COUNTRY STUDIES

Ireland - The Role of Competition Policy in Regulatory Reform

2000

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in Ireland. This report was principally prepared by Mr. Michael Wise for the OECD.

Overview

Related Topics

BACKGROUND REPORT ON

THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM*

* This report was principally prepared by **Michael Wise** in the Directorate for Financial and Fiscal Affairs of the OECD. It has benefited from extensive comments provided by colleagues throughout the OECD Secretariat, by the Government of Ireland, and by Member countries as part of the peer review process. This report was peer reviewed in October 2000 in the OECD's Competition Law and Policy Committee.

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Executive Summary

Background Report on The Role of Competition Policy in Regulatory Reform

Competition policy is central to regulatory reform. Its principles and analysis provide a benchmark for assessing the quality of economic and social regulations. It motivates the application of laws that protect competition, which must be applied vigorously as regulatory reform stimulates structural change so that private market abuses do not reverse the benefits of reform. A complement to enforcement is advocacy, the promotion of competitive, market principles in policy and regulatory processes.

Effective competition policy is important to stimulating innovation and production while keeping price increases in check. It can thus help eliminate some of the bottlenecks to achieving growth without inflation, which include weak price competition and insufficient entry and innovation. Ireland has moved in the direction of implementing best practices in competition policy and enforcement, but its efforts have suffered from missed opportunities and uncertain commitments. Ireland's present prosperity offers an opportunity to strengthen its commitment to effective competition policy.

Ireland's conception of competition policy is still evolving. Some aspects of Ireland's competition policy support pro-competitive reform. These include the principles announced in the Prime Minister's regulatory reform programme, the government's plans for restructuring infrastructure industries, and the enforcement priorities of the Competition Authority (the "Authority"), which emphasise the goal of consumer welfare. These programmes and policies, which are based on promoting free competition, entry, and efficiency, represent a new departure in the last decade. They have accompanied, and in some respects responded to, reform initiatives from the EU. For most of the 20th century, Ireland's history and its economic and political culture fostered a different conception of competition policy, one which emphasised fairness and the protection of incumbent interests, particularly small businesses, more than efficiency and consumer interests. Producer interests have dominated policy debate, while consumer interests have been neglected. Tensions between the older and newer conceptions explain the difficulties Ireland is facing now in applying its competition policy to problems in domestic, non-traded sectors.

Ireland's national institutions have most of the tools needed to promote competition policy effectively. The substance of the competition laws, which follows the EU-based model, is fully adequate. But important gaps remain. The Authority has dealt with the flood of applications, mainly about vertical restraints, that followed adoption of the competition law in 1991. Since it obtained the power to initiate enforcement action in 1996, the Authority has made horizontal cartels its top priority. But in part because the Authority depends upon the Department of Trade, Enterprise and Employment ("DETE") for appointments, budget, and staff, it has suffered from personnel problems that have hampered its efforts. DETE, not the Authority, has decision power concerning the competitive impact of mergers. Whether sanctions to ensure compliance are adequate depends entirely on the courts. Treating competition law violations as crimes shows that they are taken seriously — and is the only way to apply pecuniary sanctions in Ireland — but it complicates enforcement processes.

Competition policy is not yet sufficiently integrated into the general policy framework for regulation. The overall reform programme calls for evaluating regulatory proposals based on their competitive effects, but it is not yet clear how this criterion will be applied in practice. Many entities play some role. DETE oversees competition policy issues, but another body, the Department of Public Enterprise ("DPE"), is responsible for reform in major infrastructure sectors. The Authority itself has only limited advocacy powers and insufficient resources to perform that role effectively. Despite the fragmentation of responsibility, reforms in many government programmes and policies to encourage more competition have shown positive results, particularly in traded sectors. But as attention turns now to the more difficult problems of domestically-imposed constraints and non-traded sectors, the independent Authority plays an *ad hoc* role in policy deliberations.

Regulations have produced long-standing and well-known competition problems, notably in Dublin's pub and taxi sectors. To counter inflation, though, the government has relied more on controlling pub prices than on promoting competition. Recent reforms move toward greater reliance on competition in the long run, by permitting more flexibility in pub licensing — but retaining numerical limits — and opening up the taxi market to free entry — prompting strong protests by the current license holders. The durability of these restraints demonstrates the continued political influence of the older tradition, of protecting incumbent interests and small business. It is thus all the more important that competition policy decision-making be clearly and effectively independent.

Box 1. **Competition policy's roles in regulatory reform**

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.

- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different outcomes.

- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

1. COMPETITION POLICY FOUNDATIONS

From a history and tradition of protecting small producers and fair competition, Ireland has been trying for the past decade to establish a competition policy founded on promoting efficiency and consumer welfare. This new approach should be congenial to reform, as economic policy has abandoned autarky and embraced the goal of a market-led and open economy. But the process of developing this policy approach and creating the institutions to apply it has encountered difficulties, while the lingering tradition of concern about supposedly unfair competition impedes reform in some non-traded sectors.

1.1. Context and history

Ireland's traditional economic policy approach did not emphasise market competition. The Irish Republic tried to be economically self-sufficient for most of the 20th century, following a model of state-directed centralisation. The state was involved directly as an investor or operator in some major industries. In others, such as the cement industry, it granted monopoly privileges to private operators. Enterprises in agriculture and commerce were typically small-scale, and the small business culture supported political demands for protecting and preserving it. Despite Ireland's leap into the international economy over the last 20 years, the tradition of protecting small enterprises against competition remains strong.

The traditional approach to market regulation in Ireland tended to rely on control rather than competition. The Prices Acts, which date from 1958, provide for fixing prices by ministerial order. Price orders were in effect through the 1970s and into the 1980s. Most of the structure of price orders was dismantled in the 1990s, but the government still occasionally tries to control prices directly, and not just in infrastructure utility sectors.

Ireland's first competition act, the Restrictive Practices Act of 1953 law, protected fair trade. This statute supplemented the common law's principles governing business behaviour. It was designed to control abuses, not to prohibit particular types of conduct. The statute was applied through orders prescribing fair practices for an industry and through decisions about applications for exemption. These actions were taken by a Minister based on recommendations from the Restrictive Practices Commission (Ireland, 2000). The three Commissioners were not full-time appointees until the 1970s, when the body was renamed as the Fair Trade Commission, and they had no professional staff support.

As Ireland's economic policy direction shifted in the late 1980s, a different competition culture began to appear. One stimulus for change has been the EU directives calling for liberalisation in industries that were traditionally cartels and state-run monopolies. Changes in policy direction in Ireland coincided with similar changes elsewhere, as many EU and OECD Member countries moved toward more market-based regulatory systems. Support for change in Ireland has been reinforced by Irish emigrants returning home, bringing with them their experiences of market-oriented alternatives to Ireland's traditional approach. Other events, such as the success of airline liberalisation in expanding service and reducing fares, tended to build support for the direction of change among decision-makers as well as the general public.

There had already been calls for reform of competition policy in the 1970s. The Fair Trade Commission issued a report in 1989 recommending fundamental changes. In 1991, the old Restrictive Practices Act was replaced by a new Competition Act,[1] which prohibited restrictive agreements and abuses of dominance, and the Fair Trade Commission was succeeded by a new Competition Authority ("Authority"). All of the "restrictive practices" orders were eliminated, except the one covering the grocery industry.

But the means provided for enforcing these new prohibitions were ineffective. The Minister for Industry and Commerce could file suit in court seeking an order to stop prohibited behaviour; during the 5 years that the Minister had the sole authority to take enforcement action, it took none. Private parties harmed by prohibited conduct could sue for damages or injunctions; several parties filed suits, at considerable cost but with limited success. Meanwhile, the independent Authority had only an advisory role. The Authority could license agreements, but there were no consequences if parties did not notify the Authority of their agreement. The Authority could not investigate a cartel unless the agreement was submitted for approval. The Authority could not deal with abuse of dominance or mergers unless the Minister requested advice. Under the merger laws, the Minister issued orders and the Director of Consumer Affairs, not the Authority, enforced them. These first years without enforcement provided a transition period during which businesses could become accustomed to the new policy regime. But the weakness of the initial enforcement system suggests that, despite the change in the statute, the commitment to stronger competition policy was ambivalent.

Concern about the lack of public competition law enforcement led to calls for further reform in the mid-1990s. One obvious step was to give the independent Authority the same power the Minister had, that is, to seek court orders to stop prohibited conduct. Debate about reform featured increasingly vigorous claims about the need for stronger enforcement. As a result, and somewhat unexpectedly, the Competition (Amendment) Act of 1996 not only provided for independent enforcement power and a Director of Competition Enforcement, but it also made all violations of the law potentially criminal offences and set

fines and even imprisonment as available sanctions. Ireland thus provides in principle for some of the toughest sanctions in OECD countries for similar violations.

At the same time that enforcement powers were dramatically expanded, and before there was any experience applying them, the Minister appointed an outside advisory panel, the Competition and Mergers Review Group ("CMRG"), to examine competition policy and enforcement processes. The CMRG's broad assignment included the merger laws, the effectiveness of the competition laws, "cultural matters" related to the application of the Competition Act (particularly its provisions for exemption from the prohibition against restrictive agreements), and appropriate means of implementing the law (Ireland, 2000). The timing of the CMRG's creation suggests that the Minister thought it prudent to maintain continuous monitoring of the enforcement process, both to gain support for assigning enforcement to an independent body as well as to work through some of the implications of making competition violations criminal offences. The CMRG issued its final report in early 2000, making 40 detailed recommendations about applying competition law and about the relationship between competition policy and other regulatory institutions and policies.

1.2. Policy goals

Official statements about the goals of competition policy permit many interpretations. Ireland's constitution contains "Directive Principles of Social Policy", which are intended to guide legislation, but not to control it.[2] These constitutional directives call for the state to favour private initiative and ensure "reasonable" efficiency in production, but "where necessary" the state is also to "supplement" private enterprise. The state is to protect the public against "unjust exploitation", and to aim toward distribution of ownership and control to serve "the common good". Moreover, and "especially," policy must not permit free competition to result in concentration of ownership or control of "essential commodities in a few individuals to the common detriment." Taken together, the constitutional aspirations appear to authorise a competition policy of controlling monopoly and abuse, more than a policy of supporting free competition and efficiency. The statement of purpose in the Competition Act too is general and perhaps indecisive, echoing the constitution in saying that restrictive agreements and abuse of dominance are prohibited "in the interests of the common good" (Competition Act, long title). The use of the term "common good" might be taken to imply that protecting public interests should take precedence over protecting private interests.

To guide its application of competition policy, the Authority has adopted a Mission Statement that implies a preference for consumer interests. The Mission Statement describes enforcement as "contributing to an improvement in economic welfare," and the Authority treats consumer welfare and economic efficiency as its main priorities (Ireland, 2000). In this context, the emphasis is usually on allocative efficiency, except that dynamic efficiency could be more important for subjects such as intellectual property licensing.

1.3. Competition policy in reform

In promoting an approach based on efficiency and consumer welfare, Ireland's competition policy institutions are trying to take the lead in changing the traditional solicitude for the interests of producers and the protection of incumbents. But this new direction has been feasible only "because the welfare of exporters is often coincident with that of domestic consumers and because of Ireland's EU membership" (Fingleton, 1997, p. 112). Producer interests that benefit from the fair-competition tradition have resisted change. As a result, features of regulatory programmes that protect incumbents have often survived the government's reform efforts.

In the government's general regulatory reform programme, competition policy is a main substantive theme. The Strategic Management Initiative ("SMI") is devoted mostly to process, rather than the substance of regulations. But in the SMI's "quality regulation checklist", which departments must complete for each proposed new law or subordinate regulation, the second criterion is whether the proposal "will affect market entry, result in any restrictions on competition or increase the administrative burden" (Ireland, 2000). (The first criterion is whether the regulation is absolutely necessary.) The 1996 Report of the SMI's Working Group on Regulatory Reform is more pointed. It calls for "removing entry restrictions" in existing regulations, because "better quality regulation must address issues such as licences and permits". In general, the Working Group Report found that reform should "aim at the targeted dismantling of burdens to market entry and exit, price controls and other restrictions on competition."

Plans to restructure utilities and infrastructure services would rely more on competition. The Department of Public Enterprise ("DPE"), which has principal responsibility for the regulatory framework over many of these sectors, has developed proposals to manage the relationship between regulation and competition policy. These proposals may lead to legislation to deal with potential overlaps between the Authority's responsibilities to ensure compliance with the rules of competition and the sectoral regulators' responsibilities to ensure that competitive markets exist (Ireland, 2000); in September 2000, DPE issued Outline Legislative Proposals for the Regulation of the Telecommunications Sector which include provisions about co-operation. The DPE proposals recognise that the general competition law will apply in these sectors. DPE's statement of objectives emphasises the use of regulation during the transition to liberalised markets to accomplish goals, such as ensuring free market entry, that are typically the function of competition policy. In addition, though, it also emphasises such goals for economic regulation as "fair market conditions", a notion whose application can be inconsistent with competition policy based on consumer welfare, as well as public service requirements. And it contends that "economic regulation can comprehend social and regional objectives" (Ireland, 2000*b*, p. 6), a position that seems contradicted by experiences in other OECD countries. Rather, economic regulation proves to be best suited for problems of market power and asymmetric information, while social and regional policy goals are addressed more effectively and efficiently by other means (OECD, 1997).

The Department of Enterprise, Trade and Employment ("DETE") is responsible for policy issues related to the competition law (Ireland, 2000). Pro-competitive reform has been a theme at DETE, following the leadership of its Minister (who is also the Deputy Prime Minister).[3] In intra-government deliberations, DETE can call attention to the impact of regulation on competition. But other demands can affect DETE's competition policy priorities. DETE is also responsible for consumer protection policy and enforcement, which includes the occasional application of the Prices Act. And the consumer protection office in DETE is responsible for applying one of the remaining potentially anti-competitive aspects of the pre-1991 competition policy approach, the Groceries Order.

The well-intentioned goals of reform do not always determine policy choices, though. Some of Ireland's principal competition policy problems result from the anti-competitive entry-controlling licensing schemes that the SMI Working Group said should be eliminated. But in mid-2000, as the economy's continued strength produced very high inflation indicators (3 times the EU average), the government's response to demands for action included imposing temporary price control prices for drinks at pubs, rather than eliminating the anti-competitive licensing controls against new entry. The Minister acknowledged, however, that the sustainable solution to reducing pub prices lay in greater competition. Ministers reportedly met with industry groups to emphasise the need for "social responsibility" in setting prices.[4] The groups involved — in construction, homebuilding, auctions, motor vehicle sales, medical and legal professions, brokerage, and banking — comprise a roster of sectors where it would not be surprising, based on experiences in other countries, to find explicit or implicit price co-ordination, entry control, or market division. Such official admonition to be "responsible" risks encouraging potentially vulnerable

industries to agree on target prices — that is, to flout the most basic principle of modern competition policy.

2. SUBSTANTIVE ISSUES: CONTENT OF THE COMPETITION LAW

Ireland's basic substantive law about restrictive agreements and abuse of dominance, which was explicitly crafted by analogy to EU law (Competition Act 1991, long title), is comparable to standard practice in other OECD countries. The methods for dealing with mergers, though, should be streamlined. And reliance on court proceedings and criminal sanctions, necessary for imposing fines under Ireland's constitution, introduces some technical hurdles and uncertainties.

