for increased political and other lobbying. This analysis of the current state of competition policy suggests four areas where policy changes need to be considered, regardless of the success or otherwise of the provisions of the 1996 Amendment.[71]

Mergers and Acquisitions

The current system of considering mergers and acquisitions exhibits problems with the procedures for notification and investigation and with the criteria for approval. The procedures need to permit as rapid a decision as is possible consistent with high quality decision-making. To this end, it would be desirable to have a single notification procedure, a clear specification of the detailed information that should accompany a notification and a strict time limit for reaching a decision (possibly with a two-stage procedure for weeding out cases that are clearly not problematic). Information from competitors, suppliers and customers should be collected routinely using standard questionnaires. The need for a formal system of remedies is highlighted by the petrol case.

At present the criteria for approval, and hence the admissible defences of a merger, are unclear. In addition, the fact that the Minister takes the decision may lead to inconsistency with other elements of competition policy decided by the courts or the Authority. Only an efficiency defence should be permitted, as any valid argument in favour of increasing market concentration to the detriment of competition should be capable of being expressed in terms of an increase in economic efficiency. In

particular, there should be no failing firm defence. Regional and employment objectives can and should be addressed by other policy measures (e.g. industrial policy via taxes, subsidies etc.) rather than by implicit discrimination in competition policy decisions. Although there is little evidence (other than the Newspaper outcome) that this has occurred in the last 5 years, the door is wide open for it to happen in the future. Regardless of who takes them, written reasoning of decisions would enable a more transparent policy and would help to ensure that the criteria are correctly applied.

Natural Monopoly

An important policy question concerns the role of competition policy in industries characterised by natural monopoly. The detail of this question is beyond the scope of this paper, and has been addressed in a recent paper to the Society.[72] At present in Ireland, there is practically no independent regulation of natural monopoly, although this is set to change. However, given the difficulty of regulating every possible natural monopoly and the manner in which technological developments can alter the cost structure of markets (both towards and away from natural monopoly), it might be desirable to apply competition rules directly in such markets, regardless of whether they are regulated independently. This conclusion is further enhanced by the fact that a competition agency is less susceptible to regulatory capture than a dedicated regulatory agency. It would also ensure consistency of treatment across markets, creating greater social consensus in favour of competition policy.

Markets with Licensed Operators

Licensing is often necessary to ensure safety and other standards in a market. Examples of qualitative criteria in licensing systems are requiring taxi drivers to have insurance and a road-worthy car, requiring pharmacists to be qualified, requiring publicans to have safety exits and toilets and to close at certain hours.

Such criteria do not restrict entry *per se*, but merely set out the conditions under which entry can occur.

Often quantitative criteria have been used as proxies. The (usually mistaken) logic is that limiting the number of operators contributes to meeting the qualitative standards required. One need only ask whether restricting the number of taxis improves a driver's knowledge of the roads or the incentive to have a clean, road-worthy car, or whether restricting the number of public houses improves toilet facilities.[73] The use of quantitative restrictions typically benefits producers, with only the most tenuous benefits for consumers, if any, and considerable costs.

In Ireland, there are two particular problems:

1. how to deal with the rents created by the existing system; and,
2. how to put in place a system for licensing that balances the legitimate need for such regulation (for safety or other reasons) while safeguarding against the use of such licenses to restrict entry for anti-competitive reasons.

With regard to the first problem, several solutions are present. The government could buy out existing licences at the market price, or could issue new licences (possibly with advance notification) or some combination of these two. The former is expensive and the latter runs the risk of political mayhem with licence holders obtaining a largesse of public sympathy and simultaneously mounting legal challenges on property rights. A more cost-effective and politically sustainable solution would be to issue each licence holder with a second licence. This procedure could be applied immediately to licences for taxis and public houses.[74] This would facilitate the subsequent issue of more licences in the future until the equilibrium level is attained.

With regard to a system for licensing, it is desirable that all licensing decisions be subject to competition rules. The Competition Authority would, as at present, be expected to take account of other policy objectives such as safety and quality of service etc.[75] This could be achieved by one of two means (not mutually exclusive):

1. Requiring all licensing decisions of national or local government to be submitted to the Competition Authority for approval; and/or
2. Enabling the Competition Authority to force national or local government to change the system of licensing following an investigation that revealed anti-competitive effects.