Box 2. **The competition policy toolkit**

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same — that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also

try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

2.1. Horizontal agreements

Agreements that restrict competition are prohibited (Sec. 4). The statute does not distinguish between horizontal and vertical agreements, but enforcement attention has concentrated on horizontal cartels. Anti-competitive agreements are legally void and unenforceable. Since the 1996 statute strengthened enforcement powers, they may also be treated as crimes. (Ireland's constitution does not generally permit administrative or civil "fines"; instead, financial or other penalties against improper conduct may only be imposed by a court, after conviction of a crime). The maximum possible penalty is a fine of IR£ 3 million or 10% of turnover (whichever is greater), and imprisonment up to 2 years.

Stern treatment of horizontal restraints is consistent with efficiency-based policy. Agreements to fix prices, limit output, or divide markets virtually always harm consumer welfare. Therefore, the Authority has announced that it will seek criminal penalties, rather than just civil relief, when it finds such conduct. The Authority believes that, by contrast, the effects of other kinds of agreements among competitors may not be presumed with as much confidence, so in those cases civil remedies such as a court injunction to stop the forbidden conduct could be more appropriate. There is thus enough flexibility for enforcers and decision-makers to punish anti-competitive collusion but permit pro-competitive co-operation.

On finding that an agreement's benefits outweigh its harm to competition, the Authority may grant a licence authorising it (Sec. 4.2). If examination shows that the agreement would not violate the Act at all, the Authority can issue a certificate to that effect (Sec. 4.4). A licence or certificate may apply to a defined category of agreements, so an agreement that meets the category's terms need not be notified (Sec. 4.3(b)). (Thus "category" licences or certificates correspond to what are called "block exemptions" elsewhere). Few horizontal agreements are notified now, because firms are unlikely to have any honest doubts now about whether agreements to control price or output are prohibited. But some other kinds of plans for horizontal co-operation have been licensed. A performing rights society set common prices and demanded exclusive representation, but collected royalties more efficiently; because this arrangement was, on balance, pro-competitive, it received a 15 year licence (OECD CLP, 2000). Agreements among banks about clearing arrangements were considered facially anti-competitive, but they were licensed because they did not prevent entry and they had significant efficiency benefits (Fingleton, 1997).

Horizontal cartels became the Authority's top priority when it gained independent enforcement authority. Since 1998, price-fixing proceedings have been initiated against five trade associations, one professional association, and more than thirty separate undertakings. In three cases, the parties have consented to corrections. Since mid-1999, the Authority has forwarded three recommendations for

indictments to the Director of Public Prosecutions ("DPP") (Ireland, 2000). Among the industries and sectors in which horizontal agreements have been subject to investigation and enforcement action are:

- Petroleum products: In response to dozens of complaints since 1997 about motor fuel prices, on-site investigations of distributors and a trade association have led to summary prosecution against one distributor, while other investigations continue, as do investigations about home heating oil.

- Dairies: Cases begun in 1998 are pending. Meanwhile, a threat of boycott by the Irish Farmer's Association, aimed at a German retail chain's low milk prices, was averted by the Authority's investigation and related publicity. Another chain then started offering the same low retail prices.

- Airlines: Travel agents tried to boycott Ryanair, because it cut their commissions. The national trade association was originally involved in the 1997 action, but it promised to stop and to instruct its members to stop. Some of the association's members did not follow that instruction, and the Authority brought another enforcement action against them, which was settled through assurances of future compliance (OECD CLP, 1999).

- Wholesale beer and soft drink distribution: The Authority recommended prosecution following investigation. It appears that the investigation may have been triggered by newspaper reports of a claim by a disgruntled former employee, that he was punished for refusing to participate in meeting of an alleged cartel.

- Pubs: The Authority instituted civil proceedings in 1998 against the Licensed Vintners Association and Vintners Federation of Ireland and their members (the first association covers the pubs in Dublin, and the other covers those in the rest of the country).

Self-regulation by professional and trade associations has often been found to restrain competition in many countries. In Ireland, several associations have notified their agreements and sought licences permitting them to continue.[5] These have included associations in optometry, accounting, medicine, engineering,[6] law, and journalism. Early decisions rejected association rules that restricted fees or advertising[7] and found that restraints on premises and limits on training opportunities were unacceptable barriers to entry.[8] Enforcement actions illustrate the extent of the problems. The association of veterinary surgeons promoted "recommended" minimum fees. It advised its members that they could charge more, but not less, than those recommended levels, exhorted members to co-operate with their neighbours about fees, and offered to help them do so (OECD CLP, 1999). The Authority's civil suit was settled by the association's promise that it would comply with the law in the future. Another action targeted the association of truckers, which agreed on rates for serving the Dublin port and announced that its members would boycott anyone who paid less. The boycott escalated into a blockade, which ended only after the Authority applied to the court for an injunction. This case too was eventually resolved by the parties' admission that their conduct was a concerted practice in violation of the law and their promise, to the court, to cease from future violation — and to pay the Authority's costs.

Collusive tendering was an early enforcement target. In late 1997, the Authority sent guidelines about detecting collusive tendering to 200 public sector agencies and made a presentation about procurement collusion to local government officials. Complaints that followed disclosed that the Construction Industry Federation encouraged co-ordination by publicising its members' bidding intentions. Following a protest from the Authority's Director of Enforcement, the Federation promised to stop this practice (OECD CLP, 1998).

Using criminal law processes and penalties against horizontal agreements leads to difficulties and complications. But there is no other way to achieve deterrence through effective sanctions under Ireland's constitution, so the problems will have to be faced and solved. It is too soon to suggest particular changes, before Ireland's courts have had an adequate opportunity to devise solutions in particular cases. One source of potential difficulty relates to knowledge and intent, which are characteristic requirements of criminal laws. The Authority's enforcement policy presumes that cartels harm competition, but nonetheless the law permits parties to defend on the grounds that they did not know (or could not reasonably have known) that the effect of their conduct would be to prevent or distort competition (Competition (Amendment) Act, Sec. 2(2)(c)(i)).[9] It remains to be seen what kinds of defensive claims Irish courts will accept in this context. A particular concern could be that government efforts to control inflation by persuasion might insulate price fixing agreements from liability, if the parties to the agreement contend that the intended effect of their conduct was to respond to the Ministers' wishes in the public interest. Here, too, it remains to be seen whether Irish courts would accept this argument. There will be continuing uncertainty about the standards to be applied, at least until the courts have more experience and have issued more decisions.

Proving secret agreements usually requires first-hand admissions, particularly when the criminal law's high standard must be met. The Authority lacks the authority to implement a leniency programme to encourage parties to make these disclosures. Discussions are underway about how to accomplish this within Ireland's institutions, and the Authority hosted a public conference on the subject in November 2000.[10] In serious cases, decisions to grant leniency would be up to the DPP, not the Authority. The DPP normally has discretion to authorise leniency in particular cases, based on such considerations as the value of the evidence that the recipient can provide about other violations. The DPP has supported the concept of a formal, publicised programme that offered leniency under general terms. Such a program would need to be supported by an official policy statement, if not legislation.

Box 3. **The EU competition law toolkit**

The law of Ireland follows closely the basic elements of competition law that have developed under the Treaty of Rome (now the Treaty of Amsterdam):

- **Agreements**: Article 81 (formerly Article 85) prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 81's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.

- **Exemptions**: An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable "block" exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the "white lists" and "black lists"). Any agreement that meets those conditions is

exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.

- **Abuse of dominance**: Article 82 (formerly Article 86) prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50%, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.

- **Reforms in administration**: Recent and proposed reforms of EU competition policy reduce the scope of the prohibition against vertical agreements and would eliminate the process of applying for exemptions for particular agreements. Instead, exemption criteria would apply directly in decisions applying the law, and these decisions would increasingly become the responsibility of national competition authorities.

2.2. Vertical agreements

In principle, restraints on competition imposed between firms in a vertical supplier-customer relationship are also prohibited. In practice, the absolute prohibition applies only to resale price maintenance, territorial protections, and non-compete clauses. Although the statute sets the same kinds of sanctions, including criminal punishments, for vertical restraints as for horizontal ones, as a matter of enforcement policy the Authority would seek only civil remedies, that is, injunctions, for most kinds of anti-competitive vertical agreements.

The efficiency-based policy approach motivates application of the rules about vertical restraints (Competition Authority, 1998*d*). Recognising that most agreements along the distribution chain are likely to be efficient, a general Category Certificate-Licence[11] permits a wide range of vertical restraints. Its short list of forbidden subjects includes resale price maintenance, absolute territorial protections, and non-compete commitments that extend beyond the contract term. (Franchise agreements may contain a one-year post-term non-compete clause, to protect the franchisor's goodwill). For other kinds of practices, if both undertakings have a market share below 20% then the category certificate applies and the practice is deemed not to be prohibited. If their shares are higher, the agreement is deemed to violate Section 4(1), but if the market share of neither party exceeds 40% then the category licence applies and the agreement is permitted. At low market shares, most vertical agreements are unlikely to foreclose market access or have other anti-competitive effects. Benefits of reduced costs and increased incentives are likely to outweigh any impairment of competition even if market shares are somewhat higher. Non-price restraints that are characteristic of exclusive and selective distribution and franchising can benefit consumers by improving efficiency and increasing choice. Thus, a licence might be granted in a particular case even if the firms' market shares exceed 40% (Ireland, 2000).

The Authority has consistently prohibited vertical agreements that impose resale price maintenance, regardless of market share. Even agreements limiting maximum resale prices have been rejected, despite the claim that they keep consumer prices down, because they limit the downstream sellers' competitive strategies (Fingleton, 1997). A supplier may recommend a resale price, but the recommendation may be no more than that; the supplier must advise the reseller that he may set a different price, must not indicate the margin resulting from using it, may not require the reseller to display it, and may not do anything to make the reseller charge it. Other policy concerns rarely can outweigh competition issues. The Authority rejected the Net Book Agreement, which was then in force among UK publishers, because vertical price fixing was likely to contribute to horizontal co-ordination.[12] The proffered justifications, such as the purported need to cross-subsidise unsuccessful titles and smaller booksellers, failed because cross-subsidisation distorts relative prices and the law was not intended to protect particular competitors.

Most of the 1 400 notifications to the Authority since 1991 concerned vertical agreements, and most of those were submitted in the early years, to meet the 1-year deadline for notifying agreements that were already in existence when the law became effective. Now that these matters have nearly all been decided and the Authority has issued authoritative guidance about the issues, the number of notifications and cases about vertical issues is declining. But the first successful criminal prosecution under the Competition Act, a summary proceeding in October 2000 resulting in a fine of IR£ 1 000, was against resale price maintenance.

2.3. Abuse of dominance

The basic prohibition against abuse of dominance parallels the EU prohibition (Sec. 5).[13] Until the 1996 revisions, this prohibition was enforced principally by private lawsuits for injunctions or damages. The Authority could only deal with issues of dominance when requested by the Minister in a particular case; moreover, that request was to be founded on the Minister's prior determination that there was an abuse to be investigated (Sec. 14). Since 1996, the Authority can go to court for injunctive relief on its own initiative.[14]

Efforts to apply the law consistently with a policy of emphasising consumer welfare and efficiency have sometimes encountered difficulty. Many complaints about abuse of dominance seek actions that could be inconsistent with the Authority's policy of emphasising efficiency rather than protection of competitors. About 15% of complaints are from small businesses about refusals to supply, under conditions that are unlikely to be violations of the law. The Authority has tried to make clear that one firm's refusal to supply another would not violate the law unless the firm has a dominant position or is a party to a boycott, and it has helped to resolve some of these disputes informally.

On the only occasion when the Minister used the statutory power to seek the Authority's views about an abuse of dominance, competition policy analysis ended up being subordinated to other interests. The Minister asked first for a general study of competition in the newspaper market in late 1994, and then, shortly afterwards, for an interim report on cross-border competition with UK firms and on a newspaper acquisition in Ireland. The Authority responded in March 1995 with the conclusion that the low pricing of UK newspapers in Ireland did not constitute anti-competitive predation, but that the acquisition by the Irish firm was an abuse of dominance in the Irish market. Although the Minister stated that he accepted the Authority's findings, he did not implement them and did not ask the Authority to complete its investigation. (At that time, the Authority did not yet have enforcement authority). Instead, the Minister appointed a new *ad hoc* commission on the newspaper industry, to report on "the competitiveness of the industry in Ireland which faces growing challenge from imports", among other topics. The newspaper commission's report disagreed with the Authority's analysis of the relevant markets, found that UK newspapers were being sold "below cost" and recommended legislation to control prices, and absolved the acquiring firm in Ireland from the Authority's finding of abuse of dominance (Fingleton, 1997). It also recommended applying special substantive criteria to media sector transactions, to consider ownership and viewpoint diversity.[15]

Since 1996, there have been many occasions to apply the prohibition to claims about abuse by traditional network and infrastructure monopolies.

- Telecommunications (*Telecom Eireann*): The Authority claimed, in an April 1999 lawsuit, that Telecom Eireann's refusal to grant unbundled access to the local loop constituted an abuse of a dominant position (Ireland, 2000). This suit, brought following a complaint, was intended in part to bridge an apparent jurisdictional lacuna in the telecoms rules. An EU draft regulation would bring this issue under sectoral rules, rather than the competition law.

- Electricity (Electricity Supply Board): In the period before access would be opened according to the terms of the EU Electricity Directive, ESB proposed a pricing scheme for its larger customers, which would have given ESB the right to match any lower price offer from another supplier and to lock in customers for 6 months even if ESB did not match the lower price. This arrangement could have blocked competitive entry. Opposition from DPE and the Authority's threat of enforcement action led to ESB removing the price-matching right and reducing the notice period to 3 months (Ireland, 2000).

- Gas (*Bord Gais Eireann*): In 1997, the Authority communicated its concerns about a power plant proposal that could have involved price discrimination among firms that competed at the downstream stage, and that favoured the incumbent supplier's own operations and those of firms in which it had an interest.

- Airlines (*Aer Lingus*): An investigation of the response to Cityjet's competing service between Dublin and London City airports was pending as of mid-2000.

Special provisions of the competition law could be used to restructure dominant firms and infrastructure monopolies, through processes that depend on political decisions rather than law enforcement. After the Authority has completed an investigation at the request of the Minister, the Minister may, "if the interests of the common good so warrant," prohibit the continuance of the dominant position, place conditions on its continuance, or "require adjustment" by sale of assets or otherwise (Sec. 14(3).[16] The Minister may consult first with other Ministers, and each house of parliament must confirm the action. The power has not been used to undo a position of dominance. Ireland's utility monopolies, which are under the jurisdiction of a different Minister, are being restructured by sector-specific legislative programmes, and the CMRG has recommended that this unused power be deleted from the competition law. But if that is done, there may be no other means of achieving structural changes to correct and remedy violations. The powers of Irish courts to impose a structural remedy to control or undo a position of dominance are not yet clear. Providing some means in the law could be a useful basis for finding solutions in particular cases, even if the power is rarely, or never, formally invoked.

2.4. Mergers

Large mergers must be approved pursuant to the Mergers and Take-Overs (Control) Acts, 1978 to 1996 ("Mergers Acts"). DETE, not the Authority, administers the Mergers Acts, and decisions to authorise or prohibit mergers are made by the Minister. The Mergers Acts' substantive standard includes a competition policy test, whether the transaction would be likely to prevent or restrict competition or restrain trade in any goods or services. (This test evidently does not depend upon finding that the merged firms would enjoy a dominant position). There is also a general criterion, whether the transaction would be likely to operate against the "common good", which makes the range of policy concerns that the Minister might consider virtually limitless.

Smaller mergers, falling below the Mergers Acts' thresholds, can be reviewed as agreements under the Competition Act.[17] In addition, the Authority has contended that all merger agreements, even those for transactions large enough to be governed by the Mergers Acts, may be restrictive agreements that the Competition Act would prohibit unless the parties notify the Authority and receive a licence. Based on this claim of jurisdiction, the Authority has propounded a general merger analysis and enforcement policy. Most merger agreements have no anti-competitive effects, so notification, review, and issuance of a licence could impose unnecessary delays and burdens. Thus, the Authority's Category Certificate for Agreements Involving a Merger or Sale of Business sets out a general framework for merger policy mostly

by defining the kinds of agreements about the sale of a business that need not be notified individually (OECD CLP, 1998).

The main source of substantive guidance about merger policy is the category certificate. DETE has not issued guidelines or other explanations of its decisions under the Mergers Acts; instead, DETE evidently starts with the analysis set out in the category certificate. There is no prescribed methodology for defining product or geographic markets; treatment of potential imports as a separate factor implies a presumption that geographic markets are presumed to be national (or smaller). A three-part "safe harbour" test is based on HHI[18]: the law will not be concerned about a transaction leading to a post-merger HHI below 1000, or an increase in HHI of less than 50 regardless of the level, or a post-merger HHI between 1000 and 1800 resulting from an increase of less than 100.[19] An alternative criterion, based on plain market share, is post-merger four-firm concentration below 40%. Because of concern about dominance, no horizontal merger involving a firm with a pre-merger share over 35% qualifies for safe-harbour treatment. In general, though, if there are no entry barriers, then the level of concentration is not relevant.

Transactions covered by the Mergers Acts must be notified in advance to DETE.[20] The Mergers Acts apply if two (or more) firms involved each have assets over IR£ 10 million or annual turnover over IR£ 20million.[21] Intra-group restructuring and transactions in receivership or liquidation are exempt. DETE may request that the parties submit additional information. The Minister may refer the transaction to the Authority. The referral must be made within 30 days after the notification is completed, and the Authority must have 30 days to investigate and issue its report. The transaction may not be closed unless the Minister approves it; however, the parties may proceed if the Minister has not acted within 3 months (Ireland 2000). This deadline begins to run when the parties have submitted a complete notification (or a complete response to the request for further information). Non-compliance can lead to fines ranging from IR£ 1 000 (or IR£ 100 per day of continued violation), up to IR£ 200 000 (IR£ 20 000) for violations serious enough to call for indictment. By contrast, the Authority's process under the Competition Act would also involve notification to request a licence. There is no deadline for the Authority to act on such a notification. The sanction for failing to notify the Authority would be the risk of substantive consequences under the Competition Act for an unlicensed agreement that does not qualify for the category certificate.

The Minister has wide discretion to apply the criterion of the "common good". The Merger Acts' list of subjects to consider includes the transaction's effects on continuity of supply or service, employment, regional development, rationalisation and efficiency, research and development, increased production, access to markets, shareholders and partners, employees, and consumers. Constraints on the Minister's discretion are procedural and indirect. Before issuing an order prohibiting a transaction or subjecting it to conditions, the Minister must consider the Authority's report. Thus, to take any action other than approval requires referring the matter to the Authority, and its report may address all of these statutory factors, not just competition policy. The Minister need not follow that advice or recommendation; however, the report must be made public, and disagreement could be embarrassing. In addition, either house of parliament may pass a resolution with the effect of annulling the Minister's prohibition or conditions. By managing the process, DETE can control the balancing of policies. The process is illustrated by the application of the "common good" criterion in connection with a combination of milk producers. DETE did not refer the transaction to the Authority for review, because the Minister had decided that the firms should be permitted to combine in order to make the Irish industry more competitive in a European market. Because there was no referral and no Authority report, there was no public airing of views about the potential impact on competition within Ireland.

Mergers in industries subject to sectoral regulation are also covered by the Mergers Acts, rather than special sectoral legislation. The Minister consults with other ministries, departments, or regulators who might be concerned. A recent major merger review (and the only merger issue referred to the Authority in the reporting year 1999) demonstrates the synergy with regulation. In late 1999, the Authority

reviewed two mergers, at the same time, involving television distribution systems. The Authority noted that regulatory constraints prevented different MMDS and cable firms from offering consumers substitutable products. Even though the transactions reduced the number of different providers in Ireland to 2, the Authority determined that there was no effect on current competition. But the effects in related markets for telecommunications were potentially positive. A principal reason that the Authority recommended approval of both mergers was that each opened the possibility of introducing new telecoms technologies more quickly and over a wider geographic area (OECD CLP, 2000).

The basic substantive merger law and the guidelines for applying it are adequate, from the perspective of competition policy. Ireland's standard is slightly different from the EU merger regulation, and the CMRG recommended that Ireland adopt the European rule to make them formally consistent. The principal practical difference is that Ireland's standard could reject a merger on competition policy grounds even if it did not involve a dominant position. To reach the same result under European law requires invoking doctrines about "collective" dominance. Ireland's rule is thus more general. But if consistency is thought to be very important, adopting the European rule would probably not lead to substantially different decisions.

By contrast, the process of applying competition policy to mergers is clearly unsatisfactory. The overlapping notification systems expose parties to uncertainty and risk. The risk may be considered low, as few firms bother to make notifications to the Authority. But the system should be simplified, if only to eliminate the possibility that DETE and the Authority could issue contradictory orders about the same transaction. The CMRG has recommended that a single notification process apply to all mergers over a defined threshold, and that mergers no longer be treated as potentially restrictive "agreements" under the Competition Act. Mergers that fell below notification thresholds might still be subject to the Competition Act, but only if they involved an abuse of dominance.

The review process should be more transparent. Now, the Minister need not disclose the details of notified mergers, explain the reasons for not referring a transaction to the Authority, nor explain the reasons for approving a merger that has been notified. A low rate of referral would not, by itself, indicate a lax approach to anti-competitive mergers. But in the absence of explanation, failure to refer transactions that appear facially anti-competitive would tend to support that conclusion. To make competition policy more effective, the role of the independent body in this process should be strengthened. The CMRG recommends shifting roles, so that the Authority would receive all merger notifications and would be responsible for competition policy analysis in every case. A standard two-phase competition policy review would involve a quick examination to identify possible competition issues, and a more thorough investigation for the small proportion of filings that present them. The Minister would retain full power to permit, or prohibit, a merger on the basis of other permitted policy criteria, but the Minister could not over-rule the Authority's conclusions and decision on the grounds of competition policy. This process would bring Ireland more into line with practice in many other OECD countries that have merger review provisions in their competition statutes. The result may be to leave the Minister with the less attractive role of defending what may appear to be special interests. But the result would also be stronger support for competition policy exercised in the interest of consumers.

2.5. Unfair competition

Because Ireland is a common law country, some of the basic legal principles governing unfair competition are covered by tort doctrines of misrepresentation and deceit (Ireland, 2000). Some issues involving trademark may be covered by the Trade Marks Acts. In general, the competition law is not applied to most traditional types of unfair competition — false advertising, deception, unfair practices, trademark abuse and passing off, sales below cost, and abuse of economic dependence.

In one sector, grocery retailing, special rules based on principles of unfair competition have led to anti-competitive conditions and calls for reform. The grocery sector has been the subject of a series of Restrictive Practices Orders since 1956. As innovative market practices appeared in the sector, new orders were issued to regulate them, in 1958, 1973, 1981 and 1987. One rule under the current, 1987 Order is similar to a prohibition of below-cost sales, but that is not its actual effect. The reference "floor" is based on the invoice price, and it does not adequately take account of other factors that determine the true net price, such as off-invoice adjustments, allowances, discounts, or rebates. The effect of the rule requiring prices at or above invoice level, while permitting allowances and other measures so that actual intermediate sales are at non-invoice prices, is that distributors or manufacturers can control both downstream margins and final consumer prices. Suppliers might use these powers to reward customers who comply with preferred marketing strategies while preventing retailers from competing by lowering consumer prices. That is, the effect is an anti-competitive form of resale price maintenance.

Some of the Order's other provisions may also be inconsistent with general competition policy principles. Its rule[22] against refusal to supply apparently makes that a *per se* offence, regardless of costs, justifications, the parties' market positions, or the actual effect on the customer or on competition. On the other hand, provisions to equalise bargaining strength might be useful in some market settings, although they may not be flexible enough to take account of innovative marketing strategies and relationships. The Order tries to curb the practice of "hello" money, that is, paying, or demanding, inducements to retailers to stock the goods of suppliers. It prohibits discriminating among retailers in terms and conditions of supply or threatening or coercing retailers by withholding supplies, and to police that prohibition it requires suppliers to maintain published terms and conditions of supply and to maintain a register of supplementary terms. Suppliers may not give retailers any benefit for advertising the suppliers' goods. And retailers must pay suppliers on time.

The Groceries Order is a holdover from the era before Ireland had a comprehensive Competition Act. Enforcement responsibility is still assigned to the Director of Consumer Affairs. The original intention was that all the Restrictive Practices Orders would be revoked in 1991, as the Competition Act would become the means for dealing with anti-competitive practices in all areas of the economy. But this one alone survived, probably due to the influence of the wholesale sector, which was concerned about increased competition from firms that bypass wholesalers and source centrally. The chair of the Authority has been critical of the Groceries Order for distorting the groceries market and for promoting policy goals that are inconsistent with competition:

> *[T]he Groceries Order ... exists to prevent multiple supermarkets from undercutting smaller shops and driving them out of business. While this may seem reasonable, it has been argued that it restricts competition in the sector for two reasons. First, off-invoice discounts can be used by upstream distributors to set minimum resale prices downstream. Second, it prevents retailers from pricing their goods optimally in what is a multi-product market, whereas loss-leading on certain products may in fact be more competitive. The main motivation for the Groceries Order is an idea of fairness, but this ultimately protects small shops from competition, which may not be desirable in the long run. Moreover, it increases the incentive for other groups to lobby for such protection based on fairness* (Fingleton, 2000).

The legal status of the Groceries Order is peculiar. The law under which it was issued has been repealed. The Order cannot be amended by the same processes that were used to establish it; instead, change would require repealing the Order[23] and then replacing it with something else. The CMRG recommended repealing the Order without replacing it with any new rule against "below cost sales". A minority of the CMRG dissented from that recommendation. The CMRG does not object to new rules requiring retailers to honour suppliers' credit terms and banning discrimination and "hello" money. To support the consumer-welfare goals of competition policy, rules about marketing practices and

discrimination should be sensitive to actual effects in particular circumstances. Thus, a rule against discrimination should permit consideration of differences in costs, available alternatives, and competitive responses and effects, rather than punish every price difference as an offence.

2.6. Consumer protection

There is some potential for co-ordinating competition and consumer policies. The same Division of DETE is responsible for competition policy and consumer protection policy (Ireland, 2000). The Director of Consumer Affairs is responsible for enforcing the laws about false and misleading advertising, unfair contract terms, consumer credit, food labelling, and product safety. Although the Authority and the Director of Consumer Affairs are attached to the same Department, and the two often contact each other informally, there is no formal process for co-operation between them.

At one time, the Office of Consumer Affairs and Fair Trade combined both functions. Now that competition enforcement has been shifted elsewhere since 1991, the "fair trade" tradition survives in the Groceries Order, enforced by the Director of Consumer Affairs. In addition to enforcing laws about consumer contracts and information, her office polices rules about price posting and accuracy, which can improve consumer information and improve market functioning (but which can also help a cartel control defection), as well as the Groceries Order and orders under the Prices Act.

Consumer protection organisations outside the government have not been included in policy consultations, and their efforts to present concerns directly have sometimes been unsuccessful. Labour groups believe that they have been the *de facto* representative of consumer interests in that setting. (Yet consumer groups tend to support the Groceries Order, despite its likely effect of dampening price competition, out of a belief that it prevents market domination by large firms). A more significant Irish consumer movement, supporting pro-competitive reform, may develop as increasing affluence is leading to greater consumer awareness, beginning with demands to recognise consumers' rights in commercial transactions.

3. INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES

Benefits from reforming economic regulation can be lost if competition law and policy are not applied vigorously to prevent abuses in restructuring and developing markets. After devoting much of its attention for several years to vertical issues and notifications, since 1996 the Authority has made an enforcement campaign against price fixing cartels its top priority. The strength of enforcement depends crucially on courts and other institutions, which are being tested now for the first time.

3.1. Competition policy institutions

The Authority is the public body with principal responsibility for applying and enforcing competition law and policy. It has 5 permanent members, the maximum authorised number (the minimum is 3). They serve terms of up to 5 years, which may be renewed. The Minister recruits and appoints the members. The chair's authority is limited to calling meetings and presiding. This may represent a weakness, as the Authority has sometimes found itself attending to managerial details as a body. The CMRG has proposed that the chair assume responsibility for managing the Authority's operation. One of the Authority's permanent members may be designated by the Minister as the Director of Competition Enforcement. The Director is responsible for conducting investigations into violations and advising the

Authority about enforcement proceedings. The chair is now also serving as the Director of Competition Enforcement.[24]

Although the Authority in its present form was created by the 1991 Competition Act, it is the lineal successor of the Fair Trade Commission and, before that, the Restrictive Practices Commission, dating from 1953. All of these commissions appear to have had only limited participation in the policy process. Those commissions served advisory roles and lacked staff support, and their members did not serve full-time until the 1970s. At first, the Authority followed that pattern too, serving first in an essentially advisory role and lacking staff support. The Authority's chairs have all come from academia. Filling positions promptly has sometimes been a problem. Even as the Authority was getting authority to act independently, the Authority was unable to make any decisions because it could not muster a quorum — of 3 members — in the second half of 1996 (OECD CLP 1997).

The Authority is independent in decision-making, but in other respects it is strongly dependent on DETE, to which it is attached for administration, personnel, and budget. Experience in other OECD countries shows that competition policy bodies which depend on ministry decisions for budget and personnel may be exposed to indirect ministerial control over their priorities, while agencies with hiring authority and separate budget authorisation from parliament or other sources of funds may have more effective decision-making independence. In principle, the Authority is not subject to DETE direction in its law enforcement actions. But as long as the Authority operates under DETE's budget, for which the Minister is accountable to parliament, the Authority will not be fully independent of DETE's control. That control is manifested in decisions about membership, staff personnel, and budget. Compensation and employment terms of members and staff are determined by DETE in consultation with the Department of Finance. The members' conditions of service, including their pay, and the length of their terms of service depend on individual contracts negotiated with the Minister (Competition Act, Schedule, Sec.1). The Minister has the power to appoint "temporary members" to step in when a permanent member is unable to discharge his duties. The Minister may remove a member when that appears "necessary in the interests of the effective and economical performance of the functions of the Authority". If the Minister removes a member, a statement of the reasons for the action must be submitted to parliament (Competition Act, Schedule, Sec. 4(1)). Of course, if a Member chooses to resign, no such statement is needed.