The latter might be more efficient in that the Authority could focus attention on those cases where there was a *prima facia* case for concern about competition rather than expend valuable resources on potentially harmless licensing regimes, but the former could remain an option for the licensing body. It is important that the Competition Authority has the power to alter a licensing regime so as to give the incentive to licensing bodies to have regard to the effects on competition in their initial decisions. Naturally, appeal to the High Court would be possible.

Competition Advocacy

It might be desirable that the Competition Authority should have a more general role in the context of new and existing legislation. One option would be to permit the Authority to examine the provisions of such legislation and to publish a report stating whether there is an adverse effect on competition and, if so, whether it may be justified in terms of benefits to the consumer (as with Section 4 of the 1991 Act). The weight of such a report would depend on the type of legislation. Where it was not a decision of the parliament (e.g. a ministerial order or a decision of local

government), the Authority's conclusion could be binding, subject to appeal in the courts. Where it concerned an act of the Oireachtas, it would merely represent a public opinion by an independent body. Transparent government would suggest that a reasoned response be required from the government, so that the trade-off between different policy objectives could clearly be observed. If the Competition Authority's opinion was to be sought at the drafting stage of new legislation (as in some countries), this should be public for the same reason.

The incentive will always exist for firms to seek special treatment or protection from competition law. Indeed, the more rigorous is the enforcement of the law, the greater will this incentive be. The ability of the Irish newspaper industry to effect legislation on below cost selling of newspapers to protect producers (and the ability of other firms to have the Groceries Order retained) evidences that this is a pressing problem. Enabling an independent agency to examine legislation in such a way would drastically reduce the incentive for wasteful rent-seeking behaviour, provided that the relevant agency is totally independent of the political process.[76] It is also important that the legislation be examined according to the standard rules of competition.[77] To some extent, this would be like treating the government as an undertaking in the 1991 Act, although a legislative amendment to this effect would be too simplistic. However, in the absence of such a move, competition policy will fail to realise the full benefits of effective competition.

7. CONCLUSION

The absence of effective competition imposes enormous costs on the Irish economy. This is manifest in domestic markets by high prices, or poor quality (of service) for consumers and on international markets by weak competitiveness due to high input prices. In both cases, high prices result in reduced output and hence reduced use of resources, thereby increasing unemployment. Wasteful rent-seeking results to the extent that firms lobby to prevent or restrict competition. Such costs may amount to several percentage points of GDP per annum. Economic theory suggests that limited resources should be devoted to those markets where turnover is greatest and on those markets where rent-seeking behaviour is observed, regardless of whether the product is exported or consumed domestically.[78]

The analysis in this paper suggests that competition policy in Ireland is not yet adequate to achieving effective competition and the benefits that attend it. Many sectors and activities will continue to be exempt from competition rules and so will be unaffected by the enhanced powers of enforcement resulting from the 1996 amendment. These include those sectors where the potential gains from competition are the greatest, including natural monopolies, activities where supply is licensed and the groceries sector. In addition, inconsistencies in merger policy remain. As the enforcement of competition rules becomes tougher, the incentives for lobbying to receive special treatment will increase.

The experience with competition policy to date has brought some benefits to consumers such as those arising from competition in long-distance telephony and on the Dublin-London air route. But these examples are exceptional and imperfect in themselves; local telephony and other air-routes still being monopolised. They also illustrate the weak role of the Authority in areas where it really matters. Preventing the acquisition of Cooley by Irish Distillers is ultimately a symbolic achievement when compared with the absence of effective competition in the retailing of alcohol. Thus far, competition policy has only gone a small way to achieving its full potential benefits.

The greatest challenge to competition policy will continue to be in areas where the state directly prevents competition. The political pressure for government interference in markets to benefit interest groups (usually market participants) is inevitable, driven by the conventional desire for profitability (or the quiet life). However, delegating competition decisions to a politically independent body, with suitable safeguards and transparent decision-making, means that state involvement in markets can genuinely be confined to cases where the consumer interest dictates. Ireland has made considerable progress in recent years but still has some considerable distance to travel in this direction.