Competition policies are formulated in DETE, which is also responsible for monitoring the impact of other laws and regulations on competition. The Authority has no statutory responsibility here. It has had the power to study and report on practices and methods of competition since 1991; since 1996, it has been able to do so on its own initiative. But the law does not clearly provide for Authority comments on particular policy proposals. Nonetheless, DETE has tried to provide some means for the Authority's views to be considered in policy development. Under the "Financial Autonomy Agreement" between DETE and the Authority, DETE has undertaken to "seek the views of the Authority on the competition implications of new legislation, whether originating within the Department or elsewhere, with a view to improving its capacity for policy formulation." (Ireland, 2000). Other departments do not formally consult the Authority, although there are indirect channels of communication, through DETE.

3.1. Competition law enforcement

In applying competition policy, the Authority plays different roles in different kinds of cases. The Authority is the deliberative decision-maker for applications for licences or exemptions. It acts as a policy analyst and advisor concerning the merger matters that are decided by the Minister. And it acts in a more executive capacity, as investigator, plaintiff, or prosecutor. when orders must be sought from a court. The Director of Competition Enforcement may investigate matters in response to a complaint or on his own initiative. The Authority's general enforcement guidelines and a note about procedures in cartel

investigations detail its approach to investigations. Hearings in the courts follow Ireland's generally applicable judicial procedures.

The Authority can require production of information, books, documents and other records, and it can summon witnesses and examine them under oath (Competition Act, Schedule, Sec. 7). After obtaining a warrant from a District Court Judge, it can enter and inspect premises without notice (the so-called "dawn raid" power), require production of books and documents, and provide other information which the inspecting office may reasonably require in that process (Competition Act, Sec. 21). These powers appear broad, but assembling evidence for prosecutions requires particular sensitivity to the special requirements of the criminal law and process, including its high standards of proof. For this purpose, the plan to hire several *gardaí*[25] to assist the Authority's staff and membership, most of whom have backgrounds in economics rather than litigation, should help.[26]

The Authority tries to review complaints quickly and to contact complainants within a month if it necessary to get more information. Complainants are notified when the Authority decides to close a matter, either because the complaint does not state a claim under the Competition Act or because further investigation has found insufficient evidence to make a case. Some concerns have been expressed about delays in high-profile cases, but these complaints may result from misunderstanding about the difficulty of successful criminal prosecutions, when something that may seem obvious to the man in the street must be proved beyond a reasonable doubt in the face of a vigorous defence. Both the Authority and the DPP are still engaged in a learning process.[27]

The Authority must resort to the courts to obtain enforceable orders and sanctions. The Authority (or DETE) can bring cases in the Irish High Court seeking injunctions or orders declaring the defendant's conduct to be illegal. The burden of proof is the normal civil standard, of balance of probabilities. Civil cases may be settled before judgement, through an admission of wrongdoing and undertaking not to repeat it.

Violations may also be subject to criminal penalties. The Authority itself can bring summary actions in the lower, District court, seeking penalties up to a fine of IR£ 1 500 or six months imprisonment. Summary procedures must be brought quickly, though, and thus they may not be appropriate for complex cases, which will take more time for investigation and trial. Until recently, the Authority had made little use of this power to initiate its own enforcement action in lower courts. The first conviction in a summary action came in October 2000. For more serious cases, the Authority may refer its investigative results to the DPP, who may seek an indictment and bring a case in the Central Criminal Court. Conviction on indictment could lead to fines of IR£ 3 million or 10% of turnover, whichever is greater, and imprisonment up to 2 years. Criminal liability may attach both to individuals and to firms. As of early 2001, no indictments had been authorised yet. In general, courts have rarely imposed high penalties in white collar crime cases.

Resort to courts and criminal sanctions introduces complexities and difficulties. The scope of application of criminal sanctions remains to be determined authoritatively. The Authority's enforcement guidelines highlight the application of criminal sanctions to the hard-core cartel violations, but they do not rule out seeking criminal penalties against other practices, such as conduct whose intent or effect is clearly anti-competitive or conduct that another case has already challenged successfully. There have been few litigated cases, so many judges remain unfamiliar with these novel laws and doctrines. Competition cases may be heard by judges at all levels, which may dilute expertise and efficiency. There is no special rule of jurisdiction for competition cases. The choice of court depends on the general rules of criminal law, so cases may be heard in local Circuit Courts, which sit intermittently. The resulting problems, of lack of continuity and expertise, are not insoluble. But an opportunity was missed in 1996 to assign jurisdiction for all Competition Act prosecutions to the central criminal court, where the president of the Court could

assign an expert judge. Providing for general jurisdiction and very broad substantive coverage are evidence that the practical consequences of adopting criminal sanctions were not given enough consideration at the outset.[28]

Application of the law is a reasonably transparent process, because most of it is done through public judicial processes. The Authority's decisions about granting or withholding licences and its advisory reports about mergers are published with full reasoning.[29] But DETE's merger decisions, about whether to refer a transaction to the Authority and about prohibiting a merger or imposing conditions, have not been as transparent. The Authority's decisions about licences may be appealed to the courts, for a full re-examination on the merits (but based on the Authority's factual record). Decisions of trial courts may be appealed or reviewed through the usual judicial channels, from the Circuit Court to the High Court, where the matter may be heard *de novo*, and from the High Court to the Supreme Court.

Box 4. **The "Elective Hearing" proposal**

The CMRG proposed a complex new procedure for hearing and deciding complaints, creating a quasi-adjudicative "elective hearing" before the Authority for what would otherwise be criminal cases (CMRG, 2000, Chaptrer 4).

The proposal

For violations that would otherwise be subject to criminal proceedings, potential defendants would have the option to request a hearing first before a panel of the Authority. At the end, the Authority could set a (recommended) fine, but not a term of imprisonment or any civil remedy, such as an injunction. If the party did not pay it, the Authority's recourse would be to proceed with the prosecution in court. If the party paid the "fine" (or if the elective hearing concluded there was no violation), it would gain immunity from actual criminal prosecution, although the Authority or a private party might still seek civil sanctions, and the Authority could use the evidence and findings of the elective hearing in such a civil proceeding. The CMRG recommended that decisions reached in the elective hearing be kept confidential, at least until the final determination of actual criminal proceedings. And the CMRG suggested that DETE might appoint temporary members to assist in this process, such as experienced lawyers who could deal with admissibility of evidence and similar procedural issues in this "quasi-trial."

Motivation and intention

The proposal is intended to provide some kind of expert adjudication of competition cases, consistent with the constitution's requirement that only courts can issue mandatory orders and fines. It also anticipates that changes in EU enforcement policies will increase the workload of national authorities, and that national competition agencies will have to be constituted as adjudicative bodies. It reinforces the CMRG's proposal to separate the enforcement function from the adjudication function. In addition, some observers believe that expanding the Authority's "adjudicative" function is a response to concerns that the Authority pays too little attention to small business complaints about unfair competition and refusals to supply.

Evaluation

The CMRG proposal would give the Authority a function that looks like what an independent, collegial, adjudicative body would typically do. Because the notification-licensing function is becoming less important, and it may disappear if the EU white paper is adopted and Ireland follows that lead, virtually all important decisions would otherwise move to the courts. But the "elective hearing" does not solve any clearly identified present problem. It appears to be motivated by a desire to reduce the resort to actual criminal proceedings and fines. It is hard to understand why a defendant that "lost" this decision would pay the fine or change its behaviour. There might be some risk that a court would impose a higher fine than the Authority had sought, and might even impose prison sentences as well. But until there is more experience with actual sentences in competition trials, the extent of that risk is entirely a matter for speculation. The provision for temporary Authority members risks the appearance that decision-makers will be appointed based on expectations about their decisions.

Imaginative effort has been side-tracked on a hypothetical problem. Ireland's laws have been on the books for a decade, and enforcement and sanctions were strengthened nearly 5 years ago. Only now are courts actually facing the need to make decision in enforcement actions. It would be better to try to make the present system work. The government has evidently decided not to proceed with this proposal at this time.

3.2. Other enforcement methods

Private enforcement has been unusually significant in Ireland. For the first 5 years after the Competition Act was passed, private actions were the only form of enforcement. Under Section 6 of the 1991 Act, "any person aggrieved" by any agreement or abuse prohibited under Section 4 or 5 of the Act has a right of action for damages, injunctive relief or declaration. Actions against restrictive agreements may be brought in the High Court, while actions against abuse of a dominant position may be brought in the High Court or the (lower) Circuit Court. In the Circuit Court, the amount of damages that can be recovered is limited, but the costs of suit are also lower. Nearly all private cases have been filed in the High Court. The 1996 Amendment Act creates a wider personal liability for directors, shadow directors, managers and other officers of the defendants. Private plaintiffs can now sue those individuals, as well as their firms.

Experience with private suits has been mixed. High costs and legal uncertainty have discouraged some potential plaintiffs. Courts have struggled with the complex economic issues, and the experience has led members of the bar to believe that competition cases are difficult to win. But the private right of action may still have tactical value, in putting additional pressure on adversaries and in gathering evidence (Ireland, 2000). Plaintiffs may complain to the Authority at the same time they are pursuing private relief. (Conversely, defendants in private suits may apply to the Authority for a licence or certificate, to use in defence against the private claim). Most private actions have been complaints by entrants against allegedly dominant firms, including some against former state monopolies, about refusals to supply or other entry-deterring strategies. Although plaintiffs have rarely won outright — the courts often find there is dominance, but not abuse — the decisions have established some sound and useful precedents about the application of the Competition Act. For example, private parties must show not only private injury, but also injury to competition, in order to recover. And the decisions recognise that market power in purchasing can violate the law just as market power in selling can (Fingleton, 2000).

Private suits have accompanied public actions against anti-competitive "private regulation." When the Authority examined a licence application for an unwritten agreement between the state electricity company, ESB, and the Register of Electrical Contractors, it found that the arrangement was already the subject of a private lawsuit complaining that the agreement steered business to RECI members. After RECI ensured that smaller firms could become members, the Authority accepted the safety-based claims about the agreement's public interest justification (OECD CLP 1997). When the Royal College of Surgeons brought a private suit challenging restrictive arrangements for training pharmacists between the Pharmaceutical Society and Trinity College Dublin, the problem also came to the attention of the Authority (OECD CLP 2000). Another private action against private regulation evidently targeted the government as well as the relevant trade association, seeking damages for lost sales because of a rule preventing the sale of non-prescription reading glasses. The Opticians Act was to be amended in 2000 to remove the restriction, but the disgruntled doctor intended to maintain his suit nonetheless.[30]

The option to file a private suit is a valuable safety-valve. A party complaining about a refusal to supply has a credible alternative if the Authority lacks resources to pursue the matter or concludes that the claim is groundless. The disappointed complainant can bring a relatively low-cost action in the Circuit Court seeking an injunction. To be sure, the cost of such a suit is not zero. But it is appropriate for private parties to bear that cost and risk, for these cases are typically about private interests, more than public interests. The CMRG and the Authority have called for permitting private suits involving restrictive agreements to be filed in Circuit Courts, to reduce the parties' costs and make private remedies more widely available (Ireland, 2000).

The Competition Act originally gave full enforcement powers to the Minister for Industry and Commerce. DETE still has these powers, to seek injunctions in court, bring summary prosecutions, and recommend indictments. But the department has never used them, even during the period from 1991-1996 when it had sole enforcement power. The experience, consistent with that in other OECD countries, shows that enforcement is likely to be more vigorous when it is assigned to a body that is independent of the political decision-making process. The CMRG recommends repeal of all provisions authorising DETE enforcement actions, so that the Authority would be the only public body authorised to apply the Competition Act. Repeal would confirm the actual situation and avoid the risk of inconsistency or conflict.

3.3. International trade issues

The competition policy of the European Union applies in Ireland, but the means for applying it are likely to change. At present, the only way to apply EU competition policy through Irish institutions is by private lawsuit. The Authority does not yet have that power, even though the substance of the Competition Act is directly analogous to EU law. The EU has proposed wide-ranging, fundamental changes in the way its competition policy would be implemented. Much of the CMRG report discusses the implications of those changes. Because the proposals are still being discussed and are unlikely to be effective for several years, the CMRG recommendations on this subject are offered as items for consideration, depending on the direction the EU ultimately takes. But its first recommendation, to empower the Authority to apply EU competition law to the extent national agencies may do so, should be adopted regardless of the direction of other reforms.

The Authority's ability to deal with international matters is hampered by constraints on sharing information. The Authority and its members and staff may not disclose information they obtain in the performance of their official functions, except that they may disclose it as necessary in connection with those official functions and enforcement actions (Competition Act, 1991 (Schedule, paragraph 9)). This prohibition nearly prevents exchanging information with the competition enforcement agencies of other countries (Ireland, 2000).

In the application of the Competition Act, no concerns have been reported about national treatment of foreign firms or about the consideration of impacts of international trade on competition. The law appears to support extraterritorial jurisdiction, as the Competition Act reaches practices that have the object or effect of impairing competition in Ireland, without regard to the location of the conduct. That jurisdictional claim appears not to have been tested, though. In general, the application of competition policy seems to accommodate the impacts of foreign trade with no difficulties. On a few occasions, issues have arisen due to trade with or competition from firms in the UK. Support for the Groceries Order comes in part from local firms resisting entry by chain store operations based in the UK. In automobiles and some other products, exchange rates and tax policy differences between Ireland and the UK have created arbitrage opportunities, followed by private efforts to suppress them.

3.4. Resources and priorities

Uncertainty about personnel has hindered the Authority's work. As of mid-2000, the Authority was critically understaffed (Ireland, 2000), with 40% of its authorised positions vacant, including 5 of its 7 professional staff positions. Yet the staff had been at virtually full strength in the third quarter of 1999. The principal reasons for the decline appear to be the expiration of limited-term personnel contracts, which had discouraged retention of professional staff, and increased demand for people with these skills at the new sectoral regulators and private sector firms involved with regulation, as well as disruptions that accompanied the resignation and replacement of the chair in early 2000. Appointments restored the

Authority to its full 5 member complement in the third quarter of 2000, and recruitment continued to fill staff positions for economists and legal advisors.

Table 1. **Trends in competition policy resources**[1]

	Authorised positions	Members[2]	Economists and lawyers[2]	Non-specialists[2]	Vacancies	Budget (IR£)	Expenditure s (IR£)
2000 (2Q)[3]	24	5	7	12	8		
1999	24	5	7	12	5	1 083 000	892 000
1998	25	5	7	13	1	875 000	825 000
1997[4]	24	4	7	13	3		
1996	17	4	1	12			
1995	16	3	1	12			
1994	12	3					

1. At the Authority; in DETE, another 8-9 persons are involved in merger reviews and competition policy.
2. Authorised positions.
3. At the end of June 2000, 5 new professional positions were authorised.
4. Budget not separately identified within DETE through 1997.
Source: Ireland, 2000; OECD CLP, 1995.

The Authority depends on DETE for staff and budget resources. Disagreements about support between the Authority and the department date back to the early 1990s (Competition Authority, 1996).[31] Hiring and retaining economists and legal advisors has proved difficult. It took until mid-1998, or nearly two years after the Authority's enforcement authority became effective, to get the professional staff on board. In addition, DETE set up the staff positions as three-year contracts, rather than as permanent posts, and set the pay at normal civil service rates, rather than meet the salary levels for the relevant skills that are paid by other regulatory bodies or the private sector. In Ireland's booming job market, the combination of limited pay and lack of tenure protection decimated the professional staff. The Authority has lacked the personnel resources needed to do its job, yet it has not been able to spend all of its budget.

The Authority's dependence on DETE needs to be reduced. The Office of the Director of Telecommunications Regulation, which has an independent source of funding, has greater budgetary and operational autonomy from its related Department, as well as more flexibility in hiring and compensating its professional staff (Competition Authority, 1999). The CMRG points out that providing for separate funding authorisation and the same degree of freedom that comparable independent agencies already enjoy would strengthen the Authority's actual and perceived independence (CMRG, 2000, Recommendation 33). Before taking steps to improve the Authority's resource situation, DETE asked for an outside consultant's report. The consultant's interim report resulted in authorisation to hire 5 additional professional staff, 4 of whom are now in place. The final report recommended further strengthening of the Authority's personnel resources by adding another 15 positions.[32]

The available resources have been concentrated on the top enforcement priority, investigating hard-core horizontal cartels (Ireland, 2000). The other principal objects of investigation are resale price maintenance (in part because it may be a means of facilitating horizontal price-fixing) and certain types of abuse of dominance (Ireland, 2000). Confirming that cartels are the top competition issue in Ireland, more complaints are made about price-fixing than about any other kind of violation. Since 1996, the Authority has received 146 price fixing complaints (in many cases, more than one complaint about the same cartel), compared to 127 complaints about abuse of dominance. As staffing fell in 1999, maintaining the cartel

investigations required diverting resources from other issues, so the case backlog grew (OECD CLP, 2000). Only one investigation has wound up with a conviction and fine yet, in late 2000; otherwise, the few orders that have been issued in enforcement matters represent settlements.

Table 2. **Trends in competition policy actions**

	Horizontal agreements	Vertical agreements	Abuse of dominance	Mergers	Other[1]
1999: matters opened	37	29	39	2	53
sanctions or orders sought	3				
orders or sanctions imposed					
total sanctions imposed					
1998: matters opened	34	24	28	5	69
sanctions or orders sought	3		1	1	
orders or sanctions imposed	3				
total sanctions imposed					
1997: matters opened	57	31	48	3	81
sanctions or orders sought					
orders or sanctions imposed					
total sanctions imposed					
1996: matters opened[2]	13	20	12		49
sanctions or orders sought					
orders or sanctions imposed					
total sanctions imposed					

1. "Other" includes complaints about matters judged not to fall under the Competition Act, including unfair competition.
2. The Authority's enforcement powers became effective in the second half of 1996. Before then, the Minister did not undertake any enforcement action.
Source: Ireland, 2000.

The Authority's policy work is being pushed aside because of resource constraints. Previous industry studies such as the Authority's 1998 papers about competition problems in the taxicab and retail drinks industries were influential factors in public debate. One member and one staff economist, devoting together about one-half of a person-year, try to follow advocacy matters (Ireland, 2000). But maintaining this function has been difficult. A general study of surface passenger transport issues, begun in 1999, has been deferred because of lack of resources (Ireland, 2000). Re-establishing this function is a high priority. The chair has created a separate division, overseen by one of the Members of the Authority, to concentrate on government-imposed restraints and advocacy. Currently, 4 staff are assigned to this division, and the chair hopes that this number will be doubled.

4. LIMITS OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES

There are no explicit exemptions from the Competition Act, but many other laws and programmes inhibit competition, usually by restricting entry in order to protect incumbent firms. Where these conditions are authorised by statute, the Competition Act cannot correct them.

State-owned firms are subject to the competition law, and some of them have been sued for abuse of dominance (Ireland, 2000).[33] State monopolies may operate under laws that authorise non-competitive practices or conditions, though. The authorised non-competitive practices and conditions in Ireland have included gas and water service, forestry, airport management, and road and rail passenger transport, as well as the telecoms, electric power, broadcast, and postal sectors where reform programmes are making the transition to competitive markets. This list resembles those often found in other countries.

The Competition Act cannot redress the anti-competitive actions of local authorities. These are often taken through advisory boards that include local officials and appointees. Subjects where problems have appeared include land use, health care, and licensing. Some of these are described below with respect to the sectors involved. Anti-competitive decisions by these bodies may not be subject to challenge as violations of the competition law, if these bodies are not "undertakings" pursuing economic objectives. To correct these problems requires advocacy and legislation.

Ireland's competition policy makes no special provision for small business. The Authority has advocated repealing one vestige of small-business protection, the Groceries Order. The Authority's first decision denied that the law should not be concerned about the conduct of smaller firms. On the contrary, in a small country with a dispersed population, consumers may be more vulnerable to anti-competitive behaviour by small firms such as local retailers, professionals, and service providers.[34] Nonetheless, some observers continue to advocate adopting a *de minimis* rule, perhaps to make Ireland's rules consistent with the EU's in this respect. In its interim draft report, the CMRG proposed two possible *de minimis* exemptions, either that liability depend upon showing "substantial effects", or that the law establish a safe-harbour based on market share or turnover. But such exemptions would make it difficult to maintain a clear rule against horizontal cartels. No special rule would be needed about vertical arrangements involving small firms, for those would usually be covered by category certificates. It would be difficult to devise safe-harbour tests that would not shield some notorious competition problems, such as pubs, from effective enforcement. The *de minimis* proposal was dropped from its final recommendations, but the CMRG did propose that the Authority issue guidelines to give smaller businesses more confidence.

Box 5. **Independent regulators and competition policy**

Sectoral reforms moving from monopoly toward competition have highlighted the relationships between general competition policy and special sectoral regulators. Independent regulators for telecoms, electric power, and aviation already exist. Responsibility for postal services has been assigned to the telecoms regulator (soon to become the "Commission for Communications Regulation), and for gas, to the electric power regulator (to become the "Commission for Energy Regulation"). Regulatory arrangements for surface transport and the financial sector are under consideration.

The Authority's relationships with these sectoral regulators are still developing. Efficient sharing of responsibilities is hampered by constraints on sharing information and the lack of clear means for one agency to defer to another about a particular complaint. Disputes between the Authority and the telecoms regulator, ODTR, highlighted the co-ordination problem. In 1999, the Authority initiated proceedings against the incumbent wireline provider, contending that its refusal to unbundle local loop services was an abuse of dominance in violation of the Competition Act. At about the same time, ODTR initiated a process of public consultation to consider whether, and on what terms, the incumbent should be required to unbundle these services by regulation. Concerns about whether there was an adequate, timely effort to co-ordinate these two processes may have lent urgency to efforts to improve the process. Legislative measures to facilitate further co-operation between the Authority and sectoral regulators is under development by DPE and DETE.

As these sectoral regulators have begun to proliferate, Ireland has engaged in a debate about the implications of institutional independence and the relationship with competition policy.[35] Most of these new regulators deal with sectors that are under the jurisdiction of DPE. Thus, the Minister for Public Enterprise called for comment in September 1999 on regulatory governance and accountability. Her proposals appeared in March 2000 (Ireland, 2000*b*). The problem of devising a structure of accountability between her department and these independent bodies echoes the relationship between DETE and the independent Authority. Some of the DPE proposals about appointment and tenure, to balance independence with responsiveness, follow the current practice that applies at the Authority. DPE's proposals include means for promoting accountability to the public, such as formal decision procedures, consultation requirements, comment opportunities, publication of comments and decisions, and protection of confidentiality. Regulators would be accountable to the Minister through regular strategy statements and work programmes. And the parliament could request regulators to account to parliamentary committees at least annually. This review would deal with implementation of plans and overall performance, but not, in theory, with individual decisions (Ireland, 2000*b*).

DPE's proposals for co-ordinating regulation with competition policy are not yet fully formed, though. DPE recognises that regulators' tasks have evolved as traditional state monopolies have become privately owned competitive industries. Those tasks now call for interventions to facilitate entry and ensure fair market conditions and consumer protections. The DPE proposals apparently conclude that Ireland's competition law could not eliminate barriers to entry unless there is a showing of abuse, and that regulation could eliminate even abusive barriers more efficiently and effectively. DPE notes that sectoral regulators have powers over licensing conditions that necessarily involve them in competition issues. This suggests the potential use of those powers to enforce compliance with competition rules, if the enforcement methods of competition law are considered too time-consuming and legalistic. DPE acknowledges that sector-specific rules should not, in principle, conflict with generally applicable competition rules, but rather than try to resolve remaining tensions between them, the proposals take advantage of the contemporaneous appearance of the CMRG report to call for more consultations between the ministries and for continued consultations between sectoral regulators and the Authority (Ireland, 2000*b*). And DPE proposes a periodic review of regulatory structures that would involve regulators, other departments, industry, employee, customer, and consumer interests, the Director of Consumer Affairs, and the Authority.

The CMRG makes detailed recommendations for managing the relationship between sectoral regulation and general competition policy. To emphasise the generality of competition policy, the Competition Act should continue to apply to regulated sectors, without any substantive exclusion or exemption. A single public body, the Authority, should enforce it. To avoid putting firms in impossible positions where regulatory decisions overlap competition issues, conduct undertaken pursuant to a regulator's decision or approval should not be subject to the most serious sanctions, of criminal liability or damages, though it might still be enjoined as a violation of the law. These recommendations have the net effect of giving competition policy a general priority while leaving to the courts the task of working out the balance between competition policy and regulatory decisions in particular cases. Sectoral regulators could not confer *ad hoc* exemptions from competition law consequences, but firms in the regulated sector would be assured

that complying with the regulatory programme would not subject them to disproportionate and unjustified risk of liability because of conflicts among laws or enforcement programmes.

CMRG recommendations would also encourage co-ordination among enforcers, to prevent serious conflicts from developing. The Authority and the sectoral regulators would be required to notify each other when initiating an action that the other might also be able to take, and then to consult to avoid unnecessary duplication or inconsistency, perhaps by one agency deferring to the other. Sectoral regulators would be required to consult with the Authority before taking action about behaviour that could be considered a competition law violation, and to take account of the Authority's opinion about it. To be sure these consultations actually happen, the Authority and the regulators would be required to meet at least quarterly, face to face. The relevant laws would need to be amended to make it clear that the agencies would have legal discretion to defer to each other and to share necessary information about matters that come up within their jurisdictions. Where the sectoral regulatory programme calls for a process of appeal on the merits, one member of the appeal panel would be a member of the Authority.[36]

4.1. Sector-specific exclusions, rules and exemptions

The extent to which competition in particular sectors is impaired by licence controls and other regulations is not known with certainty. The competition policy office in DETE is undertaking, as of mid-2000, a review of existing legislation and regulatory programmes to identify state-promoted legal and other restrictions on competition in all areas of the economy (Ireland, 2000). The following section discusses developments in some sectors where the issues are already well recognised.

4.2. Pubs

The most well-known competition problem in Ireland, although perhaps not the one with the greatest economic impact, affects one of its most characteristic institutions, the pub. Both the emergence of the problem and the efforts to address it illustrate the tradition of reluctance to apply competition policy principles. The political influence of the interests who profit from the historic system prevents the most straightforward reform, which would be to eliminate quantitative entry controls. Instead, the government has repeatedly invoked the Prices Act to regulate the industry. This approach postpones fundamental reform, while the rules are modified in ways that preserve or even increase the scarcity value of the publicans' licences. The latest reform package, the Intoxicating Liquor Act, 2000, enacted in July 2000, relaxes some constraints on opening hours and, for the first time, allows existing licenses to be transferred to different geographic areas. But the numerical limit on the number of licenses remains in place.

The Licensing Acts are legion, dating from 1833. There are at least 11 separate statutes called "Intoxicating Liquor Acts." The first law to place quantitative limits on the trade was the Licensing (Ireland) Act 1902. Before then, anyone who qualified for a licence had the common-law right to enter the business. Over a century, the number of pub licences has continually declined, from about 13 500 in 1896 to just under 10 000 in 1996.[37] (Before the famine of the 1840s, there had been over 21 000 on the island). A host of different kinds of licences has developed. The basic publican's licence permits the holder to operate a bar, offering "on-licence" sale of beer, wine, and spirits for consumption on (or off) the premises. Two kinds of licences permit a hotel to operate a bar, subject to conditions such as having a minimum number of rooms or a maximum proportion of revenues from liquor sales. Restaurants may serve wine, but until the new law of 2000 they could not serve beer or spirits unless they had a "special restaurant licence". This was introduced in 1988 to address the anomaly that pubs could serve food but restaurants could not serve beer.[38] Nonetheless, conditions on the restaurant licence tended to ensure that restaurant facilities do not compete with the pubs' type of service. A *bona fide* private-member "club" is not subject to the licence requirement, but it can only serve its members (and guests in defined circumstances,) not the general

public. The licensing laws limit operating hours. A short-term "special exemption" is needed to remain open after hours.

Pub licences have been technically tied to particular premises. They could be "transferred" only through a process that involved extinguishing one or more licences and issuing another licence for the new premises. Until the law was changed in 2000, the rules differed for rural and urban premises. A "new" rural licence required extinguishing 2 existing rural licences. In this context, "rural" was defined formally, so that several densely populated suburbs of Dublin were classified as "rural". A "city or town" exemption was introduced in 1962, so that in theory an "urban" licence could be granted for an area where population had increased since 1902. But the number of licences was not increased; rather, the "new" urban licence depended on extinguishing an existing one, in the same city, town, or parish. Licences could not be transferred from rural to urban areas or between different towns and cities. A blanket "one mile" rule prevented entry that would compete with older, unimproved rural pubs. Incumbents could object to a "new" licence on the basis of the number of pubs already in the neighbourhood or on the grounds that the new licence would be "unreasonably detrimental" to their existing business.

The stated purpose of the 1902 law was simply to "safeguard the public interest" by preventing a "proliferation" of pubs. One concern was apparently to end corruption in the process of issuing rural licences. Presumably, the temperance movement provided some of the support for limiting the number of pubs. Echoing that presumed original concern about the effects of public drinking, some groups contend there are still too many pubs and that they are open too long. The Dublin pub owners' association, whose members are the principal beneficiaries of the market power that their licences confer, admitted that the system increases costs and discourages entry, but it argued that those effects are positive goods, not problems. If entry were easy, quality standards would fall, unscrupulous operators would not keep their houses orderly to protect their investment, and financial stability would be undermined as the asset value of the licences fell. Hotel operators, who also benefit from the limited licences they can obtain, objected to making any changes in the system, predicting that more open entry would lead to more failures and then to dominance by larger, monopolistic operators. The Dublin publicans claimed that prices are not identical at all pubs, so there is adequate competition. Admitting, though, that Dublin prices increased more recently than prices outside Dublin did, they also claimed that this increase was needed to pay for refurbishing amenities that customers demand, and that customers are relatively indifferent to the prices they are paying.

The effect of the limitation on price is revealed by an econometric study that the Authority commissioned. Even after correcting for differences in demand patterns stemming from Dublin's demographics, the study found that Dubliners paid 6% more than consumers outside Dublin for a pint of stout at a pub, and the differential reached 10-12% for other beers and lagers. Underlining the effect of the publicans' market power, the study found that Dubliners paid less for off-licence package products, because of the presence of efficient high-volume retailers in the urban area. Experience with free entry in the UK shows a feedback effect: more demand leads to more pubs, which in turn leads to more demand. The net effect on price in such a situation is unclear, but the positive effect on output is unambiguous. In Ireland, and especially in Dublin, where increased demand could not be met by increasing the number of pubs, the net effect was to increase prices more than to increase output.