Footnotes

1. Such behaviour is often known as rent-seeking. It is socially wasteful in that resources are expended transferring economic rent (money, favour etc.) from one party to another with no gain in economic output. As the activity is costly, there is a net loss to society.
2. See OECD (1993) for a detailed discussion. This report illustrates the high concentration in retailing and distribution in Ireland relative to other OECD countries.
3. There is little reasonable basis to prevent the publication of concentration ratios (if collected by the CSO or the Competition Authority etc.) other than the protection of producers from competition. Firms typically know each others' market shares very well indeed, but consumers are not likely to. The same argument applies to prices, especially if they are monitored by a trade association.
4. Ironically, Ireland is perhaps the only country in the world where one cannot open a so-called Irish pub.
5. In a recent case in Cork, the re-location of a licence was refused on the basis that it would damage the business of an existing publican. This suggests that an increase in competition is a sufficient reason to prevent the movement of a licence from one area to another.
6. Relative labour costs might have changed. However, any increase in the relative wages paid by public houses could merely represent sharing of those monopoly profits with workers (X-inefficiency).
7. The monopoly profits represent a transfer from consumers to producers, unless they are dissipated in rent-seeking or inefficient practices in which case they represent social loss. There is in addition the social loss due to exclusion from the market, known as the Harberger triangle.
8. See the Health (Community Pharmacy Contractor Agreement) Regulations, 1996, which came into force on 31 May 1996. The Regulations define the *catchment area* as the "natural geographic area in which the community pharmacy at its location may reasonably be expected to provide its services to the population in that area". In order to show a *definite public health need* a catchment area should have a population of at least 4,000 people and no other pharmacy within 250 meters (2,500 people and 5 kilometers in rural areas) and "will not have an adverse impact on the viability of existing community pharmacies in their respective catchment areas to the extent that it will affect the quality of pharmacy services being provided by them".
9. The *Irish Pharmacy Journal*, November 1996, Vol. 74, No. 11 outlines measures taken and expresses dissatisfaction that the new regulation did not go far enough.
10. The Groceries Order prohibits below cost selling in the retailing of non-perishable food and other grocery commodities. The cost is defined as the invoice price, but discounts not shown on the invoice are common and are believed to be substantial. Thus upstream suppliers can control both the downstream retail margin and the intermediate price by selling at a different

price than is on the invoice. See Walsh and Whelan (1996) for a more general analysis.

11. Fingleton (1993) provides a theoretical illustration applied to the Irish economy.
12. See the Task Force on Jobs in Services (1993). It does not help that such committees are often packed with producers.
13. For example, see Forfás (1996).
14. The social welfare function describes the objectives of policy. If one observes that a group in society receives favourable treatment, this might indicate that that group's welfare had a higher relative weight in the social welfare function than other groups, *ceteris paribus*.
15. This is aggravated by the system of private enforcement because firms are generally larger buyers than consumers and thus have greater incentives and abilities to bring actions under the competition rules.
16. For a more detailed description see Massey and O'Hare (1996).
17. The 1987 Groceries Order persists. Other legislation such as licensing, regulation, and patent law may also affect competition rules indirectly.
18. It includes, by way of example, fixing prices, limiting production, sharing markets, applying dissimilar conditions to equivalent transactions and the use of supplementary obligations not connected with the contract.
19. Those currently in force are set out in Statutory Instrument No. 135 of 1993. Failure to notify would make the agreement void.
20. A decision to refuse to permit a merger or to permit it only under certain conditions takes the form of a Ministerial Order laid before both houses of the Oireachtas.
21. Section 5 could also apply as a merger could constitute (indirect) abuse of dominance, as in EC case law.
22. There is the bizarre possibility that the Minister could permit a merger that the Authority might later refuse to license or certify.
23. See Meade (1995) for a discussion of the problems with enforcement under the 1991 Act. He argues that the 1991 Act may even have weakened overall enforcement in that the European Commission increasingly left matters to the Irish Competition Authority, which had practically no enforcement powers.
24. Even this is flexible. The Minister must decide within 30 days whether he has all the information required. If not, he may request that this information be provided within a specific period. Once all the requested information has been received, the Minister has 3 months (within which any Competition Authority report must be written) before the concentration is tacitly approved unless it is prohibited. There is a theoretical possibility that the process may take longer than 5 or 6 months if the Minister requested subsequent information.
25. It may also rely on some element of self-financing such as application fees and revenue from fines.
26. In Slovakia, an economy of comparable size, the Anti-Monopoly Office has a total staff of 63, including over 30 economists, but its outputs are arguably lower than those of the Irish Authority. See Fingleton, Fox, Neven and Seabright (1996).