The economic significance of the limitation on entry could be measured in the value of a pub licence. The price of a licence varied by locality. The reported minimum, for a rural licence, was IR£ 45 000; for high demand areas, it could range as high as IR£ 500 000. (By one report, a rural licence recently sold for IR£ 150 000 (to a firm that may plan to transfer it to another location, under the new legislation), and a pub licence in Dublin may have sold for as much as IR£ 2 000 000). The 2-for-1 rule for rural pubs, recently repealed, meant that the basic licence cost for a "new" rural pub would have been at least IR£ 90 000. As populations have shifted much more than pub licences, the urban areas, particularly

Dublin, have become seriously under-served. A century ago, Dublin had over 1 100 pubs; now, it has 946. Then, the average Dublin pub served 388 people; now, it serves 1 119. In one "rural" suburb, 3 pubs serve a population of 39 000 — 13 000 people per pub. Outside the Dublin area, the average population per pub is 283. The huge investment in a licence calls for investment in a big facility to recover it. Pubs in suburban Dublin are becoming much larger, in response to this demand, and the cost of a licence those areas has increased accordingly. A rough estimate of the value of all the outstanding licences, rural and urban together, under the previous regulatory constraints was IR£ 550 000 000 (Competition Authority, 1998*b*).

Box 6. **The pub problem: 75 years of studies**

Six studies have examined competition in Ireland's retail drinks industry. Since the 1960s, these studies have identified the licensing system as a critical constraint on competition.

- A 1925 report, examining whether there were too many pubs, proposed a scheme under which a pub's local competitors would pay to buy out the "excess" licencee. This operated only for one year, 1927, and was then abandoned because too much was being paid for marginal licences. That fact already suggests the industry recognised the value of scarcity: competitors found it worth more to buy out a competitor than would appear plausible from the competitor's economic performance alone.
- A Commission of Inquiry in 1957 recommended making new licences available, under a 2-for-1 rule (to get a new licence, 2 old ones had to be extinguished), except that a hotel could have a public bar in exchange for extinguishing 1 old licence. Some of its recommendation appear in the 1960 Law.
- The Fair Trade Commission was asked to study the industry in the early 1960s, after the trade co-ordinated a price increase in the wake of an increase in the excise tax. The Commission found that collective arrangements about retail prices were widespread. Some local associations did not just recommend increases, but took steps to enforce those recommendations. The result of this study was a 1965 Restrictive Practices Order prohibiting collective action about retail drinks prices, which remained in effect (although evidently unenforceable) until the new Competition Act of 1991.
- When the industry applied for a price increase in 1972, the National Prices Commission determined that the licensing system, strong trade associations, and the "closed shop" constrained competition so cost increases were passed on to consumers. The commission denied the full price increase requested, called for price displays, and recommended re-examining the licensing system because it limited competition without evident justification.
- The Restrictive Practices Commission examined the industry again in 1977, in response to a request from the Minister who was concerned about prices and about violations of the 1965 Order. The Commission found that the Order had been ineffective; concerted action continued. The licensing system facilitated collusion about price, seriously distorted the structure of the trade, and increased operating costs and prices (particularly in urban areas). For the first time, the Commission recommended ending the cap on the number of licences and eliminating the explicitly anti-competitive aspects of the licensing criteria. Only the recommendation to introduce restaurant licences was adopted, though.
- Most recently, a select Committee on Legislation and Security was appointed to review the liquor licensing laws, but it did not examine their effect on entry, deferring instead to the Authority's contemporaneous study of that aspect of the problem.

The Authority undertook a new study in January 1997, one of the first to apply its new powers of self-initiated investigation. The study responded to media reports of simultaneous price increases in licensed premises in Dublin. The study's terms of reference were not the conduct behind these particular increases (since that might prejudice any subsequent enforcement action), but rather structural barriers that could be beyond the reach of law enforcement. The Authority's interim findings were published in 1998. The Authority concluded that a serious attempt to reform the licensing laws had to address the fundamental problem, namely the complete barrier to entry. Thus, the Authority recommended revising the laws to repeal the 1902 Act's prohibition against new licences, to repeal provisions protecting existing establishments from entry, and to retain licensing criteria that are directly relevant to the social dimension of the sale of alcohol, such as suitability of the applicant and premises and compliance with health, safety, and planning requirements.

The 1998 report was "interim," because it did not yet include a discussion of how the licensing limits affected firm behaviour. Behaviour had just become the subject of another proceeding: in June 1998, the Authority initiated law enforcement proceedings under Section 4 (Competition Authority, 1998*b*).

For decades, the government's response to competition problems in this sector has been to impose price controls, rather than to permit entry. These responses may alleviate some of the effects of market power, but they put off adopting a more fundamental and effective solution, and they also tend to encourage industry co-ordination. In 1997, DETE issued a Price Acts order freezing prices outside Dublin for 6 months. But no order was needed for Dublin — because the publicans' association in Dublin had agreed that its members would fix their prices at the previous level. In response to concerns about overall inflation, another Price Acts order froze pub prices in July 2000.

Reform is complicated greatly by the network of interests and investments that have developed over a century based on the expectation that entry would be controlled. For example, the pubs' bankers object that free entry would reduce the value of their collateral. Rather than upset these expectations, reform proposals have often appeared designed to preserve the value of existing licences. Legislation[39] adopted in 2000 permits more transfers of licences and extends pub opening hours. (Some restaurants that are authorised to serve wine would also be permitted to serve beer). But the total number of licences would not increase. Allowing some rural licences that are virtually unused to be transferred to the Dublin area should increase the supply, and hence reduce the value, of Dublin licences, but it will also increase the price of those rural licences, so the net effect is not clear. Meanwhile another commission will be appointed to study the situation further and produce a final report in two years.[40]

The pub situation tests Ireland's commitment to competition policy. It is a well-known problem, which directly affects a large number of citizens. The Authority has called for ending the licensing regime, and it has resorted to law enforcement against the collusion that the present regime has fostered. A successful prosecution, demonstrating how the present system has abused consumers, could change the balance and lead to demands for structural reform. But the industry's supporters could also threaten to undermine the independence of the bodies such as the Authority and the DPP that are trying to correct the problem.

4.3. Taxicabs

The number of taxicabs in Dublin (and some other areas) was controlled by local authorities pursuant to a 1978 law. Virtually no new licences were issued until the Minister for the Environment and Local Government resumed responsibility temporarily in 1991. Between 1991 and 1995, about 150 new licences were issued, the first since 1978. The number of taxi licences was increased a few times, but the ceiling was not eliminated.[41] Regulations returned the licensing and oversight responsibility to local authorities in 1995. Taxicabs could compete to some extent with hackney services, which must be arranged privately. The extent of that competition appeared limited, though. Increasing the number of hackney licences did not reduce the market value of taxi licences, suggesting that hackney competition did not erode the taxis' revenues and profits.

Limited supply led to long waiting times and poor service. Demand increased 100% over the last 20 years, but the number of licences increased less than 30%. In times of heavy usage, waiting times of 90 minutes are reported (Fingleton, 1998). The Fair Trade Commission criticised the limitation in 1991 and recommended phasing it out. The chairman of the Authority in 1998 again called for phasing out the limits and introducing a more liberal entry regime (Competition Authority, 1998*c*). The 1998 report pointed out that the impact of the monopoly could be measured by the increasing value of a taxicab licence in the secondary market. A taxi licence was valued at about IR£ 80 000, and the aggregate value of licences

outstanding in 1997 exceeded IR£ 150 000 000. The annual monopoly profit was estimated to be IR£ 30 000 000 (Competition Authority, 1998*c*). There are other, less obvious effects of limited taxi service. Because of the limitations in the regulatory scheme in effect before November 2000, taxis could contribute little to filling Ireland's need for more flexible public transport.

Change is difficult, though, because incumbents resist losing the value of their licences. Reform will require more than simply increasing the number of licences, for it must also deal with the fact that several different local authorities issue licences.[42] Reform efforts have been piecemeal, and they have been stalled by litigation. In November 1999, the government proposed to add about 3 100 new licences, by letting each incumbent buy another, new licence and making another 500 licences available to applicants under the "points assessment" system (which would tend to favour co-drivers under existing licences). All the new licences, like the old ones, would be freely transferable. When the first regulations to implement this reform appeared in January 2000, the taxi drivers responded by threatening to strike,[43] and hackney drivers challenged several aspects of the regulatory authority in court[44] (Ireland, 2000). After the judge ruled in October 2000 that quantitative limits were illegal, the government decided to remove them entirely. The new regulations, issued 21 November 2000, set up a new licensing system that sets uniform national fees and that does not permit local authorities to impose any numerical limits. Owners of taxi licences could recover their investment as a write-off against their tax liabilities. Within days, about 300 applications for new licenses were submitted (and about 3 000 applications were requested). The taxi licence holders immediately went on strike in protest and sought judicial review in the High Court to overturn the new policy and retain their protection against competitive entry. The High Court has heard the case and reserved judgement; meanwhile, the Court has allowed the issuing of taxi licences under the new regime to continue pending its decision. By early 2000, the number of taxicabs doubled.

4.4. Pharmacies

The number of pharmacies is effectively capped. Regulations governing Community Pharmacy Contractor Agreements call for a determination of need.[45] These contracts, which cover pharmaceutical purchases that are reimbursable, amount to a necessary condition for running a viable pharmacy. A "definite public health need" would exist for a service area that has at least 4 000 people and no incumbent pharmacy within 250 meters (in rural areas, 2 500 people and 5 kilometres). Moreover, and regardless of these quantitative rules, local health boards that approve the contracts must consider their effects on existing pharmacies. Entry of a new contractor must not have an "adverse impact on the viability" of incumbents that would affect the "quality of pharmacy services" they are providing. One local health board refused a licence application for a new pharmacy in village that had no pharmacy at all, in part because it would hurt business at an existing pharmacy in another nearby town. The village where the new entry was refused, Knock, is a pilgrimage destination for the sick.

These regulations are relatively new. Entry to the profession in Ireland had been limited for many years until EC mutual recognition requirements and an expansion of university places in the UK increased the supply in the late 1980s. In response, the Irish Pharmaceutical Union, the trade association of established pharmacies, sought protection. Legislation to restrict the entry of foreign-trained pharmacists was rejected because it would be contrary to EC law. But a derogation from the EC mutual recognition requirement limits the ability of pharmacists qualified elsewhere to supervise or manage a new pharmacy in Ireland. And in 1996 the Minister for Health introduced these regulations, which give incumbents power to prevent entry in the planning process. These regulations contradict the policies adopted shortly afterwards in the government's reform process, calling for eliminating licence requirements that prevent competition. Prospects for change appear poor. The Consumer Association of Ireland has tried, without success, to discuss its objections to these regulations with the Minister for Health, while the Authority and DETE have advocated reform.

4.5. Professional services

Many professional sectors are self-regulated, setting and applying their own standards for entry, provisions for professional training, codes of conduct, and recommended fee scales. Examples are the engineering, legal, medical, dental and auditing professions. For many professions, these standards are recognised, at least tacitly, by legislation (Ireland, 2000). The associations for auditors and for solicitors have statutory recognition, while those for architects, engineers, and surveyors are independent (Ireland, 2000). In the health sector, there are several recognised regulatory bodies, for opticians,[46] nurses,[47] hospitals,[48] dentists,[49] doctors,[50] and pharmacists.[51] In October 2000, the Department of Health and Children published for comment a proposed program of statutory registration for health and social professionals. This program would formalise the process of recognising and ensuring competence to practise, by establishing self-regulatory bodies separate from the professions' trade associations. The process would still be dominated by the professionals, though, because the boards would typically have only one consumer member, and a majority would be practising professionals. Competition issues raised by the rules and practices of self-regulated professions are treated in more detail in the background report to Chapter 6, with particular attention to the legal professions.

Some professions are calling for a kind of exemption from the competition law, by treating their collective actions under the labour law rather than competition law. The Authority is considering a notified agreement that seeks this treatment. The professions that have expressed interest include free-lance journalists and hospital consultants. When the issue arose in a court proceeding against the veterinarians' association, the labour federation did not support a proposal to expand the labour law's coverage.

4.6. Consumer credit

A form of price control applies to certain finance charges. The Office of Consumer Affairs has power, under 1996 regulations, to approve or disapprove credit institutions' charges (other than interest rates). The statute calls for fee increases to be judged with "regard to the promotion of fair competition" between credit institutions, as well as claims of commercial justification, passing on costs to customers, and effects on customers more generally.[52] These regulations were borrowed from banking legislation, and the regulatory responsibility may be transferred to the proposed single financial regulator when that is established. The criterion of "fair competition" among institutions could be misapplied to effect uniformity, rather than rivalry. Rate regulation demanding "commercial justification" seems inappropriate unless there is a showing of market power. To the extent the problem it addresses is consumers' lack of information about charges, that problem would be better addressed by standardised disclosure requirements.

4.7. Other products

A private sector company has enjoyed de facto monopoly rights in cement manufacture. Under the Cement Acts, 1933 to 1962, manufacturing cement requires a licence from DETE, and only one firm has a licence. The government proposes to repeal the Cement Acts, and two firms have undertaken to enter, having been assured that the licence requirement will not be applied. Maintaining the monopoly implied an inconsistent commitment to competition as a principle; the promised repeal will be welcome. Wholesale petroleum suppliers must still source 20% of their requirements from the state-owned oil refinery (a figure that had been 35% a few years ago; the government has announced plans to dispose of the refinery and end this requirement). The state forestry operation is a *de facto* monopoly, because private sector forestry is not yet competitive in the Irish Republic. When the firm tried to gain control of a competitor in Northern Ireland, the Authority recommended that the acquisition be blocked, and the

Minister followed that advice (OECD CLP, 1999). The operation has now been privatised, but it remains a monopoly. The government continues to study how it should be structured. An opportunity was missed to establish this sector on a competitive basis at the outset of privatisation.

4.8. Other transport sectors

Trucking was liberalised in the 1980s. Attention is now turning to bus services (on inter-city routes). A study by Forfás recommends reforms that would lead to competition for the bus sector, rather than within it. A bottleneck element of the air transport system, airport services, will become subject to a new regulator, who would authorise airport charges, regulate ground handling, allocate slots, and administer some other programmes. Regulation to control monopoly elements of airport service may be called for, because distances and limited land transport infrastructure prevent competition among Ireland's airports for domestic services. A Forfás study suggests that this new regulator also take on the regulatory functions for seaports.

5. COMPETITION ADVOCACY FOR REGULATORY REFORM

The Authority has tried to move into an advocacy role, but making advocacy effective will require more resources and clearer independence.

Although the Authority's predecessors occasionally prepared and issued reports on competition issues, those were not part of a systematic programme of advocacy. The Fair Trade Commission, in its 1989 report proposing a new competition law, recommended that the new competition body "have a responsibility to examine proposed legislation and regulations from a competition viewpoint and to make public statements where, in its view, the legislation or regulations would be anti-competitive" (FTC, 1989). It also recommended that the new agency have similar powers to report about anti-competitive features of existing legislation. But those recommendations did not become part of the new law. Instead, the 1991 law only authorised the Authority to respond to requests from DETE for studies (Sec. 11) or investigations (Sec. 14).

The Authority obtained the power to initiate studies on its own, without waiting for a request from the Minister, in the 1996 amendments. It has applied this power to high-priority problems. The first project it undertook was a comprehensive study of the retail drinks market, and another "discussion paper" targeted the problems of the taxi industry. A study of competition issues in transport had to be suspended because of resource constraints.

DETE, rather than the Authority, is generally responsible for reviewing legislative proposals to assess their effect on competition policy. There is no statutory basis for the Authority to participate on its own behalf in systematic review and comment about legislative proposals. DETE may ask for the Authority's views about draft laws and regulations, which would be transmitted through DETE. In this way, the Authority has commented on proposals about digital TV, superstores, and retail planning guidelines.