27. Or that they rely on the procedures established in the US (as with mergers) or by DGIV of the European Commission (as with vertical restraints).
28. Increasing returns is not equivalent to increasing staffing as the Authority may be able to contract out part of its work from time to time, as it has already done once.
29. Revolving doors are banned in US regulatory agencies because of possible compromise to the independence of regulation. Agents might take decisions that improve later career opportunities. Firms might wish to "capture" tough regulators by making attractive job offers.
30. The Members of the Authority serve five-year contracts and are, potentially, subject to open competition for reappointment. This means that they are considered in a very different way to civil servants or judges who are more insured against the political and commercial side-effects of their actions. There are no clear rules for appointing members and decisions in regard to the appointment process appear to be totally at the discretion of the Minister. In 1991, three members were appointed without competition. In 1996, this Authority was not re-appointed and an open competition was held for three member positions (including the chairperson) but not for the new position of Director of Enforcement who is also a member.
31. It is not clear why index-linked magnitudes were not used.
32. No consideration seems to have been given to alternative methods of personal, non-transferable sanction such as the requirement of a public apology by individuals involved in a cartel or who have abused a dominant position. This would be analogous to the publication of tax defrauders' names in the newspaper.
33. The author advised on several of the cases discussed. He gave evidence on behalf of Masterfoods (Mars) in the Ice Cream case, advised Blugas in the matter of LPG category licences, was retained by the State in the Carrigaline case and most recently gave evidence on behalf of Monaghan Poultry Products.
34. The only cartel case with an effect in Ireland related to a 1994 decision of the European Commission in regard to European cement producers. An Irish cement producer was fined.
35. By the end of October 1996, the Authority had received 29 new notifications and had dealt with 80 more.
36. Newspread took a High Court case against the Authority on a procedural matter during the Competition Authority's deliberations. The Competition Authority published the full text of the decision it was minded to reach in its Annual Report for 1993. See Annex 5 of Competition Authority (1994).
37. A number of agreements between the Irish Music Rights Organisation (IMRO) and other parties which thus came under 4(1) raised questions of intellectual property protection. (e.g. Competition Authority Decision No. 383, 1994).
38. A High Court judgement in the RECI case preceded the Authority's decision. It found that exclusion from membership of an association should (a) be accompanied by reasoning and (b) capable of being appealed.
39. Cross elasticity of demand measures the ability of buyers to switch supplier and thus measures the extent of a market. Cross elasticity of supply measures the

extent to which producers of products unrelated on the demand side should be considered in the same market. For example, a producer of canned meat might be in the market for canned fish, even if fish and meat are not substitutes in demand.