Box 7. **Advice about retail regulation**

To date, retail competition in Ireland has been strong (with some exceptions due to regulatory constraints), and entry has been open to large operations, mostly from the UK. One result was relatively low inflation attributable to consumer prices in the 1990s (EIU 2000). But land use planning processes give incumbents substantial power to resist greenfield entry in retail.

Small retailers have demanded still more protection. A Report from the parliamentary Joint Committee on Enterprise and Small Business called for a host of constraints: reducing maximum store size (from 3 000 m^2 to 2 500 m^2), requiring in-country purchasing offices and suppliers, prohibiting large stores from opening overnight and limiting their Sunday opening hours, and "monitoring" and discouraging free parking at large stores and encouraging shoppers to park in town instead. And it called for studying means of setting up co-operative trading organisations to reduce the losses smaller stores were experiencing from the shift to centralised distribution.

The Authority argued against a single national rule; rather, a planning-based approach should leave room for local variation and decision, to respond to local concerns and situations. And it objected that rules based only on a store's size would be anti-competitive. Protecting small and inefficient Irish retailers would do them no favours, for in the long run their survival would depend on becoming efficient. The Authority pointed out that efforts to favour Irish firms over foreign competitors would probably violate EU competition principles. And it doubted that city fathers, trying to clear congestion from city-centre streets, would welcome measures to encourage more traffic.

The final Retail Planning Guidelines were issued in January, 2001, after a study was commissioned by the government to examine the likely impact of the proposed guidelines on competition, consumer prices, consumer choice, and suppliers.

Authority comments have aided the process of reforming traditional utility sectors. In 1997, the Authority submitted views in response to a Ministerial request about proposals to reform the electricity supply industry (Competition Authority, 1997*b*). The comments emphasised that promoting competition could require separating the industry's operations vertically and limiting the amount of generating capacity under one firm's control. The Authority also raised questions about the relative merits of the "third party access" and "single buyer" models. The Authority supported establishing a separate regulatory regime to deal with access charges and output prices, leaving other competition-related issues to be addressed under the general competition law. In 1998, the Authority submitted a similar comment to DPE about transmission and pricing issues in natural gas (Competition Authority, 1998*e*).

The resources available for analysis and advocacy, at DETE and at the Authority, are limited, One economist at the Authority works with policy staff at other departments and regulators, in addition to work on the Authority's other responsibilities. To do the function well, the Authority believes it would need to assign 2 or 3 professional staff. At DETE, only half of the competition policy staff (of 8 or 9) is available, as the rest are involved in merger review. The informal, *ad hoc* nature of the process makes it harder to use these few resources effectively. Comments are typically requested late, when there is little time for a thorough response — and perhaps little prospect of affecting the outcome, for positions may have already become inflexible.

The Authority would be a more effective advocate if its role were more public and more clearly independent. The CMRG made detailed recommendations to strengthen the Authority's advocacy capability and to help ensure that the competition impact of proposed laws and rules is considered carefully.[53] These fall somewhat short of establishing a completely free-ranging advocacy power, for the Authority could only comment on a proposal if the sponsoring Minister requested it. But concerning primary legislation at least, the sponsoring Minister would have to provide a public justification if the Authority's views were not requested. The CMRG also calls for other measures, and more resources, to clarify and strengthen the Authority's advocacy function, including express statutory power to review and assess the impact of existing, as well as proposed, legislation and of the regulations issued by regulators

responsible for particular sectors, trades, or professions. DETE too supports giving the Authority a stronger, more independent advocacy role, even though the result could be to reduce DETE's own influence and control over the process because other ministries would deal directly with the Authority.

6. CONCLUSIONS AND POLICY OPTIONS

6.1. Current strengths and weaknesses

The importance of competition policy in market reform is recognised and supported at the highest levels in Ireland. Competition policy is a principal substantive criterion of regulatory quality in the SMI reform programme of the Prime Minister's office. The Ministers with the largest stake, at DETE and DPE, support the competition policy principles of reform. As in many other countries, reform has been prodded by EU directives. In Ireland, the visibly positive results of liberalising trade, inviting foreign investment, and introducing more competition should help build even broader support.[54] Effective competition policy will be viewed as important to stimulating innovation and production while keeping price increases in check. It can thus help eliminate bottlenecks to achieving growth without inflation.

To achieve the benefits of reform, though, policy must move away from emphasis on protection of incumbents against innovation and competition. The strength of this tendency to protect incumbents appears in the persistence of barriers to new entry in pubs and taxi services, the continued support for anti-competitive regulations like the Groceries Order, and the appearance of new constraints on competition in pharmacies and retail trade. As in other countries, change comes more slowly in such sheltered sectors, where EU institutions are less likely to reach and where producer support for the status quo is strong.

Consumer interests are not well represented in policy debate and deliberation in Ireland, which remain dominated by producer interests. Consultation with consumer groups tends to come late, asking for pro forma comment on a finished product rather than help in creating it. No consumer group is among the nearly 40 bodies identified as participants in the negotiation of the social partners' "Programme for Prosperity and Fairness." The "social partnership" process has expanded beyond the traditional economic interests, but it still does not incorporate the most inclusive interest, with the most to gain from pro-competitive reform, namely the consuming public at large.

In many respects, Ireland's competition policy institutions have followed international best practices. The Authority was established with broad jurisdiction, decision-making independence, and the capacity for sophisticated fact-finding and analysis. Applying modern economic concepts, it has adopted a programme based on consumer welfare and efficiency. After clearing most of the initial flood of notifications and issued a category licence about vertical restraints, it has turned its new enforcement powers to hard-core cartels. Expert observers from the Irish bar find that the Authority's opinions and analysis are first-quality.

But these strengths of laws and institutions have been compromised by a lack of resources, unclear independence, and inconsistent leadership. The Authority's continuing resource problems suggest that the relationship between the Authority and the department that controls its budget and shares many of its powers needs improvement. A dramatic decline in staff, which coincided with the change in Authority leadership in early 2000, called attention to the urgency of this issue. The demand from the private sector and from other, new regulators for professionals with competition policy expertise surely aggravated the Authority's personnel problems.

Competition policy institutions have been employed only sporadically in the process of reforming economic regulations. Responsibilities are spread among DETE, DPE, its sectoral regulators, and the Authority. In policy matters, DETE plays some role, mostly behind the scenes, while the Authority, with limited resources, appears only infrequently. The Authority's well-publicised enforcement stance, and its reputation for being aggressive, may have weakened its appeal as a potential source of policy advice for other agencies.

Reliance on criminal processes and penalties has introduced technical problems that delay the Authority's major enforcement programme. Because well-publicised cases still have not been resolved by convictions, and indeed no criminal sanctions were imposed at all until October 2000, potential allies in the consumer movement believe that the Authority lacks power or will.

For mergers, the decision process appears to permit politicisation and risks some uncertainty. Some provision for public interest judgements may well be appropriate, but the process should be more transparent, and the trade-offs should be recognised more forthrightly.

Ireland now has a modern competition law and enforcement structure, but several opportunities to make policy more effective were missed. The Prices Acts and Groceries Order survived the three major legislative reforms, in 1987, 1991, and again in 1996. Criminal sanctions were created without giving enough attention to the legal tools that would be needed to make them work well in practice. Privatisation proceeded without ensuring competitive conditions in sectors such as forestry.

6.2. Capacities for and impediments to change

As Ireland's economy has prospered, the direction of its economic policy attention has shifted, toward factors that promote efficiency.[55] But despite the seemingly rapid changes in the economy itself, policy change in this new direction has been almost deliberately slow and evolutionary.

The institutional basis for incorporating competition into regulation systematically is still under development. The criterion of competitive effect in the SMI checklist remains an exhortation, until it becomes clear that failure to meet this criterion has real consequences. The CMRG proposes a stronger advocacy role for the Authority, but that is still a proposal. DPE took an *ad hoc* approach to the synthesis of competition and regulation in particular sectors. DPE's proposal for a more comprehensive approach postpones addressing this very issue, leaving it for further consultation. Meanwhile, as DPE proceeds to design structures and rules sector by sector, the bodies that are explicitly responsible for developing and applying competition policy play a consulting role, commenting on the proposal but not responsible for it.

The institutional framework for applying competition policy too is a work in progress. The Minister's action in appointing a new chair and supporting proposed reforms to increase the chair's management authority shows support for continued vigour. This degree of centralisation may over-correct for any problem of diffuse leadership. On the other hand, as the Authority's chief function shifts from deciding about applications to investigating and prosecuting, a single-executive structure may be more effective. Other changes may be coming, to adapt to changes in EU process. To deal with them, the CMRG's report, which represents a tremendous investment of intellectual resources, provides many useful ideas and resources. The CMRG recommendations about merger processes and some other subjects should be implemented without waiting to see what direction the EU ultimately takes. For some other topics, though, the CMRG report seems premature and hypothetical. Rather than radically redesign institutions that have hardly been tested, it will be better to give the Authority, the DPP, and the courts more of a chance to show whether the present system can be made to work.

6.3. Potential benefits and costs of further regulatory reform

A major benefit of continued pro-competitive reform could be to help Ireland control inflation. Greater competition can discipline pricing due to market power, and it can improve efficiency and thus productivity, helping keep inflation down while maintaining growth. The extent of the possible benefit is suggested by experiences with other reforms, and by analysis of some of the current problems.

Experience already shows how reform pays off. Opening up the airline market to competition reduced fares and expanded service, and also increased employment in the long run as tourism grew. Reforms in telecoms too have expanded services. The annual benefits from reform in airlines and telecoms have been estimated to be IR£ 1 billion.

Estimates of potential gains if other problems can be solved are also substantial. One example is pubs. The real prices of packaged beer, where retail sales competition is open to new entry, and on-licence beer at a pub, where entry is closed, have diverged over the last 15 years. Prices for package retail sale have declined, while prices in the pubs have increased, so that the indexes of the prices in the competitive package sector and the non-competitive pub sector have diverged by as much as 25%, for a product on which Ireland spends 5% of its GDP (Fingleton 1997). Another measure of the burden is the rents revealed in the aggregate value of taxi licences in Dublin — some IR£ 200 million (Fingleton, 2000). Estimates based on the aggregate value of the outstanding licences for pubs and taxis conclude that eliminating the constraints on entry in these sectors could produce a one-time saving of .4% of total personal expenditure, in addition to continuing savings from the elimination of market power.

To be sure, eliminating these overcharges and rents would also impose some costs, as the incumbents would lose the scarcity value of their licences, as well as the prospect of continuing to profit from market power. The long-run net effects of these changes on incumbents are unclear, though. Sometimes, eliminating a monopoly has led first to a decline in employment, but that has been followed by expansion of service that more than made up for the initial losses. The same may be true for employment in taxis and pubs.

6.4. Policy options for consideration

- Remove licensing constraints on free entry, particularly those with quantitative limits.

The SMI Working Group set this goal several years ago. The problem is not one of repealing explicit exemptions from the Competition Act, for there are none. The challenge is to identify and eliminate regulatory programmes and licensing schemes that have the effect of preventing entry and permitting non-competitive behaviour. The obvious targets are pubs and taxis. More detailed review by DETE is likely to identify other "quota"-like constraints. This review has antecedents. A 1992 report by an independent policy review group recommended a programme to relax controls, restrictions, licences, and other limitations that restricted entry into trades, professions, and services. The Minister for Enterprise and Employment reported to the parliament in 1994 that his Department had conducted "a wide review of regulations and restrictions which operate to restrict competition," requesting other Departments to identify controls or licensing systems in their areas of responsibility. That 1994 statement claimed progress concerning lawyers, opticians, electric power, telecoms, oil, gas, air and bus transport, broadcasting, taxi and hackney licensing, ports, and casual trade licences (CMRG, 1999). Seven years later, constraints on competition persist in nearly all of these sectors, but the recent action to eliminate limits in taxi service is a most welcome development — if it survives the pending challenge in the High Court. The CMRG commissioned a review of statutory controls that inhibit competition in several sectors, too.[56]

- Eliminate special-interest rules that inhibit efficient competition, such as the Groceries Order.

The potentially anti-competitive effects of the Groceries Order are well recognised. The CMRG's proposal, to eliminate rules aimed at sales supposedly below cost but retain some rules against anti-competitive discrimination and assertion of buyer power, seems sensible.

- Apply competition policy against non-transparent, anti-competitive self-regulation of professions and services.

This subject is treated at more length in another chapter of this study. These problems have already been the subject of enforcement action. Vigorous enforcement may be necessary, but the risk of backlash must also be managed. That is, the professions may seek legislative protection against further enforcement. To resist that plea, the Authority should be able to demonstrate how its action have yielded concrete consumer benefits.

- Complete the process of introducing competition, and the application of general competition policy, in traditional monopoly sectors.

This subject is treated at length in other chapters of this study.

- Improve advocacy powers, with clearer authorisation for more independent, wide-ranging analysis, clearer responsibilities on other agencies to consult with the Authority, and more resources to do the job.

The statute should be amended, if needed to authorise more clearly a broad-ranging analysis and advocacy role for the Authority. The Authority should act on its own right, and it should participate at the outset, rather than offering futile commentary at the end of the process. The CMRG recommendation presents a useful model for advocacy powers. Ministers sponsoring legislation should be free to request the Authority's views directly, without going through DETE, about the proposal's implications for competition. Ministers should explain their views about the proposals' likely impacts and the reasons why restraints on competition could be justified in the public interest, and they should state whether they have consulted the Authority. The Authority's opinion would become public when the bill is published. Similarly, Ministers should be free to consult the Authority about the effects of proposed regulations, and the Authority's views about them would be made public along with the regulations. Providing for more systematic competition analysis of regulations and decisions below the level of legislation could be particularly important. Input from the Authority should be routine before departments adopt rules that limit entry and competition. More broadly, the CMRG calls for empowering the Authority to publish general discussion papers, to participate in the development of national policies that may affect competition, to co-operate with sectoral regulators, and to appear before parliamentary committees concerning issues that may affect competition. To do these things effectively, the Authority will need another economist or two.

- Clarify the respective roles of sectoral regulators and the Authority to ensure a co-ordinated, uniform competition policy approach in the regulated sectors.

Here many of the CMRG recommendations should be followed, to provide for a structured process of co-ordination and a legal basis for the agencies to defer to each other without risk and without diluting or compromising the application of competition policy. The Authority and sectoral regulators should advise each other about matters that may come under the others' jurisdiction, and consult when they find they are both pursuing the same matter. [57] To do this meaningfully, they must have the right to exchange information with each other. Having someone from the Authority sit on appeal panels for sectoral regulator decision is an excellent idea for integrating policy perspectives.

- Clarify and make operational the criteria about competitive effects in the SMI checklist and standards.

The competition policy criteria in the SMI checklist may be too general to guide non-expert bureaucrats. Either through additional guidance or training, they could be made more practical and specific. For example, they might operationalise the Working Group's recommendation to eliminate constraints that act like quotas limiting entry. And it must be clear that there will be some consequences if a rule, or a proposed rule, fails these criteria. An inter-agency conference might be useful, to show other agencies how to avoid creating competition problems in their regulation.

- Make merger processes consistent, and eliminate the risks of overlap, uncertainty, and conflict.