40. See Chapter 2 of Neven, Nuttall and Seabright (1993) for a discussion of this distinction and its consequences for possible bias in decisions.
41. An unsuccessful High Court Case (Cronin) was taken to argue that it was unconstitutional to issue category licences as this amounted to licencing agreements that the Authority had not yet seen. The case is under appeal to the Supreme Court.
42. An issue concerns fairness when it redistributes rent without a positive effect on economic efficiency. Thus fair competition often protects firms from competition.
43. Seabright (1995) proposes that vertical restraints should only be examined if they have adverse effects on third parties.
44. See Competition Aurhority (1995a).
45. This case is important in terms of the rigour which the judge attached to the economic evidence, particularly the questions of the definition of the market, what constitutes a barrier to entry and the distinction between abusive and efficient behaviour by a dominant firm.
46. C_4 measures the combined market share of the largest four firms in a market. The Herfindahl index measures the sum of the squares of the market shares of all the firms in the market. Higher values of each represent greater concentration. Monopoly is characterised by a C_4 (and C_k for any k)) of 100 and a Herfindahl of 10,000.
47. These were: Irish quality daily, UK quality daily, Tabloid daily, Evening, Sunday tabloid, Irish quality Sundays and UK quality Sundays.
48. Independent Newspapers owns a printing house, a distribution company, Newspread, itself the subject of an Authority investigation, and has a holding in Cork Communications Limited, the monopoly cable company for the Cork area and party to the Carrigaline High Court case, and in other cable television companies.
49. The Authority did not consider supply substitutability in the definition of the market thus creating a bias in favour of higher market shares. However, given the sweeping dominance of the Independent group, this would not have affected the conclusion of dominance.
50. As the request was made under Section 11 of the 1991 Act, the Minister could only bring an action in the courts following the report of the Authority. If the request had been made under Section 14, he could have issued an order prohibiting the activity.
51. At the time of writing, legislation banning below-cost selling is being introduced.
52. Such arguments would have to be made in the context of EC rules on state aids and barriers to trade.
53. The third case, the Tribune merger in 1992, was the subject of an Order that is still in force and under appeal.

54. See Competition Authority (1996b).
55. The experience in the British market where retail multiples have successfully entered the petrol retail market suggests that more consideration should have been given to the possibility of entry.
56. They did not consider that competition in the market for gas oil (a bulk product) would be affected adversely because barriers to entry are less important there.
57. Statutory Instrument No. 45 of 1996 was issued on 16 February 1996. The original notification was received on 9 November 1995, illustrating that the procedure takes more than 3 months.
58. Statutory Instrument No. 214 of 1996, dated 16 July 1996.
59. Section 4.23 states "The small number of large firms in the market indicates that oligopolistic behaviour is a threat. For markets to behave in an oligopolistic fashion it is not necessary for there to be collusion among rival firms and the Authority has found no evidence of collusion. It is a characteristic of oligopolistic markets that firms place less emphasis on price competition and compete more in non-price areas". This statement confuses market structure and the behaviour of competitors. It is misleading in that it could encourage firms to make erroneous complaints simply on the basis of a market structure being oligopolistic.
60. In section 4.25, the report states "Nor can tea be regarded as a high margin item due to consumer tastes as would be the case, for example, for goods like perfumes or designer label clothing". It could be misleading to suggest that consumer preferences, in themselves, can be responsible for high margins. Perfume margins are not high, rather (supposedly) complementary services are supplied. There are compelling reasons to omit such general theoretical (and arguably unfounded) statements, especially as they add little to an otherwise sound analysis. No mention is made of the usefulness of profitability comparisons in drawing conclusions about competition.
61. Again, there is a lack of clarity in the analysis here. First mover advantage can exist when there are sunk costs or locked-in consumers. The discussion of brand proliferation makes no reference to sunk costs (as it should), and there is little discussion of whether the sunk costs and consumer switching costs are exogenous or endogenous.
62. For example, relative levels of consumption of tea and coffee imply absolutely nothing about the ability of individuals to substitute at the margin. In saying that "the underlying principle is that the smallest market is the relevant market", the Authority may have implied that the market was being defined arbitrarily narrowly, which was not the case.
63. The submissions of the parties noted expansion into Northern Ireland as a defence of the acquisition.
64. It would not be important whether the entrant purchased the incumbent or *vice versa*, as suitable transfers could be arranged to achieve the same end result.
65. As mentioned above, an early decision of the Authority considered that concentrations fell under Section 4 of the Act, so that this amounts to a different procedure than that of notification to the Minister discussed in the previous section.