Maintaining two notification systems, reflecting a lingering jurisdictional skirmish, presents an accident waiting to happen. Before it produces an embarrassment such as contradictory orders from two regulators, the process should be streamlined and responsibility for competition policy reviews for all mergers clearly assigned to the Authority. Application of other public interest factors would then be up to the Minister. This change might require transferring some of the personnel at the Department, who now do the initial merger screenings, to the Authority, anticipating that they would continue performing that function there. In November 2000, the government decided to change the review process so that the Authority would have sole decision-making responsibility, except for mergers involving the media.

- Authorise a "whistleblower" or leniency programme.

Effective pursuit of the Authority's top priority will be aided greatly by a publicly announced offer of leniency to cartel members to give evidence against their co-conspirators. Implementing this would require close co-ordination between the Authority and the DPP, which would ultimately make any leniency determinations. Here, Ireland may wish to study the Canadian programme, for responsibilities there are also divided between the competition agency and the prosecutor. Generally applicable criminal procedures might support such a program. If not, then special legislation or an authoritative policy statement would be needed.

- Consider ways to develop judicial expertise in competition matters.

Competition law may still be novel for many Irish judges. The CMRG has recommended that competition cases be assigned to judges on the basis of their expertise in competition matters, both in the High Court and in Circuit Courts. This may accomplish the same thing as establishing a specialised competition court, but without the need for structural changes in the judicial system. Rather, it could presumably be accomplished by court rule, adopted by the judges themselves.

- Make the Authority more independent with respect to budget and staffing decisions.

Advocacy and especially a formal review role could only work if there is a statutory basis for Authority independence, as well as independence from indirect control through the government budget. The Authority should have the same hiring flexibility that is enjoyed by the regulatory bodies under DPE. Permitting the Authority to exceed civil service salary caps could improve its retention experience. After the crisis of 1999 and early 2000, DETE has taken steps to bring the Authority and its staff up to authorised levels. At a minimum, that process should be completed. Additional investigative staff from the *gardaí* will aid the enforcement program. And additional economic resources will enable the Authority to revive its analysis and advocacy functions.

6.5. Managing regulatory reform

The leading method for advancing competition policy now appears to be law enforcement. The Authority is trying to demonstrate that the new competition policy tools can identify, punish, and correct problems that directly affect consumer welfare. This strategy explains its early and continued pursuit of high-profile enforcement actions, such as the civil actions against the pub associations. By March 2000, newspapers were reporting that the Authority had referred findings about price fixing among wholesalers for prosecution.[58] (The Authority may have missed an opportunity to demonstrate some quick, early successes by bringing more summary prosecutions on its own initiative, which would not have to be referred to the DPP. The first completed criminal case, in October 2000, was a summary prosecution brought by the Authority). There is some risk that this emphasis on enforcement, targeting criminal violations, has positioned the Authority outside the policy debate. To reduce that risk will require devoting attention again to advocacy.

Presenting novel policy ideas effectively requires careful attention to background expectations and traditions. In Ireland, reaction to economic policy steps such as privatisation has been coloured by impressions about the nearby experiences in the UK. Thus, it may be helpful if reform proposals and decisions can be presented and explained in terms of their contrast with UK efforts that seem to have faltered, or their consistency with UK experiences that turned out well. Another background condition is Ireland's tradition of favouring producer interests, in part because of cultural memories of a society dominated by small, family enterprises. Perhaps reforms should be designed and presented in ways that are consistent both with consumer interests and efficiency and with the interests of at least some important producers. Repeal of the Groceries Order may require introducing particular rules about discrimination and unfair transacting practices, to accommodate producers' concerns. Solving the problems in pubs and taxis will probably require compensating the incumbents in some way, although that will dilute the benefits of the reform.

The moment is right to take action with long-term benefits, for prosperity and full employment will cushion short-term adjustment shocks.[59]

NOTES

1. References to the "Competition Act" are to the Competition Act, 1991. All citations are to this Act, unless otherwise noted.

2. Irish Constitution, Art. 45.

3. Unless otherwise indicated, references to the "Minister" are to the Minister for Enterprise, Trade and Employment.

4. Irish Independent, online edition http://www.independent.ie/, 18 July 2000; Irish Times, online edition, www.ireland.com/newspaper, 18 July 2000

5. An association of "undertakings" may itself be an "undertaking", so that agreements entered by the association are subject to the law (as is the overall agreement establishing the association itself) (Fingleton, 1997).

6. This application was withdrawn before the Authority reached a decision.

7. Contractors; CA/836/92, cited in (Fingleton, 1997, p. 101).

8. Optometry; Authority Decision No. 17, 1993, cited in (Fingleton, 1997, p. 101).

9. In addition, the statute provides detailed rules about defensive arguments that could arise in situations involving the licensing process.

10. The CMRG recommends legislation to grant immunity to persons to make complaints or furnish information about violations of the Competition Act, and sets out numerous technical matters and possible resolutions of them (CMRG, 2000; Recommendation 10). The focus of this recommendation seems to be on protecting the "whistleblower" employee who gives evidence against a firm that is in a cartel, rather than on granting lenient treatment to the firm itself. But the latter idea could also be included in the CMRG's proposal.

11. Decision No. 528 of December 4, 1998.

12. Decision No. 336, 1994.

13. One phrase in the law, which is not paralleled in the EU law, implies a limitation in coverage. That is, Ireland prohibits abuse of a position that is dominant "in trade" for goods or services. This phase could imply that a third party, such as a trade association setting standards or terms for its members, that does not itself participate in the "trade" could not be found to be in a dominant position. Such a situation could probably be treated as a restrictive agreement among the association and its members.

14. Criminal sanctions could apply to abuse of dominance (Competition (Amendment) Act 1996, Sec. 2(7)). The Authority has indicated as a matter of policy that it does not propose to bring criminal proceedings for such cases.

15. The CMRG recommends incorporating these criteria into legislation about mergers, subject to their compatibility with Community law (CMRG, 2000, Recommendation 29).

16. The text implies that the Minister could act even if the Authority did not find dominance and abuse.

17. In principle, the Mergers Acts do not apply to banks, but because bank mergers are usually accomplished through corporate forms that the laws do cover, the exception has little practical significance.

18. "HHI" is the Herfindahl-Hirschman index, which is computed as the sum of the squares of the market shares of each of the firms in the relevant market.

19. This scheme echoes the thresholds in the US Merger Guidelines.

20. Notification must be made within one month after the parties reach agreement on the transaction (or an offer is made that the other party could accept).

21. In addition, the Mergers Acts apply to any acquisition or merger involving a newspaper or magazine, regardless of size.

22. Art. 13(1)(a).

23. It may be possible to "amend" the Order by repealing parts of it, without repealing it all.

24. The CMRG recommends making the Director of Competition Enforcement a separate, staff-level position, rather than one of the Authority members. One motivation is to separate the functions of investigation and prosecution from decision-making, out of concern that information learned through the process of reviewing notifications could be misused in enforcement proceedings. The CMRG is evidently concerned that firms will be reluctant to notify their agreements, if the information might later be used in a prosecution or to support a decision about a proposed merger. But the notification process is becoming less important, for firms and for the Authority. Another motivation for the proposal could be to reduce the Director's power and the risk of conflict with the priorities of the chair and the other members

25. The Garda Síochána is the national police force; the literal translation is "guardians of the peace".

26. The CMRG's final report makes many technical recommendations to improve aspects of the investigation and enforcement process, about such topics as search warrant standards, the power of "arrest" to lead to admissions, targets' rights to consult counsel in connection with dawn raids, and rules of evidence.

27. For non-enforcement actions, the CMRG recommends establishing a 4 month deadline for Authority decisions on applications for licences (CMRG, 2000, Recommendation 34).

28. The CMRG report tries to correct this lack of consideration, after the fact. Because filing a criminal case after a civil case could force defendants to "give evidence" against themselves in the civil proceeding, the CMRG recommends that the public enforcer should complete its criminal proceeding first. It recommends assigning competition cases in the high court to specially qualified judges. Because there is no provision for exemplary damages or administrative fines in Irish law, to retain the deterrent effect the CMRG recommends keeping criminal penalty despite the attendant procedural and conceptual complications (CMRG, 2000, Recommendation 6).

29. The CMRG recommends that the statute be amended to require the Authority to furnish detailed written reasons for its decisions (CMRG, 2000, Recommendation 36). As a practical matter, this would just ratify current practice. As a legal matter, though making this a statutory obligation could lead to collateral challenges and litigation about the Authority's decision processes.

30. Irish Independent, web edition, 23 March 2000.

31. The relationship degenerated to the point that the Authority chairman brought a lawsuit over the adequacy of benefits. Irish Independent, 2 August 1996; Irish Times, 2 August 1996.

32. There had been discussions about the possibility of adding 5 investigators from the *gardaí* to the Authority staff, for example. The status of those discussions is unclear.

33. State firms that are engaged in regulatory functions are effectively exempt with respect to those functions, although not with respect to their commercial or revenue-producing operations The exemption follows from the definition of an "undertaking" that is subject to the law and to legal remedies, as an entity engaged "for gain" in production, supply, or distribution of a good or service (Competition Act, Sec. 3(1)).

34. Competition Authority Decision No. 1, Notification No. CA/8/91, *Nallen/O'Toole* (1992). The statement was *dictum* in the particular decision, which approved a non-competition agreement that accompanied the sale of a small repair shop.

35. The more general problem, of establishing the right balance among independent decision-making and political accountability, is taken up in background report to Chapter 2.

36. One concern underlying the CMRG's recommendations is to avoid subjecting firms to "double jeopardy" in multiple administrative proceedings. Its solution is to put a burden on complainants. The CMRG calls for requiring an "election of remedies", at least to the extent that a complainant could not take its problem to two different agencies at the same time. The prohibition could tend to undermine the CMRG's other recommendations calling for inter-agency co-operation. A complainant who was in doubt about whether its problem was covered by a regulation or by the competition law might want to submit the same complaint to each and let the two agencies sort it out, consulting with each other about the best course to take. Prohibiting simultaneous complaints might tend to discourage simultaneous actions, but it would not necessarily prevent them. The first agency would have better information, from the complainant. But even if the complainant did not tip it off, the other agency would learn of the possible problem at the time of consultation, and could then undertake an *ex officio* investigation. The CMRG proposes to permit a disappointed complainant to go to the other agency after the first one rejects its case. Permitting sequential complaints might tend to clarify jurisdictional boundaries. Presumably, when the disappointed complainant goes to the second agency, it is because there has been an authoritative ruling that its problem cannot or should not be resolved under the other's jurisdiction, leaving the way clear for the second agency to act without risk of conflict. On the other hand, if the first agency's action concludes or implies that the complainant's problem is not worthy of any relief at all, that finding could tie the second agency's hands.

37. The total number of retail outlets of all kinds, including hotels, restaurants, and stores selling packages for off-premises consumption, is about 15 000.

38. To serve intoxicating liquor, a restauranteur must either apply for a restaurant certificate in conjunction with a wine retailer's on-licence or a publican's licence pursuant to Section 12 of the Intoxicating Liquor Act 1927, or a Special Restaurant Licence. The Special Restaurant Licence, introduced in 1988, permits the sale of the full range of alcoholic drinks. The Intoxicating Liquor Act, 2000, allows restaurants with full restaurant certificate and wine on-licence to serve beer with a meal, abolishes the requirement that the waiting area be not greater than 20% of the dining area, and abolishes the requirement for a Bord Failte certificate for restaurants operating on the basis of a Special Restaurant Licence.

39. Act 17 of 2000, 30 June 2000.

40. The commission is expected to report on the off-licence sector within 3 months of its first meeting, set for March 2001.

41. There is no limit on the number of licences for wheel-chair accessible vehicles, for which the required fee has been IR£ 15 000; the licensee must also operate a specially equipped vehicle. The aggregate cost of setting up to operate with this kind of licence is estimated to be about IR£ 42 500 (Competition Authority, 1998*c*).

42. The 1998 paper by the chair of the Authority argued that incremental reform would not work as long as licences remained transferable and thus valuable. Although rapid, complete liberalisation of entry would be even better, it recommended eliminating licence transferability first, in order to begin the process of dissipating the rents and reducing the licence value to 0 (Competition Authority, 1998*c*).

43. Irish Independent, web edition, 15 January 2000, 17 January 2000.

44. Irish Independent, web edition, 22 March 2000.

45. Health (Community Pharmacy Contractor Agreement) Regulations, 1996 SI No. 152 of 1996; definition of "definite public health need", Regulation 2(1).

46. Bord na Radharcmhastoiri (The Opticians Board), established under the Opticians Act, 1956.

47. An Bord Altranais (The Nursing Board), established under the Nurses Act, 1950.

48. Comhairle na Ospideal (The Hospitals Council), established under the Health Act, 1970.

49. The Dental Council, established under the Dentists Act, 1985.

50. The Medical Council, established under the Medical Practitioners Act, 1978.

51. Pharmaceutical Society of Ireland, established under the Pharmacy Act, 1875.

52. Sec. 149(8), Consumer Credit Act of 1995.

53. Concerning primary legislation, sponsoring Ministers would be free to request the Authority's views directly. Even if they did not, legislative proposals would have to be accompanied by a competitive impact statement, explaining whether the proposal would impair competition, and if so, why the restriction is justified in the public interest. If the Authority's views were sought and obtained, the Authority's opinion should be made public when the proposed bill is published. For proposed regulations, similarly, sponsoring Ministers would be free to request views directly from the Authority, and those views would be published along with the regulations (CMRG, 2000, Recommendation 17).

54. As the chair of the Authority has observed (Fingleton, 2000):

> [I]n the industries where regulatory reform and liberalisation have occurred (such as telephony, broadcasting and electricity generation), competition from new entrants is developing apace. This new environment has forced enormous change on the former monopolies. Substantial growth of many of the markets, something that accompanies increased efficiency, means that redundancies to deal with historic overstaffing have not increased unemployment. Consumer choice has expanded and the quality of service improved as former monopolies switch from a focus on technical and engineering proficiency to an emphasis on the consumer and the market. New product markets and innovative services have developed where entrants see profitable opportunities. Dramatic falls in telephony prices illustrate how competition and regulatory policies can simultaneously be expansionary and counter-inflationary.

55. "[T]here has been a startling transformation in economic policy in which the emphasis has moved from meeting macroeconomic targets to a detailed focus on microeconomic efficiency. Competition and regulatory policies play an essential part in a portfolio that also includes reforms of taxation and company law" (Fingleton, 2000).

56. See (CMRG, 1999), p. 220 n. 350. This report was evidently not published.

57. Making the agencies meet together quarterly to make sure they really do this seems like an oddly precise requirement, but its inclusion in the CMRG recommendation recognises, unfortunately, the history of suspicious relations among these agencies.

58. Irish Sunday Independent, web edition, 12 March 2000, 30 May 2000.

59. From (Fingleton, 2000):

Although producer interests trump consumer interests, there are signs that this is changing. The positive experience in deregulating areas like telecommunications and air travel makes clear the enormous benefits from reform, and also removes fears concerning the dire scenarios predicted by the vested interests in such markets. As such, this early success builds momentum or constituencies for further change and makes it easier to argue for more extensive reform. In the first half of 2000, the Government finally started to tackle the problem in the Dublin taxi market, and has announced plans to introduce competition in the bus market in Dublin. A major review of competition law has recommended sweeping changes that would also benefit consumers, several of which were mentioned above and includes the abolition of the Groceries Order. On the other hand, greater competition increases the incentive for vested interests to seek protection by special regulation. As a result, we can expect exciting debates that raise complex economic, legal and political issues to continue in this area.

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