66. A possible defence of an acquisition is that the firm being acquired will go out of business otherwise. Although such a defence is appealing *ex post*, permitting it creates incentives *ex ante* to drive rivals close to bankruptcy before acquisition.
67. This approach, using concentration to determine whether further analysis is merited rather than as evidence of weak competition *per se*, is consistent with the US Department of Justice approach which is frequently cited by the Authority.
68. Commentators who lambasted the Authority for being philistine in regard to books were equally fulsome in the other direction when it came to newspapers, indicating that public opinion may be considerably less consistent than the Authority's.
69. This argument might not apply in the limit. However, it does apply at the margin, as no fines have yet been imposed.
70. Although much of the focus of the Authority's work to date has been on vertical restraints (which are typically the least damaging to competition), this has not been totally worthless given the level of concentration and evidence of weak competition in the distribution sector.
71. A Competition and Mergers Review Group, established to report on merger legislation, the effectiveness of competition legislation, and other matters, is expected to report in the second half of 1997.
72. See Chapter 12 of Massey and O'Hare (1996) for a comprehensive treatment.
73. Indeed, it may go in the opposite direction in that the threat of entry induces higher quality complementary services such as air-conditioning and toilet facilities.
74. The second licence might be issued first to those holders who purchased a licence in recent years and then a year or two later to the remainder. Economic efficiency suggests that all such licences should be traded without restriction.
75. The Authority, in applying Section 4 of the 1991 Act to professional associations, has shown that it is capable of balancing the interests of competition with the benefits that arise from such agreements.
76. The Competition Authority currently lacks budgetary independence, and is not insulated from political interference in the long term. The question of how best to achieve institutional independence requires careful study. One possibility is to have the Authority answerable directly to Parliament, with an annual vote on its budget. The question of appointment procedures would also need to be addressed, possibly with changes to bring them into line with those of judges.
77. One of the reasons why the Commission on the Newspaper Industry differed so much from the Competition Authority was that it was required to report on fair competition. Thus, from the outset, the Commission was faced with a criterion biased towards protecting producers from competition.
78. The 1996 Act, in permitting public enforcement at the discretion of the Authority (i.e. *ex officio* investigations), will enable greater prioritisation than hitherto.

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DISCUSSION

Patrick McNutt: It is indeed a privilege to have been invited here this evening by the Statistical and Social Inquiry Society to propose a vote of thanks on John's excellent paper. His paper on *Standards of Competition in the Irish Economy* covers a range of issues and I have opted to limit my reply[1] to a few substantive points and invite the audience to participate. At the outset, I would concur with John, that an independent Authority with budget autonomy and removed from political influence, is the preferred option, I am of the opinion that political independence is not determinative; its a perception and a philosophy which is shared by the Authority and the Department of Enterprise and Employment.

The paper is challenging in presenting to the reader a menu of standards applied in competition policy. His assessment of standards applied by the Authority *viz* market definition, barriers to entry, dominance, concentration and vertical restraints are in accord with good economics. The standards of competition are applied and adhered to in order to promote effective competition.

I would like, however, to contrast the *standards approach* in John's paper with what I shall refer to as a *rules approach* where the emphasis is placed on achieving equilibrium in the product-market. A set of rules might include *viz* protect competition not the competitor, a q-ratio rule[2] (whereby high profits may not mean that firms have market power), more reliance on non-price competition, a market share test of dominance and a presumption that vertical effects are welfare enhancing unless horizontal effects are negative.

A set of rules and the standards[3] addressed by John do not have to be mutually exclusive. For example, a high q-ratio could signal a need for greater investment to meet consumer demand rather than the existence of positive monopoly rents. Any abuse of dominance arising from a monopoly position, as measured, could be mitigated by the requirement for greater investment by the incumbent monopolist. In other words, the presumption in the classical Modigliani-Sylos-Labini limit entry model is that the structural disadvantage on costs accrues to the potential entrant. This can be mistaken in some markets; often it is the incumbent that has the greater cost disadvantage and in that scenario entry deterrence is no longer a profit maximising strategy for the incumbent.

In such markets, a strategic alliance between an incumbent and a potential entrant may arise. A national competition agency ought to take cognisance of one of the rules, (say) the q-ratio, in arriving at an ideal market configuration which best promotes the standard of effective competition in the relevant market. I shall return to this point later in the case of our public utilities.

My reply orientates towards a political economy theme - public choice theme if you will -and there are two public choice concepts which are particularly relevant to the theme of John's paper. The first concept is painted against a political economy

background of a newly constituted quasi-judicial Authority with new enforcement powers and a new competition policy regime which has the hallmarks of a signalling game. The game is to be played between the Authority and possible offenders of the Act, between the Authority and the professional community of lawyers and economists. But it is the game between the Authority and the offenders that is of immediate interest in ensuring that standards of effective competition are met. On the one hand companies should be well advised to establish compliance programmes while there co-exists the threat of fines and possible imprisonment. In addition there is the potential for regulatory capture as new legislation swings into force, as we ponder on how the Courts will decide on fines and as the business community await the dubious honour to be bestowed on the first company Director to be imprisoned under the new regime.

My second concept revolves around a more macroeconomic issue and the relationship between competition and competitiveness. John comments that an 'absence of effective competition imposes enormous costs on the Irish economy'. There is a perceived wisdom amongst scholars on what constitutes domestic competition and in particular the benefit accruing to the Irish economy of achieving domestic competition, a benefit as yet mysteriously wrapped up in the swaddling clothes of the holy grail of 'competitiveness gains'. Do the gains translate into lower consumer prices (maximising consumer welfare), or into greater exports or into lower input prices during the production cycle. How are the promised *real* gains of competition to be distributed in the economy? Who actually benefits?

The perceived wisdom on realisation of gains, however measured, would also target the demise of the monopoly public utilities. But I put it to you, that, in theory, or if you will hypothetically, a price discriminating monopolist may be more welfare enhancing than perfectly competitive firms. With more competition the economy will inevitably witness a greater incidence of rent-seeking games *viz* inefficient firms become complainants, efficient firms acquire dominance, a greater frequency of price war games will emerge as potential offenders abandon mergers in favour of price wars as a strategy to maintain and acquire greater market shares. Such firm-specific activities and strategies will impose higher opportunity costs *viz* the real resources of the economy as individual firms adjust to the new competitive equilibrium, arrived at competitively, but with only a few dominant players remaining in the market.

The search for competition should focus on welfare enhancing strategies, where existing public companies, for example, should be encouraged and indeed exhorted by Government to seek strategic alliances and achieve cost competitiveness. Provided such strategic alliances between a public utility and a private entrant do not prevent new entrants penetrating the relevant market, competition benefits may ensue. I believe and have argued elsewhere[5] that Bangemann's reference to international competitiveness for EU firms, as clearly expressed in the *White Paper on Competitiveness and Employment*, envisons a Europe with public monopolies

replaced by private monopolies once the derogations are removed, allowing the winds of competition to change irrevocably the relevant market structure.

My perspective biased as it is towards a more realistic public choice view of the competition outcomes, prepares the groundwork for the introduction of the Schumpeterian competitive process, whereby competition and progress occur together but in a series of temporary monopolies. The outcome of the Schumpeterian process parallels the outcome of a competitive process, embedded in John's paper, which applies market standards policed by competition agencies.

Who are the inevitable winners in either process? A difficult question to answer, but unless the winner is unequivocably competition, any disagreement by scholars on how competitive outcomes are achieved and in what markets they should be demonstrably present, becomes a matter of academic debate.

I thoroughly enjoyed reading John's paper and it is a welcome and timely contribution to the ongoing debate on Irish competition policy.

Footnotes

1. The views expressed here are my own and do not reflect the views of the Competition Authority.
2. The q-ratio is the ratio of market asset value/reproduction cost: in a competitive equilibrium with zero monopoly rents, q = 1.
3. The standards of competition referred to in section 5 of the paper, are de facto rules of behaviour by which the market structure can be monitored as between competitive and anti-competitive. An alternative is a set of rules, the interpretation of which, emphasises the conduct and performance of the firms and the likely impact on market structure.
4. McNutt, 1994 (pp. 74-76) *Perspectives on Competition Policy Issue,* CIEL University of Ulster and McNutt, 1996, (pp. 4-6) "The Essence of Global Political Economy" *European Business Review* vol 96 no 5.
5. Pp. 4-12, 1996